

February 22, 2013

VIA E-MAIL AND US MAIL

Angela Angove
Washington State Department of Transportation
999 Third Avenue, Suite 2200
Seattle, WA 98104

Re: I-90 Tolling Proposal Environmental Assessment (EA) Scoping Comments

Dear Ms. Angove:

This law firm represents the City of Mercer Island (“City”) as to WSDOT’s proposed tolling of I-90 and the NEPA process associated therewith. We write on behalf of the City to comment on the proposal by the Federal Highway Administration (“FHWA”) and Washington State Department of Transportation (“WSDOT”) to prepare an Environmental Assessment (“EA”) for tolling the Interstate-90 (“I-90”) bridge over Lake Washington.

The City is on record as opposing tolling I-90 for the reasons set forth in Resolution 1402.¹ The purpose of this letter is to comment on the NEPA review for tolling. Therefore, this letter will not repeat the many other arguments based in policy, equity, and the law that inform the City’s opposition, but rather will focus on issues related to NEPA review. As discussed below, taking a hard look at tolling’s environmental effects will demonstrate that the effects are significant and require an EIS, but will also illustrate why FHWA and the state legislature should reject tolling.

These significant environmental effects include regional impacts to a variety of resources, including transportation, air quality, greenhouse gases, and public safety, especially in combination with other tolling plans within the Central Puget Sound Region. In addition, the social and economic impacts to Mercer Island – and other communities – will

¹ Attached as Exhibit A is a copy of Resolution 1402 (adopted Oct. 6, 2008); the City recently re-affirmed this Resolution and its conclusion that the 1976 Memorandum of Agreement (“MOA”) requires that WSDOT must seek the City’s concurrence before modifying the structure and operation of I-90.

lead to significant environmental effects.² The significance of these impacts makes this a controversial action that under NEPA and WSDOT's own guidance requires an EIS. Within the EIS, both WSDOT and FHWA should develop, evaluate, and consider reasonable alternatives that will fulfill both the funding and congestion reduction objectives and mitigate impacts to all residents of the Central Puget Sound Region.

Comments on the National Environmental Policy Act Process

I. Tolling I-90 Will Have Significant Environmental Effects and WSDOT and FHWA Must Prepare an Environmental Impact Statement.

Tolling I-90 will affect a wide range of resources, and impacts on some of those resources will be "significant." NEPA requires preparation of an EIS for a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). "If there is a substantial question whether an action 'may have a significant effect' on the environment, then the agency must prepare an Environmental Impact Statement." *Center for Biological Diversity v. National Highway Transp. Safety Agency*, 538 F.3d 1172, 1185 (9th Cir. 2008) (remanding for further NEPA analysis). WSDOT's proposal to prepare an EA fails to recognize that its decision to toll I-90 will have significant impacts.

A. Tolling I-90 Will Have Significant Impacts to Transportation and Other Related Resources.

NEPA requires agencies to consider direct effects, which are caused by the action and occur at the same time and place, and indirect effects, which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(a), (b). The indirect transportation impacts of tolling I-90 will be

² Supporters of tolling sometimes dismiss such potential economic impacts, particularly as such impacts pertain to Mercer Island. This letter provides facts to demonstrate that such impacts are significant and warrant NEPA's "hard look." For instance, a commuter with a toll each way each workday will pay nearly \$1,750 per year for roundtrip, daily tolls. For a person renting an apartment on the North End of Mercer Island who commutes to Seattle or Bellevue, this is equivalent to a rent increase greater than \$140/month. For a person with a \$40,000 annual income, this amounts to a tax increase greater than 4%. WSDOT's Alaskan Way Viaduct EIS accepted the logic that tolling will change behavior and cause impacts; early returns on the SR-520 tolling experiment appear to prove it. If a 4% tax hike at the upper end of the economic scale is worth a decade of national debate, surely a 4% hike at the family wage level merits at least a study of its impacts. These are not trivial impacts and require thorough analysis before the experiment is extended.

particularly significant in the Central Puget Sound Region highway system³ due to diversion. Both FHWA and WSDOT have previously concluded that tolling (and diversion caused by tolling) can result in potentially significant adverse impacts to transportation resources at a level that requires analysis in an EIS.

The FHWA recently prepared a Supplemental Environmental Impact Statement (“SEIS”) for an analogous project in order to analyze the significance of impacts to transportation.⁴ The Ohio River Bridges project involved the construction of two new bridges between Louisville, Kentucky, and southern Indiana; after the initial FEIS, FHWA proposed tolling as a source of revenue to pay for the construction work. As part of the SEIS, FHWA conducted an extensive transportation impacts analysis covering three parallel bridges in the same region (not all of which would be tolled) and ultimately concluded that interstate users would divert to secondary and local roads to avoid tolls associated with the bridges.⁵

Similarly, WSDOT’s Final Environmental Impact Statement for the Alaskan Way Viaduct Replacement Project also recognized that tolling can cause potentially significant adverse impacts to transportation. The Draft Supplemental EIS and Final EIS analyzed transportation impacts within the Central Puget Sound region and determined that tolling through-traffic on SR 99 (i.e., not cars entering or exiting in downtown) would cause an estimated 40,000 to 45,000 daily trips to shift to I-5 and city streets,⁶ that tolling would increase Vehicle Miles Traveled, Vehicle Hours Traveled, and Vehicle Hours of Delay within the region,⁷ and that the “diverted traffic and increased congestion would have the

³ The study area for this proposal should extend beyond the “Cross-Lake Washington Corridor” described in WSDOT’s materials to include the four-county Central Puget Sound Region (King, Kitsap, Pierce and Snohomish counties) that is the relevant planning unit for state and federal transportation planning purposes. Transportation 2040: Toward a Sustainable Transportation System at i (2010)

<http://www.psrc.org/transportation/t2040/t2040-pubs/final-draft-transportation-2040>. WSDOT used this geographic scope for the Alaskan Way Viaduct Replacement Project traffic analyses. Alaskan Way Viaduct Replacement Project Draft Supplemental Environmental Impact Statement (“DSEIS”) (2010) at 208; Alaskan Way Viaduct Final Environmental Impact Statement (“FEIS”) Appendix IX at 4 (2011).

