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HONORABLE RICHARD EADIE

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

SEATTLE CITIZENS AGAINST THE TUNNEL
and ELIZABETH CAMPBELL,

Plaintiffs/Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION; PAULA HAMMOND, IN
HER OFFICIAL CAPACITY AS SECRETARY
OF THE WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION,

Defendants/Respondents.

ELIZBETH A. CAMPBELL,

Plaintiff/Petitioner,

v.

CITY OF SEATTLE, a municipal corporation,

Defendant/Respondent.

**NO. 09-2-36276-9SEA
(CONSOLIDATED WITH
NO. 09-2-40939-1SEA)**

**WSDOT'S AND CITY OF
SEATTLE'S AMENDED MOTION TO
DISMISS UNDER CR 12(b)(1)**

RELIEF REQUESTED

Defendants Washington State Department of Transportation, Secretary of
Transportation Paula Hammond (WSDOT), and the City of Seattle move the court pursuant to

1 CR 12(b)(1) for an order dismissing this action without prejudice on the grounds that the court
2 lacks subject matter jurisdiction because the claims raised by the plaintiffs are not yet ripe for
3 review under the State Environmental Policy Act, 43.21C.075.

4 STATEMENT OF FACTS

5 WSDOT is the state agency charged by statute with design, construction, and operation
6 of the state highway system. RCW 47.01.260. State Route 99 is part of that highway system.
7 RCW 47.17.160. SR 99 passes through the city of Seattle and includes the Alaskan Way
8 Viaduct.
9

10 The Viaduct was built in the mid-1950s. In February 2001, the Nisqually earthquake
11 caused some damage to the Viaduct. Immediately after the earthquake, WSDOT closed the
12 Viaduct for several days in order to perform a complete inspection of the structure. Since that
13 time, WSDOT closes the Viaduct twice annually for inspection. The inspections have revealed
14 damage that resulted from the 2001 earthquake, including ongoing settlement in some areas, in
15 addition to potential for failure in any future significant earthquake. Declaration of Ron
16 Paananen ¶3 and ex. 2 at pages 1-2. WSDOT continues to repair the Viaduct and perform
17 regular maintenance, along with repair of damage that occurred during the 2001 earthquake.
18 This work included shoring up four columns that were found to have settled since the
19 earthquake. Paananen declaration ¶5.
20
21

22 After the 2001 earthquake, WSDOT stepped up its planning to replace the aging
23 Viaduct structure. Because the replacement is likely to use federal highway funds, the Federal
24 Highway Administration issued a notice of intent to prepare an environmental impact
25 statement under the National Environmental Policy Act, 42 U.S.C. § 4332, in June 2001.
26

1 66 Fed. Reg. 33602 (June 22, 2001). WSDOT has been working with FHWA since that time
2 on the environmental review process for a viaduct replacement. Paananen declaration ¶6.

3 After the notice of intent to prepare an EIS was published, WSDOT began looking at a
4 long list of potential alternatives for replacing the vulnerable sections of SR 99, primarily the
5 Viaduct. These alternatives were narrowed down to five reasonable alternatives. This work
6 culminated in the issuance in 2004 of a Draft Environmental Impact Statement (DEIS).
7 FHWA and WSDOT selected the cut and cover tunnel as the preferred alternative in December
8 2005. Paananen declaration ¶6 and ex. 2 at pp. 8-13.

9
10 In order to further analyze the impacts of the years-long construction process that any
11 of the five alternatives would have, WSDOT published a Supplemental Draft EIS (SDEIS) in
12 July 2006. Paananen declaration ¶7. The SDEIS further narrowed the reasonable alternatives
13 to two – a “cut and cover” tunnel that would be constructed by excavating a deep trench along
14 the waterfront, and a new elevated structure similar to the current Viaduct. Paananen
15 declaration ¶7 and ex. 2 at pp. 13-18.

16
17 Also in 2006, Governor Christine Gregoire asked the City of Seattle to conduct an
18 advisory election on the voters’ preference for either the cut and cover tunnel or the elevated
19 structure. Both alternatives received a majority “no” vote in the March 2007 election.
20 Paananen declaration ¶8 and ex. 2 at 19.

