HONORABLE RICHARD EADIE
(Hearing Date: April 30, 2010 1:30 p.m.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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. ELIZABETH A. CAMPBELL, Plaintiff/Petitioner, v. CITY OF SEATTLE, a municipal corporation, Defendant/Respondent	NO. 9-2-36276-9 SEA (CONSOLIDATED WITH NO. 09-2-40939-1 SEA) PLAINTIFF'S STRICT REPLY TO DEFENDANTS' REPLY FOR DEFENDANTS' MOTION TO DISMISS UNDER CR 12(b)(1)

NATURAL RESOURCE LAW GROUP, P.L.L.C.
P.O. BOX 17741
SEATTLE, WA 98127-1300
Phone: (206) 227-9800 Fax: (206) 789-0655

Plaintiffs hereby submit this strict reply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss.

I. ARGUMENT

A. PLAINTIFF CONSTRUCTIVELY COMPLIED WITH THE COURT'S MARCH 12, 2010 ORDER TO FILE AND SERVE A RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff was directed in an order by this court on March 12, 2010 to file a response to the Motion to Dismiss by March 26, 2010. Plaintiff electronically filed her Response on March 26, 2010 at 4:31 p.m., one minute after the cut-off time for filing on that Friday. This should be considered constructive filing and harmless error, since it is not unusual that the court's web site may be bogged down with filings on a Friday afternoon, causing it to run slowly, or that an individual's computer may be running slowly. While the "Date Received" time stamp on the Confirmation Receipt received by Plaintiff after the electronic filing is "3/29/2010 8:30:00 am," no real harm or prejudice to defendants has occurred.

Defendant was also served, or constructively served with a copy of the Response to Defendant's Motion to Dismiss. Defendant admits that it received an e-mail with a link to the SCAT website that contained the response. Plaintiff was not aware of any specific rule only allowing one way to serve the Defendant with her response. It is hardly burdensome to go to a web site and open a link – it does not require "surfing" around the internet, or doing a Google search to find the document. It only requires the depressing of the button on one's mouse, as simple as opening an e-mail. While an attorney may not have chosen to serve Defendants in this manner, Plaintiff, *pro se*, was unaware of any prohibition against serving the document to Defendant in this manner.

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Plaintiff requests the court find that her Response to the Motion to Dismiss was constructively, or factually, filed and served and that the Motion to Dismiss should not be granted on the grounds that it was not filed and served strictly as ordered.

B. THE COURT MAY RESTRAIN ANY FURTHER ACTIONS BEING TAKEN ON THE AWV PROJECT UNTIL ENVIRONMENTAL REVIEW IS COMPLETE, AND PLAINTIFF CLEARLY SUBMITTED EVIDENCE THAT SHOWS A FINAL AGENCY DECISION

NEPA case law makes it clear that EISs that appear to be merely a *post hoc* rationalization of an already-chosen project alternative are inappropriate and contrary to the spirit and the letter of NEPA. If it looks like a duck, quacks like a duck, and walks like a duck, then it must be a duck – so, too, with a final agency action. Attached to Plaintiff's brief in response to Defendants' Motion to Dismiss was a copy of the MOA between the City and the State agreeing to IMPLEMENT the bored tunnel alternative, evidence of a final agency action. Seattle city ordinances were passed and signed by the mayor for the <u>bored tunnel alternative only</u>. Additional final decisions have been made that cement the bored tunnel alternative as the chosen one:

1. There have only been two alternatives presented in the DEIS – the tunnel alternative and the no action alternative. This is clearly a violation of NEPA, and taken as a whole with other actions taken by the Defendant, indicates a decision has already been made – a final agency action.

2. Defendant has hired a firm to do public relations to promote the tunnel alternative to the public, and produced a video that creates a highly biased view that would persuade the viewer to certainly select the tunnel alternative.

3. Defendant has already begun sending out RFPs for bids from contractors for the bored tunnel project option, but no RFPs for bids for other options. This, combined with the actions mentioned above, certainly looks, quacks, and walks like a federal agency action.

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4. Defendants can't have it both ways. On the one hand, they claim that Plaintiffs claims are not ripe for review because there has been no "final agency action." This is a disingenuous argument because on the other hand, every action they have taken is in the nature of a decision has already been made rendering the EIS process as simply a pro forma way to rubber stamp that decision, or a *post hoc* rationalization.

Early case law discussing this point shows that the *post hoc* rationalization problem was quickly detected early in the life of NEPA. Contrary to Defendant's allegation that the Court can only provide the remedy in this case of directing WSDOT to prepare an EIS, the Court can restrain any further action on the project until the proper environmental studies and NEPA/SEPA procedures have been completed as required by law. The "presumption is that an action proceeding in violation of NEPA should be enjoined…" Realty Income Trust v. Eckerd, 564 F.2d 447, 457 (D.C. Cir. 1977). An injunction restraining an action that violates NEPA has been rightly termed "the vehicle through which the congressional policy behind NEPA can be effectuated." Environmental Defense Fund v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973). The policies underlying NEPA "weigh the scales in favor of those seeking the suspension of all action until the Act's requirements are met…" Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984). Without injunctive relief, "application of a "rule of reason" would convert an EIS into a mere rubber stamp for *post hoc* rationalization of decisions already made." Natural Resource Defense Council v. Callaway, 524 F.2d 79, 95 (2nd Cir. 1975).

On these grounds, the court should DENY Defendants' Motion to Dismiss and allow Plaintiffs the opportunity to enter into discovery and proceed to trial on the merits of the case.

NATURAL RESOURCE LAW GROUP, P.L.L.C.
P.O. BOX 17741
SEATTLE, WA 98127-1300
Phone: (206) 227-9800 Fax: (206) 789-0655

DATED this 28th Day of April, 2010

NATURAL RESOURCE LAW GROUP, PLLC

By: /s/ Jill J. Smith
Jill J. Smith, WSBA #41162
P.O. BOX 17741
SEATTLE, WA 98127-1300
Phone: (206) 227-9800
Fax: (206) 789-0655
E-mail: jill.smith@naturalresourcelawgroup.com

NATURAL RESOURCE LAW GROUP, P.L.L.C.
P.O. BOX 17741
SEATTLE, WA 98127-1300
Phone: (206) 227-9800 Fax: (206) 789-0655

DECLARATION OF SERVICE

I declare that a true and correct copy of the following document:

1. PLAINTIFFS' STRICT REPLY TO DEFENDANT'S MOTION TO DISMISS

was served on the following as indicated below:

Amanda Phily, Attorney General's Office
Deborah Cade, Attorney General's Office
State of Washington
7141 Clearwater Drive SW
Tumwater, WA 98501

Via e-mail delivery.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of April, 2010 in Seattle, Washington.

Jill J. Smith
Natural Resource Law Group, PLLC
610 NW 44th St. Suite 106
P.O. Box 17741
Seattle, WA 98127
(206) 227-9800 phone

NATURAL RESOURCE LAW GROUP, P.L.L.C.
P.O. BOX 17741
SEATTLE, WA 98127-1300
Phone: (206) 227-9800 Fax: (206) 789-0655