⁴ 76 Fed. Reg. 8808, 8808 (Feb. 15, 2011).

⁵ Ohio River Bridges Final SEIS at 5-11 (Apr. 2012). For the SEIS, the FHWA consultant prepared a 151-page “Louisville-Southern Indiana Ohio River Bridges: Traffic Forecast” to examine the impacts of tolling on air quality, noise, highway capacity, historic resources, and environmental justice. *Id.*, Appendix H.1.

⁶ Alaskan Way Viaduct DSEIS at 209-214; Alaskan Way Viaduct FEIS, Appendix IV, at 26 (incorporating DSEIS findings into FEIS).

⁷ Alaskan Way DSEIS at 208-09; Alaskan Way FEIS, Appendix IV, at 22-23.

potential to result in effects on the disciplines of environmental justice, historic and cultural resources, air quality, energy and greenhouse gases, and noise.”⁸

The experience with SR-520 also shows that diversion causing significant impacts is likely to happen within the Central Puget Sound Region. Despite WSDOT’s prediction in the SR-520 Variable Tolling EA that transportation impacts due to diversion would be insignificant,⁹ WSDOT’s October 2012 update on SR-520 tolling suggested that SR-520 tolling caused greater diversion than anticipated with a 13% increase in traffic on both SR-522 and I-90. SR-522 thus has received an additional 4,000 cars per day; on I-90, this appears to have imposed an additional 15,000 cars per day.¹⁰ The perceived need to mitigate SR-520’s diversion by tolling I-90 further illustrates the significance of these impacts. Depending on the process required to implement I-90 tolls, temporal overlap in the SR-520 and I-90 tolls may cause even more cars to divert to SR-522 and I-405 to avoid paying tolls. Transportation impacts would also be magnified during SR-520 bridge reconstruction when overall capacity is lower than normal and I-90 provides the only direct access across Lake Washington.

Given the interconnectedness of the highways in the Central Puget Sound Region, severe congestion on SR-522 and I-405 may limit the benefits of reduced congestion on I-90.¹¹ The Alaskan Way DSEIS analysis concluded that all of the toll alternatives under consideration would cause so much diversion to surface streets that vehicle queues would back up on to the SR-99 mainline and degrade SR-99 operations.¹² Given existing congestion, it is likely that tolling I-90 within the geographically larger Central Puget Sound Region will cause similar effects at I-90 interchanges. Regardless of whether WSDOT agrees with the City as to the relative impacts, clearly WSDOT has previously concluded the nature of such impacts are significant; this element of “controversy” merits consideration in an EIS. 40 C.F.R. § 1508.27(b)(4), (5). Whatever the outcome may be, NEPA requires that

⁸ Alaskan Way DSEIS at 223; Alaskan Way FEIS, Appendix IV, at 33-41.

⁹ SR-520 Variable Tolling Project EA at 5-3 (2009) (anticipating a reduction in cross-lake trips overall and predicting that “the regional transportation network . . . is relatively unaffected by the proposed tolling on SR 520”), 5-5 (estimating 1-3% increase in traffic on SR-522 and I-90), 1-3 (predicting “minimal to no noticeable diversion of traffic to SR-522, I-405, and I-5”), 1-7 (no “cumulative effect on travel patterns” because of “existing capacity restraints” and planned construction on I-90).

¹⁰ For context, WSDOT’s January 2012 SR-520 tolling update reported an increase in traffic on I-90 (11% or 15,000 cars), SR-522 (9% or 4,000 vehicles), I-5 (2% or 4,000 vehicles) in downtown Seattle, and I-405 (5% or 10,000 vehicles) in downtown Bellevue.

¹¹ The SR-520 Variable Tolling Environmental Assessment (2009) notes that “all routes that cross or go around Lake Washington operate poorly during peak periods due to congestion; these routes include SR 520, I-90, and SR 522.” *Id.* at 5-3.

¹² Alaskan Way DSEIS at 209; Alaskan Way FEIS, Appendix IV, at 22-23.

WSDOT and FHWA at least perform this analysis.

Other factors counsel in favor of an EIS. For instance, diversion to SR-522 and I-405 may also impact public safety by slowing down emergency responders. Actions that pose a threat to public safety are another factor in the determination of whether to prepare an EIS. 40 C.F.R. § 1508.27(b)(2). Given the already congested nature of the roads within the Central Puget Sound Region, WSDOT and FHWA should consider the “significant” cumulative impacts of tolling I-90 on public safety.

In the same vein, the agencies should also consider the significant accompanying impacts to air quality, greenhouse gas emissions (due to increased Vehicle Miles Traveled, Vehicle Hours of Travel, and Vehicle Hours of Delay), and increased likelihood of accidents in an EIS before deciding whether to impose tolls on I-90. Because other roads in the Central Puget Sound Region are already congested, cumulative impacts can be substantial even if the impacts of the I-90 tolling proposal are minimal.¹³

In addition to these significant impacts, the WSDOT Environmental Procedures Manual explains that the agency should prepare an EIS for projects that are “apt to create substantial public controversy.”¹⁴ In addition to the “controversy” regarding this proposal’s impacts (as described above), the project is also “controversial” in terms of public opposition – several hundred people showed up at a recent public meeting to protest tolling I-90. John White of WSDOT recently spoke at the Mercer Island Chamber of Commerce and noted that the Mercer Island scoping meeting was the largest turnout he had ever seen, even when compared to public meetings for the SR-520 and Alaskan Way Viaduct projects. The I-90 tolling proposal is clearly just as “controversial” as these other projects for which WSDOT prepared EISs, which provides another rationale for WSDOT and FHWA to prepare an EIS instead of an EA.