21
22 WSDOT, Seattle, and King County then undertook a collaborative process throughout
23 2008 to identify other possible alternatives for the Viaduct replacement. With the help of a
24 citizen advisory committee, they identified eight new possible solutions that included efforts
25 by all three agencies to address mobility through Seattle. These eight scenarios included
26

1 “surface” options that involved removing the viaduct and making improvements to city streets;
2 “elevated structure” options that included replacement of the Viaduct with another elevated
3 highway; and tunnel alternatives, including a cut and cover tunnel and a side-by-side dual-bore
4 tunnel. These eight scenarios were evaluated under several criteria, including whether the
5 project could be built with WSDOT’s \$2.8 billion legislative allocation. Paananen declaration
6 ¶ 9 and ex. 2 at pp. 23-53.
7

8 The agencies and the advisory committee next developed three “hybrid solutions” that
9 included elements of the original eight scenarios. These included a surface option, an elevated
10 structure option, and a twin-bore tunnel option. Because of concern that the twin-bore tunnel
11 (or a larger single bore tunnel) could not be built with available funds, the agencies then settled
12 on two “hybrid” solutions: a surface option and an elevated structure option. Paananen
13 declaration ¶10 and ex. 2 at pp. 54-64.
14

15 In early 2009, WSDOT determined that with additional funding support from the Port
16 of Seattle, the single bore tunnel project could be built with available funds. Governor
17 Gregoire, Mayor Greg Nickels, and County Executive Ron Sims recommended to their
18 respective agencies that the Viaduct be replaced with a four-lane single bored tunnel.
19 Paananen declaration ¶11. WSDOT then began a second supplemental DEIS to analyze the
20 impacts of a bored tunnel and to compare the impacts of that alternative with the impacts of
21 alternatives previously studied. FHWA published a revised notice of intent to prepare an EIS
22 in June 2009. 74 Fed Reg. 26917 (June 4, 2009). The second SDEIS will be released for
23 public comment in 2010. A final EIS (FEIS) will be published in 2011. The federal lead
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25
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1 agency, FHWA, will issue a Record of Decision (ROD) some time after the FEIS is published.
2 Paananen declaration ¶12.

3 Pursuant to federal regulations that allow solicitation of design-build contractors prior
4 to completion of the NEPA process, WSDOT has issued a request for qualifications for
5 contractors interested in submitting proposals for a bored tunnel project. Paananen declaration
6 ¶13; 23 C.F.R. § 636.109. WSDOT will issue the request for proposals (RFP) next year, and
7 plans to select a design-build contractor in early 2011. The RFP will include the final contract
8 language. The terms of the contract will preclude the contractor from performing final design
9 or beginning construction until after the Record of Decision is issued. After the ROD is issued,
10 then the contractor will be notified by WSDOT that it may proceed with development of final
11 designs and plans as well as construction. This final notification to the design-build contractor
12 will be WSDOT's final action that commits the agency to actually building the project. The
13 contract will also provide that if an alternative other than a bored tunnel is selected, then
14 WSDOT will terminate the contract. Paananen declaration ¶14.

15
16
17 The City of Seattle and the State have entered into a Memorandum of Agreement
18 regarding the roles that each agency will play in the viaduct replacement project. Petition,
19 ex. A. The city council authorized the mayor to sign on behalf of the City; Governor Christine
20 Gregoire signed on behalf of the State of Washington.

21
22 Petitioners Seattle Citizens Against the Tunnel and Elizabeth Campbell challenged
23 WSDOT's actions in developing the Central Waterfront viaduct replacement as not being in
24 compliance with the State Environmental Policy Act (SEPA), RCW 43.21C.010 et seq. The
25 same petitioners also challenged an ordinance enacted by the Seattle City Council approving a
26

1 Memorandum of Agreement signed by the mayor and the governor regarding each agency's
2 responsibilities in the development of the Central Waterfront project. On WSDOT's motions,
3 WSDOT intervened in the matter against the City and to both matters have been consolidated.
4

5 **ISSUES PRESENTED**

6 1. Has WSDOT not yet taken a final agency action that is subject to judicial
7 review for compliance with SEPA?

8 2. Where WSDOT has not yet taken a final action that is subject to judicial review,
9 does the court lack subject matter jurisdiction over this action, requiring the court to dismiss
10 the action?