NEPA also requires preparation of an EIS where a proposed action might adversely affect structures listed on the National Register of Historic Places (“NRHP”). 40 C.F.R. § 1508.27(b)(8). Because the Lacey V. Murrow Bridge is listed on the NRHP, WSDOT and FHWA should closely examine any adverse impacts to the structure or aesthetics of the bridge in an EIS.

¹³ WSDOT Guidance on Preparing Cumulative Impact Analyses at 5 (2008) (“The cumulative impact analysis should focus on . . . resources currently *in poor or declining health* or at risk even if project effects are relatively small”).

¹⁴ WSDOT Environmental Procedures Manual at 300-4 (2012).

Finally, the I-90 tolling proposal has no temporal limitation. This was key to WSDOT's analysis of the SR-520 Variable Tolling Project, and this difference should inform WSDOT and FHWA's evaluation of each element of the environment considered in the NEPA process.

B. WSDOT and FHWA Must Prepare an EIS to Analyze Cumulative Impacts, Including Those Caused by Additional Foreseeable Tolling.

NEPA requires agencies to consider the "cumulative impacts" of an action, i.e., "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002) (noting that both EAs and EISs need to analyze cumulative impacts). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. "It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now." *Kern*, 284 F.3d at 1075.

Tolling I-90 is one action within an overall plan to impose tolling in the Puget Sound Region on major highways between many communities, including I-405, SR-522 and the mainstem I-5 corridor. Specifically, the Transportation 2040 Plan (the federal Regional Transportation Plan for the Central Puget Sound Region), calls for "additional high-occupancy toll lanes brought into operation in the first decade of the plan" and further calls for partial tolling to fund "major highway capacity projects" with the intent to "manage and finance the highway network as a system of fully tolled facilities."¹⁵ The Plan projects that tolls will increase from \$400 million during the plan's first decade to \$3 billion in the plan's last decade.¹⁶ Chapter 47.56 RCW already authorizes WSDOT to impose tolls on portions of I-5 and I-405,¹⁷ and the Transportation 2040 Plan FEIS clearly depicts all these highway segments (including all of I-5 and I-405 through the Puget Sound Regional Council's four-county planning area) with future tolls.¹⁸ These other tolling actions under the plan are reasonably foreseeable and their cumulative impacts must be reviewed in the I-90 EIS. 40 C.F.R. § 1508.7.

As WSDOT noted in its January 11, 2013 letter commenting on the Gateway Pacific Terminal, "[I]t will be important for the EIS to evaluate the cumulative effects to the state's

¹⁵ Transportation 2040 at 47 (emphasis added).

¹⁶ *Id.* at 44 (Figure 23).

¹⁷ RCW 47.56.890 (authorizing toll on existing I-5 bridge over Columbia River); RCW 47.56.880 (authorizing tolls on express lanes in I-405 corridor).

¹⁸ Transportation 2040 Final Environmental Impact Statement ("FEIS") at 3-39 (2010). Exhibit 3-17 (attached to this letter as Exhibit B) is an illustration of the "Preferred Alternative Tolling Scenario."

transportation system of this proposal in light of other similar proposals.”¹⁹ Perhaps the most striking deficiency in WSDOT's environmental review proposal is its disregard for the cumulative impacts of the tolling proposed in the region's adopted plan. Clearly this is a proposal where the system-wide cumulative effects of similar tolling proposals as outlined in "Transportation 2040" should be examined in one project specific EIS now that a specific proposal is on the table.²⁰

C. Tolling I-90 Will Have Significant Local Impacts to Social and Economic Resources on Mercer Island.

The effects analysis extends to social and economic impacts where such impacts are interrelated with natural and physical effects. 40 C.F.R. § 1508.14; *City of Rochester v. U.S. Postal Service*, 541 F.2d 967, 973-74 (2d Cir. 1976) (remanding for preparation of an EIS where U.S. Postal Service failed to consider “substantial environmental effects” such as increasing commuter traffic by car; loss of job opportunities; departure of residents to other communities; and the ultimate economic and physical deterioration of the community); *see also Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93-94 (2d Cir. 1975) (noting that NEPA “must be construed to include protection of the quality of life of city residents” and criticizing the agency for failing to consider the proposed action’s effects on urban factors such as traffic; parking; neighborhood stability; implications for the city's growth policy; and overall urban decay). WSDOT itself has called for agencies conducting NEPA analyses to “assess economic benefits and impacts . . . to local and state economies.”²¹ The City believes that these impacts require preparation of an EIS, but also asks that regardless of the form of the NEPA analysis, WSDOT and FHWA should address these social and economic impacts during the NEPA process.

Tolling I-90 will significantly impact social and economic resources on Mercer Island and it is reasonably foreseeable that these social and economic impacts will lead to the environmental degradation of Mercer Island. Tolling I-90 will make Mercer Island less attractive to businesses, residents, and employees. In the long-term, this could lead to vacancies in commercial and residential property and undermine the City’s efforts (consistent

¹⁹ Letter from Stephen T. Reinmuth, WSDOT, to GPT/BNSF Custer Spur EIS Co-Lead Agencies, re: Gateway Pacific Terminal Environmental Impact Statement Scoping Comments (Jan. 11, 2013) (hereinafter “WSDOT Letter (Jan. 11, 2013)”).

²⁰ The Transportation 2040 FEIS only analyzed alternatives which included some form of tolling or user fees, which provides no basis for the relevant comparison here. Transportation 2040 FEIS at 3-6. *See also* Alaskan Way Viaduct DSEIS at 206 (recognizing that “[a]s appropriate for long-range Regional Transportation Plans, the *Transportation 2040 Final EIS* did not identify specific impacts from tolled projects or cumulative impacts from multiple tolled projects occurring at once.”).

²¹ WSDOT Letter (Jan. 11, 2013).

with the Growth Management Act) to create a vibrant economic town center that is integrated with the region and will accommodate a certain level of anticipated growth. WSDOT and FHWA should prepare an EIS to analyze how these significant impacts to businesses, community cohesion, and real estate values will weaken the tax base of the Mercer Island City and School District, modify land use, and degrade the physical environment on Mercer Island. *See West 514 v. Spokane Cty.*, 53 Wn. App 838, 847-48, 770 P.2d 1065 (1989) (recognizing need for EIS under the State Environmental Policy Act (SEPA) to analyze blight impacts of regional shopping center on downtown of city); WAC 197-11-444(2)(b) (including land use as an "element of the environment" which requires analysis under SEPA).

Because there is no public access to Mercer Island other than I-90, WSDOT and FHWA should carefully consider the many ways in which tolling I-90 will have significant effects on community cohesion and the Mercer Island economy as discussed below.

Impacts to the City, School District, and Mercer Island Businesses

WSDOT and FHWA should analyze the average cost that tolling I-90 would impose on employees of the City of Mercer Island, the Mercer Island School District, and a variety of Mercer Island businesses. Employees might have to pay just to get to work,²² while employees of Seattle and Eastside businesses have the option of diverting to I-405 and SR-522. The Island hosts a wide variety of businesses ranging from Farmers Insurance to the numerous day care facilities and private schools scattered all over the Island; many of these employees live off-Island. For full time employees who work on Mercer Island, this amounts to an annual pay cut in the thousands of dollars and a disproportionate contribution toward the SR-520 bridge. For tutors and coaches who might spend 2-3 hours on the Island at a time for fairly limited wages or employees of day care facilities and service-oriented businesses (e.g., Starbucks), paying the toll constitutes an even larger pay cut. Simple economics suggests that Island employers will have to subsidize the tolls for their employees, raise salaries, or accept that it will be difficult to attract and keep good employees.

The City and School District would be in a similar position. Nearly all City employees (218 of 225 employees) and roughly two-thirds (333) of School District employees live off Island. The School District Board of Directors recently estimated that it would cost the District \$500,000 to cover the cost of the toll for the 180 school days per year, which assumes a relatively low toll (the same rate currently imposed on SR-520) and does not include summer-time teacher training. Assuming the same toll rate and 240 working days per year (i.e., excluding two weeks of vacation and ten days of public holiday), the City can either spend more than \$375,000 per year to do the same or ask each of its employees to assume more than \$1,700 per year in additional commuting costs. Like Mercer Island

²² The SR-520 peak hours toll is currently \$7.18 per day round-trip.

businesses and the School District, the City would have to divert money from operations and capital improvements just to retain current employees.

WSDOT and FHWA should also analyze the average cost (e.g., decline in revenue, reduced competitiveness vis-à-vis off-Island businesses) that tolling I-90 would impose on Island businesses and City revenues. Imposing an I-90 toll will increase the cost of raw materials and the cost of shipping finished products; these changes will affect the bottom line of every business on the Island. The toll will also make it difficult for businesses on the Island to attract consumers and clients from off Island. This includes a wide variety of service and food establishments which might otherwise attract customers from Seattle or Bellevue, medical and other professionals whose clients span the Puget Sound region, and the Mercer Island Youth and Family Services (“MIYFS”) Thrift Store. In the case of the Mercer Island Community Event Center, which hosts weddings, fundraisers, and a wide variety of other large-scale events, the toll will reduce the Center’s utilization rate (and the City’s revenue) if organizers have to ask their guests to pay several dollars in tolls just to attend the event. Limiting access to the Island will hit certain types of organizations particularly hard, including Youth Theatre Northwest, the Jewish Community Center and other groups that offer entertainment and services.

WSDOT and FHWA should consider the effect of these social and economic impacts on real estate occupancy rates on Mercer Island. A small percentage of commercial real estate on Mercer Island is currently unoccupied due to the recession; the toll (and its related economic impacts to businesses) will make Mercer Island less attractive to businesses currently on the Island. In the long term, tolling I-90 will make it more difficult to fill the existing vacancies and draw new businesses to Mercer Island businesses to replace the ones which choose to leave.

Impacts to Mercer Island Residents

WSDOT and FHWA should estimate the average cost of tolling for Mercer Island households, especially the most financially vulnerable households, and prepare data that permits comparison to other communities in the region. By our rough calculations, Mercer Island makes up only 3% of the households in the region, but may end up paying for 20% of the remaining SR-520 bridge funding.²³ Indeed, some families estimate that imposing a \$4 toll will cost them more than \$5,000 per year. This is an exorbitant amount for Mercer Island residents to pay, especially given the inaccessibility of the SR-520 bridge.

Tolling will impose an even more disproportionate burden on Mercer Island residents

²³ The population of Mercer Island comprises 3% of the 700,000 people who live in Bellevue, Mercer Island, and Seattle, and Islanders’ trips are roughly 20% of the total trips across the I-90 bridge.

who live on a fixed income. For instance, roughly 20% of Mercer Island's 23,000 residents are 65 years of age or older (compared to 12% of King County's population). Mercer Island's population is not large enough to host as wide a variety of medical professionals as Seattle and Bellevue, so residents must leave the Island to obtain critical services. For those elderly residents who live on a fixed income and rely on automobile access to their off-Island doctors, tolling I-90 at a level equivalent to SR-520 would present a serious hardship.