11 3. Are the Memorandum of Agreement between the State and the City, and the
12 City Council's approval of the Memorandum, also not final agency actions because WSDOT
13 has yet to take a final agency action on the viaduct replacement?
14

15 **SUMMARY OF ARGUMENT**

16 SEPA does not allow judicial review until there is a final agency decision on the
17 project. For a highway project, that does not occur until the agency makes a final decision to
18 go forward with the project and begins to develop the final design for the project. WSDOT is
19 currently conducting the environmental review of the replacement of the Alaskan Way
20 Viaduct, including the Central Waterfront section of the Viaduct. WSDOT will not be making
21 a final decision on this project and preparing a final design for the project until a Final
22 Environmental Impact Statement has been issued and the Federal Highway Administration's
23 Record of Decision under the National Environmental Policy Act has been issued. Because
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1 there is as yet no final agency decision that is reviewable under SEPA, this matter is not ripe
2 for review and the court lacks subject matter jurisdiction.

3
4 **ARGUMENT**

5 **A. In Order For An Appeal To Be Ripe For Review Under SEPA, The Agency Must**
6 **Have Made A Final Decision With Respect To The Agency Action**

7 SEPA requires that judicial determination of SEPA compliance shall without exception
8 be based on a review of the environmental documentation together with the underlying
9 governmental action. RCW 43.21C.075.

10 (1) Because a major purpose of this chapter is to combine environmental
11 considerations with public decisions, any appeal brought under this chapter
12 shall be linked to a specific governmental action. The State Environmental
13 Policy Act provides a basis for challenging whether governmental action is in
14 compliance with the substantive and procedural provisions of this chapter. The
15 State Environmental Policy Act is not intended to create a cause of action
16 unrelated to a specific governmental action.

17 (2) Unless otherwise provided by this section:¹

18 (a) Appeals under this chapter shall be of the governmental action together
19 with its accompanying environmental determinations.

20 RCW 43.21C.075. This section also describes the “governmental actions which are subject to
21 review under this chapter” as “underlying governmental actions.” RCW 43.21C.075(5).

22 Consistently with this section, the SEPA Rules define “underlying governmental action” as
23 “the governmental action, such as zoning or permit approvals, that is the subject of SEPA
24 compliance.” WAC 197-11-799.

25 This section further addresses the availability of judicial review under SEPA:

26 ¹ RCW 43.21C.075(3)(b) allows administrative appeals, but not judicial appeals, of environmental
determinations apart from the underlying agency action, but none of the circumstances set out in that
subparagraph apply here.

1 Judicial review under this chapter shall *without exception* be of the
2 governmental action together with its accompanying environmental
3 determinations.

4 RCW 43.21C.075(6)(c)(emphasis added).

5 Courts rely on this provision in RCW 43.21C.075 to determine whether judicial review
6 of the SEPA documents is being properly sought together with review of the underlying
7 governmental action. *See, e.g., State v. Grays Harbor*, 122 Wn.2d 244, 857 P.2d 1039 (1993);
8 *Boss v. Washington State Dep't of Transp.*, 113 Wn. App. 543, 549, 54 P.3d 207 (2002). In
9 *Boss*, WSDOT had entered into a contract with a contractor for the development of a new
10 Tacoma Narrows Bridge. After publishing the final EIS, WSDOT issued a letter to the
11 contractor notifying the contractor of WSDOT's approval of the contractor's design. The court
12 identified this letter as the final agency action, and found Boss's referral to this letter in his
13 complaint to be sufficient linkage between the SEPA documents and the final agency action.
14 113 Wn. App. at 549.

15
16 **B. There Is No Final Agency Action Regarding A State Highway Project Until There
17 Is A Final Decision On Project Design Or Location**

18 **1. The SEPA Rules require that SEPA obligations be met at the time the agency
19 commits to a particular course of action**

20 WAC 197-11-055 sets out the requirements for when SEPA review must occur:

21 Agencies shall identify the times at which the environmental review shall be
22 conducted either in their procedures or on a case-by-case basis.

23 WAC 197-11-055(2)(b).

24 Appropriate consideration of environmental information shall be completed
25 before an agency commits to a particular course of action.

26 WAC 197-11-055(2)(c).

1 **2. WSDOT's commitment to a particular course of action is adoption of a specific**
2 **design or project location**

3 A state agency is the SEPA lead agency for its own proposals. WAC 197-11-926.
4 WSDOT's own SEPA rules apply the standard regarding timing of SEPA review to
5 transportation projects:

6 As provided by WAC 197-11-055, the SEPA process shall be completed *before*
7 *the transportation department is irrevocably committed to a particular course of*
8 *action.* At the same time, the SEPA process should not be undertaken until a
9 proposal is sufficiently definite to permit meaningful environmental analysis.