Similarly, tolling will cause a decline in revenue for the MIYFS Thrift Store, which sells gently used, high-quality items and uses the proceeds to fund mental health counseling, school counselors, emergency assistance, and other human services programs for low-income Mercer Island residents. More than 200 households sought the MIYFS's food bank and emergency financial services in 2012. We estimate that roughly 35% of the Thrift Shop's customers come from off-Island. Imposing a toll will make it less attractive for bargain-hunters to visit the Thrift Shop, and thus negatively impact MIYFS services and the low-income Mercer Island residents it supports.

WSDOT and FHWA should evaluate the social and economic impacts of reduced access to off-Island establishments (e.g., performing arts venues, sporting venues, civic events, museums, recreational opportunities and shopping). While Mercer Island is a distinct community, it considers itself a part of the greater Puget Sound region and its residents enjoy the opportunities offered in neighboring cities. Tolling I-90 means that Mercer Island residents cannot access any of these amenities without paying a toll, unlike every other community in the Puget Sound which has untolled alternate routes.

Impacts to Non-Residents and Island Establishments Which Attract Non-Residents

WSDOT and FHWA should evaluate and attempt to quantify the economic and social impacts for the religious and educational institutions which currently attract off-Island visitors and low-income individuals who patronize these establishments (e.g., reduced attendance or decline in revenue or donations). For instance, Mercer Island hosts a synagogue serving much of the Puget Sound area, and many churches on the Island draw from populations in neighboring communities. Mercer Island Presbyterian Church has historically partnered with churches in low-income regions throughout the Puget Sound region. Depending on personal financial resources, tolling will discourage and impair some individuals from observing their religious beliefs with other members of their communities. Consider this simple fact -- a daily or weekly two-way toll on an annual basis would be a significant part of the collection plate or the charitable donation for many who commute to religious institutions.

Mercer Island also hosts private schools such as Northwest Yeshiva High School, the French American School, and various pre-schools that attract off-Island students. Roughly 70% of the students from St. Monica's Parish School come from off Island, as do 30% to

50% of students at various preschools. At the French American School, a full quarter of the students at the French American School receive a scholarship (up to a 90% discount on tuition). Tolling I-90 could interfere with the ability of a low-income family to take advantage of these educational opportunities and impair the ability of these institutions to thrive on Mercer Island.

WSDOT and FHWA should comprehensively analyze the significant social, economic, and environmental impacts in communities east and west of the I-90 bridge due to the toll severing this important arterial. WSDOT itself recently advocated a broad geographic scope of NEPA review for a proposed action that it believed would have widespread impacts to the transportation system and other resources.²⁴ While the cities in the Central Puget Sound Region are diverse, our communities are integrated in many ways. Tolling I-90 will have the effect of increasing distances between the cities, particularly for the elderly and individuals of modest means (e.g., students). For instance, residents of both Mercer Island and Seattle frequently use I-90 to access the extensive wilderness recreation areas, and many of those individuals volunteer to restore and maintain those resources. Some communities east of the bridge rely heavily on the economic contributions of these avid hikers, bikers, and conservationists. Tolling I-90 will hamper habitat restoration efforts, reduce social benefits to the volunteers, deter recreation-related tourism, further burden the state and federal agencies who rely heavily on volunteers to maintain wilderness areas for recreation purposes, and ultimately the direct social and economic impacts will lead to indirect environmental impacts. If crossing the bridge in the opposite direction, tolls will discourage residents of east-side communities from accessing the many educational and cultural resources in Seattle. Impacts to social, economic, and natural resources will extend both east and west of the I-90 bridge over Lake Washington.

In sum, WSDOT and FHWA should thoroughly examine the scope and extent of these impacts during its NEPA review. Moreover, because the impact to social and economic resources is likely to cause significant environmental degradation within the local context of Mercer Island, WSDOT and FHWA should analyze these impacts in detail in an EIS and strongly consider mitigation measures that preserve “equitable and dependable access.”

²⁴ WSDOT Letter (Jan. 11, 2013).

II. WSDOT and FHWA Must Consider a Reasonable Range of Alternatives.

NEPA requires agencies to consider all reasonable alternatives. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991). The purpose of the I-90 tolling project is currently defined to include: (1) raise revenue for substantial transportation improvements in the “Cross-Lake Washington Corridor”; and (2) help alleviate congestion on I-90 between I-5 and I-405.²⁵ As currently drafted, this combination of purposes sharply limits the alternatives analysis. *Id.* (“An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”).

A. *The No Action Alternative Should be Reviewed As a Valid Policy Choice.*

NEPA requires review of the No Action Alternative. 40 C.F.R. § 1502.14(d). Careful review of the No Action Alternative is particularly warranted here for two reasons. First, the 1976 Memorandum of Agreement is based on the understanding that I-90 is the only public access to Mercer Island. WSDOT and the FHWA recognize the Agreement as an “existing commitment” and part of the “local transportation planning process.” Second, the policy alternative of not tolling the system, or its parts, was not analyzed in the Transportation 2040 Plan and Final Environmental Impact Statement²⁶ and it is critical for the legislature to have an accurate understanding of the No Action Alternative and its impacts so that it can understand the changes that tolling would create. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (“NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch”). While it should be no surprise that the City continues to fight to ensure “equitable and dependable access” to the Island, it is important to recognize that NEPA, properly done, will enable the legislature to fully consider issues of equity and access for the system as a whole, by providing information that allows a meaningful comparison of the No Action Alternative to other options.

B. *The Alternatives Should Include Different Combinations of Revenue Tools in Transportation 2040.*

As a threshold matter, even if the narrow purpose statement is accepted, this does not limit the scope of environmental review to various tolling options. WDOT and FHWA are required by law to examine the range of reasonable alternatives, *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990) (in evaluating whether an agency considered a reasonable range of alternatives, “the touchstone for our inquiry is whether an

²⁵ WSDOT Scoping Notice (Jan. 24, 2013).

²⁶ See Transportation 2040 FEIS at 3-6 (noting that all Plan alternatives include tolling).

EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.”), and there are clearly other reasonable mechanisms for raising revenue and/or alleviating congestion.

Instead, WSDOT and FHWA should consider alternatives which combine mechanisms for funding and reducing congestion on I-90. This is consistent with WSDOT's recent recommendation that the U.S. Army Corps of Engineers should conduct an expansive alternatives analysis for the construction of the Gateway Pacific Terminal in Bellingham, WA.²⁷ To address potential transportation impacts to the Edmonds ferry, WSDOT suggested that the Corps should analyze the reasonable alternative of relocating the ferry terminal.²⁸ At the very least, WSDOT and FHWA should analyze the impacts of tolling on Mercer Island's many Seattle-region educational facilities, including St. Monica's Parish School, Northwest Yeshiva High School, and the French-American School, and develop alternatives that would mitigate such impacts.

The City of Mercer Island asks for examination of less extreme alternatives here. The Puget Sound Regional Council (“PSRC”) issued the “Transportation 2040” Plan in order to guide regional transportation planning for the four-county Central Puget Sound Region (King, Kitsap, Pierce and Snohomish counties).²⁹ The Transportation 2040 Plan relies on several funding options – not just tolling – and explicitly includes continuation of and expansion upon the traditional financing scheme (retail sales tax, fuel sales tax, etc.).³⁰ Another alternative could be imposition of a gas tax, as recently proposed in the Washington House of Representatives.³¹ This recent legislative activity – and the requirement of legislative approval for the proposal and any alternatives thereto – makes it especially important that WSDOT and FHWA analyze traditional funding mechanisms in the NEPA process. *Natural Resources Defense Council v. Morton*, 458 F.2d at 837.

C. The Alternatives Analysis Should Include Different Levels of Tolls and Different Geographic Coverage.

To the extent that WSDOT and FHWA proceed with tolling, the agencies should follow the Transportation 2040 Plan, which explicitly recognizes the need for a “nexus” between the road being tolled and the road being improved.³² For the near-term “high-occupancy toll lanes and individual facility toll financing” contemplated in the

²⁷ See WSDOT Letter (Jan. 11, 2013).

²⁸ *Id.*

²⁹ Transportation 2040 at i.

³⁰ *Id.* at 45.

³¹ Andrew Garber, *House Democrats to Propose \$6 Billion Transportation Package*, THE SEATTLE TIMES (Feb. 12, 2013).

³² Transportation 2040 at 45.

Transportation 2040 Plan, the Plan anticipates that such “toll revenues are essentially dedicated to making the investments in these corridors possible.”³³

Alternatives might, for example, combine tolls on the new SR-520 bridge (after construction) and other congestion relief methods for I-90. *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (“a discussion of alternatives that would only partly meet the goals of the project may allow the decisionmaker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact”); *Town of Mathews v. U.S. Dep’t of Transp.*, 527 F. Supp. 1055, 1057 (W.D.N.C. 1981) (invalidating alternatives analysis because NEPA “does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multi-purpose project.”). WSDOT and FHWA should analyze the transportation impacts of such an alternative; some combination of congestion relief and the forthcoming I-90 HOV lanes may sufficiently alleviate congestion to make other (more equitable) funding mechanisms viable.

The Transportation 2040 Plan also recognizes that broad geographic tolling (i.e., including all of the I-450 lanes, I-5, and SR-522) would be more effective at balancing revenue and impacts.³⁴ WSDOT and FHWA should consider imposing lower tolls on more roads within the Central Puget Sound Region to meet the stated purposes, be more consistent with the Transportation 2040 Plan, and spread burdens more equitably between Central Puget Sound Region communities.

D. The Alternatives Analysis Should Thoroughly Explore Subalternatives to Mitigate Impacts to Mercer Island.

To the extent that WSDOT and FHWA proceed with tolling, the agencies should carefully consider options that balance the burden between Mercer Island residents and employees and those who directly benefit from replacement of the SR-520 bridge. As WSDOT knows, there are many potential refinements – or subalternatives – within the tolling alternative that should also be examined carefully:

1. Segmented Tolls
2. Only pay the toll if you drive the entire bridge (e.g., placement of gantries at east and west ends of bridge; no charge unless a car passes both gantries)

³³ *Id.* at 48 (“Guidance on the Use of Tolling Revenues”).

³⁴ Transportation 2040 at 46 (“Generally, the effectiveness of congestion tolling is the greatest with broad geographic coverage. Broader coverage can reduce the problem of diverted traffic: traffic that is ‘tolled-off’ the priced facility and now is using and congesting other roadways.”).

3. Only pay the toll if you drive in a designated direction
4. Pay no more than one toll per day
5. Pay tolls only when returning to Mercer Island
6. Provide an annual pass (cap) for tolls paid by Mercer Island residents and employees
7. Reduced toll for trips only to/from Mercer Island

The NEPA document should also acknowledge that depending on how tolling is implemented, Mercer Island residents will not necessarily have the same access to transit options to mitigate these impacts. WSDOT's own data show that unlike park and ride spaces in Bellevue, Kirkland or Sammamish, over one half of the spaces are used by non-Mercer Island commuters that travel to the Island. Depending on how WSDOT implements tolling, this problem may worsen if commuters park on the Island and switch to the bus or light rail in order to avoid paying the toll. Thus, the provision of park and ride spaces does not necessarily provide dependable or equitable access to Mercer Island residents who are unable to use the majority of spaces and have no access to such spaces after approximately 7:30 a.m. when the lot is full. Depending on the extent to which WSDOT and FHWA's implementation of tolling minimizes impacts to the City and its residents, the EA or EIS should provide for mitigation to offset the disproportionate impacts to Mercer Island residents.