9

10 (4) The threshold determination and any required EIS for transportation
11 department actions of a project nature shall in all cases be completed prior to the
12 approval of the location or design of the project in question. . . . While the
13 transportation department may present a preferred alternate location or design in
14 a draft EIS, *final adoption of a particular location or design* shall not occur
15 until a final threshold determination has been made or a final EIS has been
16 prepared.

15 WAC 468-12-055 (emphasis added). WSDOT's SEPA rules therefore designate "final adoption
16 of a particular location or design" as that point in the project development process when the
17 agency is "irrevocably committed to a particular course of action."

18 Washington courts have not addressed the question of what step in the state highway
19 development process constitutes final agency action on the project. However, the Ninth Circuit
20 addressed that issue under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332.²
21 The Federal Highway Administration's (FHWA) action in approving state highway projects
22 was addressed in a manner consistent with the approach taken by the SEPA Rules.
23 *Robinswood Community Club v. Volpe*, 506 F.2d 1366 (9th Cir. 1974). The issue was whether

24 _____
25 ² Because NEPA and SEPA are substantially similar, Washington courts have relied on federal NEPA
26 cases for SEPA interpretation. *Public Utility Dist. No. 1 of Clark Cy. v. Pollution Control Hearings Board*, 137
Wn. App. 150, 158, 151 P.3d 1067 (2007).

1 NEPA applied to highway projects that were already in development when NEPA was enacted.
2 The result depended on whether FHWA would still have to undertake a major federal action in
3 order to implement the project. For federally funded highway projects, the court concluded
4 that the last "major federal action" is FHWA's final design approval:

5
6 Once the engineering design stage is finalized, the plan, the implementation of
7 which results in an impact on the environment, has been completed. Each house
8 that is moved, each mound of dirt that is excavated, each ribbon of concrete that
9 is laid has an impact on the environment, but that impact is determined by the
10 plan already adopted. Of course, the government will have substantial
11 participation in the project subsequent to January 1, 1970. But mere
12 participation is not enough. The real question is whether the government's
13 continued participation constitutes 'further major Federal actions having a
14 significant effect on the environment' *After final design approval, nothing
15 further occurs which (1) is major and (2) has a significant effect on the
16 environment other than what is contemplated by the approved design.*

17 *Id.* at 1370; (emphasis added). The court noted that this interpretation would allow some
18 projects to go forward without NEPA review, but concluded that government agencies have a
19 need for a definite standard regarding whether, and when, NEPA applies:

20 [T]he standard must be applied and we believe that the point of final approval is
21 the logical place. This makes a definitive point which can be appropriately
22 called "major Federal action."

23 *Id.* Applying the same standard to WSDOT's actions, there can be no "major governmental
24 action" under SEPA until WSDOT makes a final decision on the project's design and location.
25 In this project, that will not happen until at least 2011, after a final EIS is issued.

26
3. In a design-build project, the major governmental action will be WSDOT's approval of the design-build contractor's preliminary design and instruction to the contractor to begin final design and construction

The Viaduct replacement project will be a design-build project, in which a single contractor will be engaged to complete design of the project and to construct it. Thus, the

1 contractor is hired much earlier than in the traditional “design-bid-build” process contemplated
2 under chapter 47.28 RCW. In a design-bid-build project, WSDOT prepares the final design as
3 well as the plans and specifications that are provided to bidders. See RCW 47.28.040.
4 Completion of the final design and preparation of the bid package are a “major governmental
5 action,” and the SEPA process must be complete before those actions may be taken.
6

7 In a design-build project, WSDOT asks contractors to submit proposals that include not
8 only the contractor’s proposed price, but also the contractor’s proposal for how the project
9 design will be completed and how the project will be built. See RCW 47.20.780 (“design-
10 build” means a method of contracting under which WSDOT contracts with another party for
11 the party to both design and build the project). Thus, final design is not complete when the
12 contractor is solicited and hired. The design-builder then takes over the design work that
13 WSDOT staff or consultants would have performed in a design-bid-build project. Regardless
14 of the contracting mechanism, WSDOT’s approval of the design and direction to the contractor
15 to proceed with the rest of the work, including construction, is its final commitment to go
16 forward with the project. Thus it is the major governmental action that must comply with
17 SEPA. See *Boss v. WSDOT*, 113 Wn. App. 540, 549 54 P.3d 207 (2002) (WSDOT’s written
18 approval of bridge project directed to contractor was the “relevant governmental action” to
19 which SEPA challenge applied).
20
21