Conclusion

- Under NEPA, agencies must prepare an EIS where there is a "substantial question" that an action's effects will be significant. In prior EISs, WSDOT and FHWA recognize that tolling causes diversion and the impacts of such diversion can be significant (and thus require preparation of an EIS). The City has provided more than enough information to show that diversion is likely to have significant impacts in the Central Puget Sound Region; WSDOT and FHWA should prepare an EIS.
- The proposal to toll I-90 is merely one action in a menu of transportation choices laid out – but not thoroughly analyzed for NEPA purposes – in the Transportation 2040 Plan and FEIS. This proposal presents the perfect opportunity for WSDOT and FHWA to fulfill their obligations under NEPA to fully examine the cumulative impacts of tolling I-90 and other roads in the Central Puget Sound Region.
- Tolling I-90 will cause a wide range of social and economic impacts which are likely to cause environmental degradation in the long term. WSDOT has advocated in favor of an expansive review of economic impacts to the state and local economies for other projects, and the City of Mercer Island requests that WSDOT and FHWA prepare an EIS to analyze these impacts here.

Angela Angove
February 22, 2013
Page 16

- WSDOT and FHWA should consider a reasonable range of alternatives, which must include a full analysis of the No Action alternative, different combinations of revenue tools in the Transportation 2040 Plan, different levels and geographic scope of tolling options, and sub-alternatives that mitigate impacts to Mercer Island and other Central Puget Sound residents.

The City of Mercer Island looks forward to further discussions regarding solutions that meet the State's funding needs, preserve "equitable and reliable access" to Mercer Island, and address congestion on I-90. Thank you for the opportunity to participate in the National Environmental Policy Act ("NEPA") process.

Very truly yours,

K&L GATES LLP

By

William H. Chapman

A handwritten signature in black ink, appearing to read "W. H. Chapman", written over a horizontal line.

EXHIBIT A

**CITY OF MERCER ISLAND
RESOLUTION NO. 1402**

**A RESOLUTION OF THE CITY OF MERCER ISLAND, WASHINGTON
REGARDING TOLLING ON LAKE WASHINGTON BRIDGES.**

WHEREAS, the geographic position of Mercer Island, separated from the mainland on all sides, means those who live and work on the Island cannot leave their community without using I-90; and

WHEREAS, if tolls are imposed on the I-90 bridges, Mercer Island residents, unique among all others in the Puget Sound region, would have to pay a fee penalty each time they traveled to or from their city; and

WHEREAS, Mercer Island is a small and primarily residential community of 22,000, with limited medical care, other professional services, retail and entertainment opportunities on the Island, thereby requiring access to the mainland to fulfill the needs and obligations of daily living; and

WHEREAS, if a proposal to toll I-90 across Lake Washington is advanced, the Department of Transportation and Washington State Transportation Commission are obliged under the terms of paragraph 14 of the 1976 Memorandum of Agreement to "take no action which would result in a major change in either the operation or the capacity of the I-90 facility without prior consultation with and the involvement of the other parties [to the Memorandum of Agreement], with the intent that concurrence of the parties be a prerequisite to Commission action to the greatest extent possible under law."

WHEREAS, The Washington State Highway Commission originally approved 10 lanes for I-90, 4 general purpose lanes west bound, 2 transit lanes, and 4 general purpose lanes east bound (4-2T-4); and

WHEREAS, both the original and amended I-90 Environmental Impact Statements (EIS) were based on this configuration; and

WHEREAS, Mercer Island was projected to generate almost one full lane of traffic into Seattle; and

WHEREAS, Mercer Island has already made significant sacrifices in agreeing to give up the 4th general purpose lane for the right of Mercer Island traffic to use the transit lanes on a third priority basis

WHEREAS, the I-405 final environmental impact statement (FEIS) approved on June 10, 2002 and issued on June 28, 2002 is a comprehensive analysis studying the major transportation corridors east of I-5 and including the operation of I-90; and

WHEREAS, the I-405 Corridor Program Record of Decision documents the FEIS as approved by 24 agencies; and

WHEREAS, the Mercer Island City Council has consistently asserted the City's right and responsibility to protect Island residents, businesses and visitors from degradation of their mobility to and from the Island; and

WHEREAS, plans are now underway to replace the failing SR 520 bridge across Lake Washington, and \$1.5 to \$2 billion more is needed to fund the bridge replacement project; and

WHEREAS, roadway tolling has been identified as one of the possible revenue sources for the needed project funding; and

WHEREAS, tolling SR 520 in order to generate revenue to fund replacement of the 520 bridge places the responsibility for payment on those who actually use 520, but tolling I-90 to help fund 520 places a burden on those who do not and will not directly benefit; and

WHEREAS, the 520 Tolling Implementation Committee appointed by the State Legislature is charged with evaluating the feasibility of raising the needed funds through tolling on 520 and possibly also tolling on I-90; and

WHEREAS, the Tolling Committee's initial evaluation results indicate that more than enough revenue would be collected if I-90 were tolled in addition to 520 given the initial toll rate assumptions; and

WHEREAS, these initial evaluation results also show only a small diversion of traffic from SR 520 to I-90 if tolls are collected on SR 520 alone; and

WHEREAS, the Tolling Committee is also evaluating the "reasonableness" of tolls that might be imposed on one or both of the cross-Lake Washington bridges, and reasonableness includes the concept of equity; and

WHEREAS, the citizens and businesses of Mercer Island will be uniquely and unfairly impacted if tolls are exacted on their travel to and from their community; and

WHEREAS, tolling I-90 to pay for a new SR-520 bridge would place a disproportionate share of the costs on Mercer Island residents

WHEREAS, under State and Regional Growth Management principles all jurisdictions must achieve a balance between housing and employment, and for Mercer Island this requires daily immigration of employees, and tolls on I-90 would be a material barrier to achieving this important goal; and

WHEREAS, the 520 Tolling Implementation Committee has requested input on their initial evaluation results from all affected communities and their elected representatives,

NOW THEREFORE BE IT RESOLVED by the Mayor and City Council of the City of Mercer Island as follows:

SECTION 1.