22 WSDOT has not decided on a specific proposal or location, and has not selected a final
23 design for a project for the Alaskan Way Viaduct replacement. That step will not be taken
24 until the second supplemental EIS is completed, a final EIS is issued, and the Federal Highway
25 Administration issues a Record of Decision under NEPA. WSDOT has issued a draft EIS and
26

1 a supplemental draft EIS, and is in the process of preparing a second supplemental draft EIS.
2 After that second supplemental draft has been issued and the public has had an opportunity to
3 submit comments, WSDOT and FHWA will prepare a final EIS. After that final EIS is
4 published, FHWA will issue a Record of Decision that sets out what the selected alternative is
5 along with mitigation commitments that the project will include. Thus there has been no final
6 agency action taken yet that is subject to review under SEPA.
7

8 **C. SEPA Does Not Provide For Any Intermediate Judicial Review Of The Agency's**
9 **SEPA Compliance**

10 Neither NEPA nor SEPA provide for an interlocutory review of the intermediate steps
11 being taken in the environmental review process. SEPA in particular prohibits such an "over
12 the shoulder" type of review by the court while the agency is in the process of undertaking
13 environmental review by requiring that review of the SEPA process must be linked to review
14 of the underlying governmental action. The adequacy or validity of all of those intermediate
15 steps may be raised in an environmental challenge, but not until there has been a final agency
16 action.
17

18 **1. Washington courts have dismissed premature SEPA claims**

19 Washington courts have consistently dismissed SEPA claims that were brought prior to
20 the lead agency's final action. In *Foster v. King County*, the appellants sought review of a
21 determination of significance, which required them to prepare an EIS on their project. 83 Wn.
22 App. 339, 921 P2d 552 (1996). The appellants argued that requiring them to wait until there
23 was a final governmental action on their permit application would effectively deny them a
24 remedy, because they would have to prepare the EIS in order to get the local agency to make a
25 permit decision. However, the court determined that the legislature had considered that issue
26

1 in amending SEPA to require linkage of the SEPA procedure and the substantive agency
2 decision. Even though review would be delayed until after a final decision on the underlying
3 governmental action, the appellants still had the ability to seek review. The court thus rejected
4 the appellants' request for an interlocutory review of the SEPA process separate from the
5 underlying governmental action. *Id.*, 83 Wn. App. at 344-45. *Accord Saldin Securities v.*
6 *Snohomish County*, 80 Wn. App. 522, 529, 910 P.2d 513 (1996), *aff'd* 134 Wn.2d 288, 949
7 P.2d 370 (1998).

9 Even in the cases in which applicants have themselves sought review of the SEPA
10 determination prior to the decision on the underlying governmental action, courts have refused
11 to intervene prior to the substantive agency decision. In those cases, avoidance of delay was
12 arguably not an issue; in fact the appellants were seeking review in order to potentially reverse
13 the decision that an EIS was required, thus avoiding the time and cost of the EIS. In this case,
14 it is not an applicant seeking review, it is an individual and a group that oppose the Viaduct
15 replacement project. Reviewing WSDOT's actions so far on this project, prior to the
16 completion of the ongoing second supplemental draft EIS and the final EIS, serves no purpose
17 other than to delay this needed public safety project. If the applicants' arguments in *Saldin*
18 *Securities* and *Foster* were insufficient to overcome the plain language of RCW 43.21C.075,
19 then the petitioners' claims in this case certainly cannot be enough to sustain their challenge.

22 **2. Federal courts have dismissed NEPA challenges that were brought prior to**
23 **a final agency action**

24 Despite the fact that the National Environmental Policy Act (NEPA) does not contain
25 the same language as RCW 43.21C.075 linking review of the environmental process to the
26 project decision, federal cases on NEPA compliance have reached the same result. *See* 42

1 U.S.C. § 4332. Courts have consistently found that where there has been no final federal
2 agency action on a project, the challenge to NEPA compliance is not ripe for the court's
3 consideration. See *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43,
4 48-49 (D.C. Cir. 1999); *Western Radio Services Co. v. Glickman*, 123 F.3d 1189, 1197
5 (9th Cir. 1997)(until United States Forest Service made final decision regarding construction of
6 a new road, challenge to the road under NEPA was not ripe for review).

7
8 In *Friends of Potter Marsh v. Peters*, a group of citizens challenged a city's efforts to
9 extend a trail with federal transportation funds. 371 F. Supp. 2d 1115 (D. Alaska 2005). The
10 project had issued a draft EIS, and relied on several federal guidance documents. The court
11 examined whether there was a final agency action that could be subject to review under NEPA.
12 The court reiterated the standard set out by the U.S. Supreme Court regarding whether agency
13 action was final: (1) whether the action marked the "consummation" of the agency's decision-
14 making process and was not merely tentative or interlocutory in nature, and (2) whether the
15 action was one by which "rights or obligations have been determined" or from which "legal
16 consequences will flow." *Id.* at 1119 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, 117
17 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)).
18

19 The plaintiffs had argued that the draft EIS was a final agency action. "Plaintiffs
20 attempt to characterize their claims as 'final administrative words' that took 'definitive
21 positions.'" *Id.* at 1119-20. However, the court determined that the draft EIS did not meet the
22 test for final agency action. *Id.* The court treated the federal highway guidance documents in
23 the same manner. *Id.* at 1120-22. Finally, the court concluded that the municipality's use of
24 federal funds for the preparation of NEPA documents and other planning purposes as well as
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1 for preliminary engineering and design work did not create a reviewable agency action. *Id.* at
2 1121 and 1125-26.

3 The court then went on to consider whether any of the issues was ripe for the court's
4 review, and concluded that they were not:

5 Here, there is no question that judicial intervention would interfere with
6 FHWA's process of complying with NEPA. FHWA is still required to consider
7 public comments on the draft EIS, publish a final EIS, and issue a record of
8 decision. Judicial review at this stage in the process would deprive the agency
9 of the opportunity to consider public comments and decide whether it made any
mistakes requiring correction. There is still time for the agency to review its
past actions and ensure that it is in compliance with all relevant statutes.

10 *Id.* at 1125. The court therefore dismissed the NEPA claim.

11 *Friends of Potter Marsh* is factually analogous to the present case: (1) no final decision
12 on the project has been made by the project proponent, WSDOT; (2) the SEPA / NEPA review
13 process is underway, with two draft EISs having been prepared and circulated for comments
14 and another supplemental draft being prepared; (3) no final EIS has yet been prepared, in
15 which WSDOT and FHWA will respond to public comments and have the opportunity to make
16 changes to the project based on those comments. This case should be subject to the same
17 disposition and should be dismissed.

18
19
20 **3. At this stage of the project, the documents that a court would review in a
SEPA challenge are not yet complete**

21 When a SEPA challenge is brought in a timely manner, the question before the court is
22 whether the agency took a hard look at the environmental consequences of the project.
23 Compliance with SEPA is determined by reviewing the EIS and the agency's administrative
24 record to see whether it documents this "hard look." The court reviews the EIS to determine
25 whether it is adequate as a matter of law. *See, e.g., Glasser v. City of Seattle*, 139 Wn. App.
26

1 728, 740, 162 P.3d 1134 (2007). The court reviews the adequacy of an EIS under the “rule of
2 reason, under which the EIS must provide a “reasonably thorough discussion of the significant
3 aspects of the probable environmental consequences” of the agency's decision. *Id.* (citing
4 *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633,
5 860 P2d 390, 866 P.2d 1256 (1993))(internal quotation marks omitted). What an elected
6 official or anyone else said during the process is not even relevant to that question. However,
7 if the plaintiff believes that it is, then that issue can be raised at that time.
8

9 At this point, there is no remedy that the court could order other than to direct WSDOT
10 to complete a final EIS, which it is already doing. If WSDOT had taken the position that
11 SEPA did not apply and were going forward with a project with no SEPA review underway,
12 that might be a different case. However, WSDOT is *in the process* of completing its review to
13 comply with NEPA and SEPA. WSDOT needs to be allowed to finish that work before any
14 judicial review occurs.
15