Any proposal to toll I-90 across Lake Washington would constitute an action resulting in a major change in the operation and capacity of the I-90 facility and therefore would trigger the consultation and concurrence provisions contained in paragraph 14 of the Memorandum of Agreement.

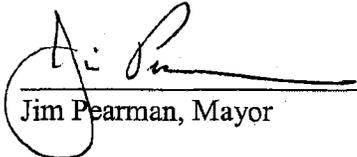
SECTION 2.

Both the continuous HOV lanes planned for construction between Seattle and Bellevue and across Mercer Island on I-90 (R8A) and the consultation and concurrence prerequisites of the Memorandum of Agreement must be completed prior to implementation of tolling on I-90.

SECTION 3.

Tolls must not be imposed on travel to and from Mercer Island on I-90, the only means of public access to and from the Island.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON AT ITS REGULAR MEETING ON THE 6th DAY OF OCTOBER, 2008.



Jim Pearman, Mayor

ATTEST:



Allison Spietz, City Clerk

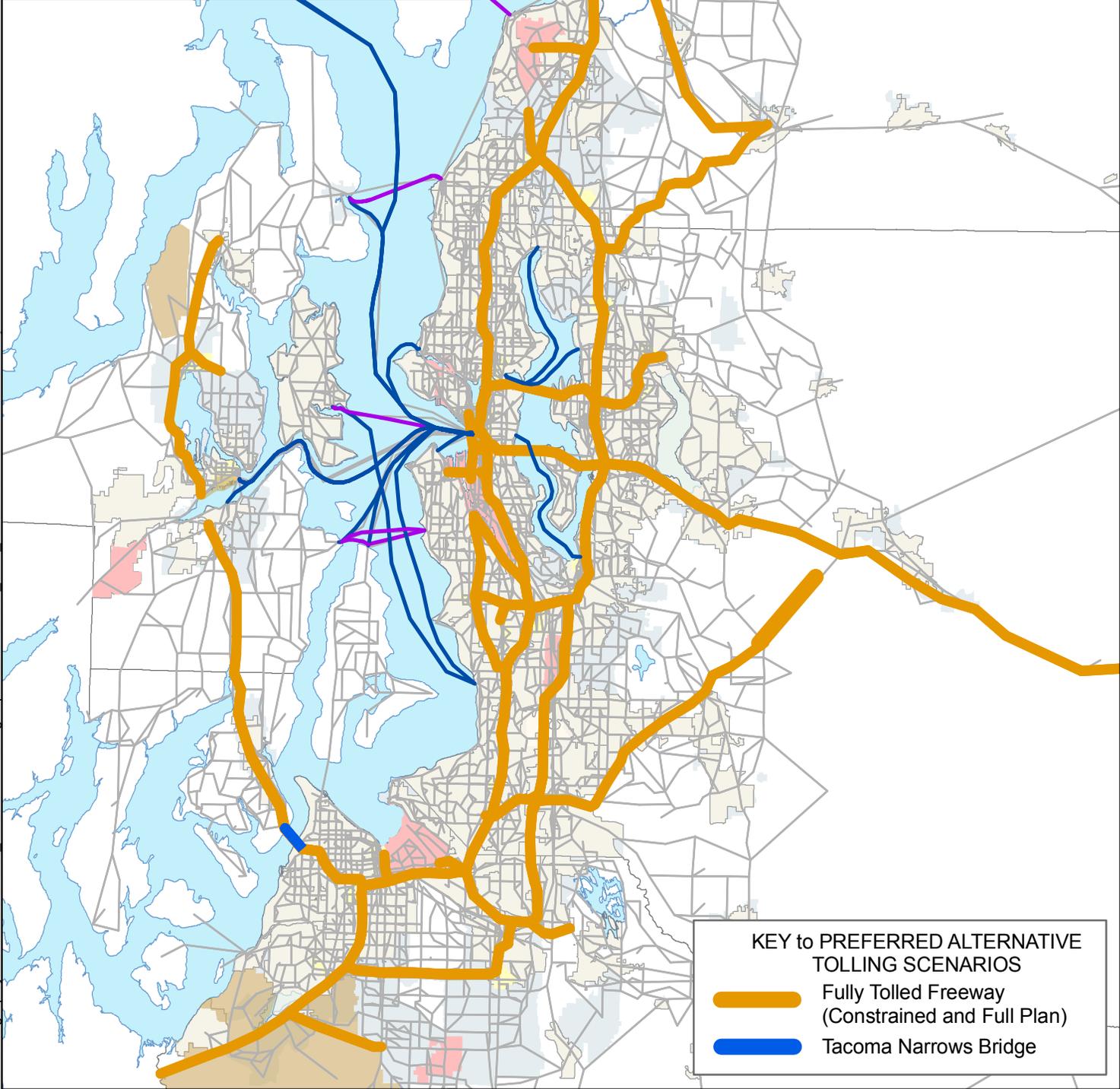
EXHIBIT B

Exhibit 3-17 Preferred Alternative Tolling Scenario

NOTES:
The Preferred Alternative in the Full Plan (includes Unprogrammed element) is defined as representing a range of user fees “such as extended VMT, system tolling, and other user fees”. For analysis purposes highway and arterial tolling , plus a VMT charge, were used to represent the extent of that range of user fees.

Note also that the ferry route configuration is different between the Constrained and Full analyses of the Preferred Alternative.

Preferred Alternative
See Note



KEY to PREFERRED ALTERNATIVE TOLLING SCENARIOS

- Fully Tolled Freeway (Constrained and Full Plan)
- Tacoma Narrows Bridge