16 **D. The Court Must Dismiss This Action For Lack Of Subject Matter Jurisdiction**
17 **Because The SEPA Claim Is Not Ripe For Review**

18 If the plaintiff's claim is not ripe for review, then the court lacks subject matter
19 jurisdiction and must dismiss the complaint. *See St. Clair v. City of Chico*, 880 F.2d 199, 201
20 (9th Cir. 1989) (ripeness goes to court's subject matter jurisdiction); *Broughton Lumber Co. v.*
21 *Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992)(if claim is not ripe for
22 review, court lacks subject matter jurisdiction and must dismiss claim).
23

24 A motion to dismiss on the grounds of ripeness and lack of subject matter jurisdiction is
25 treated as a motion to dismiss under CR 12(b)(1):
26

1 CR 12(b)(1) sets forth a defense for “lack of jurisdiction over the subject
2 matter[.]” “Without subject matter jurisdiction, a court or administrative
3 tribunal may do nothing other than enter an order of dismissal.”

4 *Ricketts v. Washington State Bd. of Accountancy*, 111 Wn. App 113, 116, 43 P.3d 548 (2002)
5 (quoting *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn.
6 App. 121, 123-24, 989 P.2d 102 (1999).

7 CR 12(b)(1) allows the court to consider material outside the pleadings:

8 Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance
9 of a complaint's jurisdictional allegations despite their formal sufficiency, and in
10 so doing rely on affidavits or any other evidence properly before the court. It
11 then becomes necessary for the party opposing the motion to present affidavits
12 or any other evidence necessary to satisfy its burden of establishing that the
13 court, in fact, possesses subject matter jurisdiction. The district court obviously
14 does not abuse its discretion by looking to this extra-pleading material in
15 deciding the issue, even if it becomes necessary to resolve factual disputes.

16 *St. Clair v. City of Chico*, 880 F.2d at 201. The declaration relied on by WSDOT to support
17 this motion establishes that there has as yet been no final agency action taken by WSDOT that
18 is reviewable under SEPA's appeal provisions in RCW 43.21C.075. Because there has been
19 no final agency action, SCAT's claims that WSDOT is acting in violation of SEPA are not ripe
20 for review, and must be dismissed.

21 **E. SCAT's Claims Against the City Must Also Be Dismissed Because the City Has
22 Not Taken A Final Agency Action**

23 For the same reasons, SCAT's claims against the City are not ripe for review under
24 SEPA. The City is not developing the project; WSDOT is. As explained above, WSDOT will
25 not take a final agency action until it makes the decision to go forward with developing the
26 final design for the project. The Seattle City Council's expression of the City's policy as well
as approval of a memorandum of agreement that sets out what the two agencies' eventual roles

1 will be cannot be “final agency actions” when the underlying project, the viaduct replacement,
2 has not yet been the subject of a final agency action.

3 WSDOT is the project developer and is the state agency that is charged with siting,
4 designing and building the state highway system. The City Council cannot take an action that
5 makes a final decision for WSDOT. The Council cannot bind WSDOT to a final project
6 decision. The Council’s ordinance is not a final agency action under SEPA.
7

8 **F. The Petition Does Not State A Claim For Relief Under the Land Use Petition Act**

9 The City Council’s action was not a “land use decision” under the Land Use Petition
10 Act (LUPA). LUPA defines a land use decision as (1) a local agency’s final decision on a
11 permit; (2) an interpretive or declarative decision on the application to specific property of
12 “zoning or other ordinances or rules regulating the improvement, development, modification,
13 maintenance, or use of real property;” and (3) a final decision on enforcement actions. RCW
14 36.70C.020(2). An ordinance that expresses the City’s policy regarding a state transportation
15 project as well as approving an agreement between the agencies as to what responsibilities
16 each will have as the project is developed is not a land use decision. The court has no
17 jurisdiction to decide this matter under LUPA.
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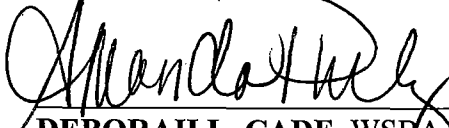
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CONCLUSION

For the foregoing reasons, respondents WSDOT and City of Seattle request that the court dismiss the petitions against WSDOT and the City of Seattle without prejudice for re-filing when the claim is ripe for review.

DATED: February 12, 2010.

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