Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAURINE HARRIS, *et al.*, Plaintiffs, vs. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, Defendants.	NO. CV02-1481 C PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: Friday, August 9, 2002 ORAL ARGUMENT REQUESTED

I. Relief Requested: The plaintiffs move the court to enjoin the demolition or damaging of any existing structures or any infrastructure or landscaping at Rainier Vista during the pendency of this action. Plaintiffs are threatened with imminent and irreparable harm if demolition and site clearance are allowed to proceed. According to the Seattle Housing Authority's (SHA's) June, 2002 Rainier Vista Revitalization Plan Update, demolition and site clearance may begin as early as July, 2002.[1] Plaintiffs also seek a preliminary injunction against release and expenditure of project funds and other redevelopment activity until such time as the U.S. Department of Housing and Urban Development

[1] Declaration of Steve Fredrickson (hereinafter "Fredrickson Dec. Ex. A"), Attachment ("Att.") 20, p. 36

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(HUD), the City of Seattle (City), and SHA comply with their NEPA and affirmatively furthering fair housing duties.

II. Statement of Facts: Rainier Vista is a 481-unit family public housing development located in the Rainier Valley neighborhood of the City of Seattle. Rental units at Rainier Vista are guaranteed to be affordable because rents for these units are, in most cases, set at a level equal to 30 percent of a family's adjusted income.[2]

The Rainier Valley is a racially and ethnically diverse neighborhood where over 40 languages and dialects are spoken. Numerous social services agencies that provide bilingual and culturally-competent services have located in the Rainier Valley to serve the immigrant communities that have settled in the Rainier Valley. The residents of the Rainier Vista public housing project mirror the racial and ethnic diversity of the Rainier Valley neighborhood; over 85 percent of the Rainier Vista residents are racial or ethnic minorities.[3]

In May, 1999, SHA successfully applied for a $35 million HOPE VI revitalization grant from the U.S. Department of Housing and Urban Development (HUD) to displace Rainier Vista residents, demolish their homes, and redevelop the site as "mixed income" housing. SHA's plans generated substantial objections and controversy from the community. In May, 1999, 170 Rainier Vista residents signed a petition that was submitted to SHA stating their opposition to SHA's HOPE VI plan.[4]

Since May 1999, SHA's HOPE VI plans have undergone at least two significant amendments. Under the current amendment, the result of a Memorandum of Agreement (MOA) executed between the

[2] Fredrickson Dec. Ex. A, Att. 1, p. 3.8-1; 42 U.S.C. § 1437a
[3] Fredrickson Dec. Ex. A, Att. 1, p. 3.10-2; Att. 14
[4] Fredrickson Dec. Ex. A, Att. 19, pp. 1,3; Att. 2, Section 4.1 General Responses, General Response 3

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City and SHA in October 2001, Rainier Vista residents will be displaced from their homes in two phases and all 481 units of family public housing will be demolished.[5]

In the place of these 481 family public housing units, the MOA calls for the construction of 1,081 new units of various types over the next one to four years. Of these, only 310 are to be public housing units. According to the MOA, an additional 171 "replacement" rental units will also be constructed to replace the remaining public housing units originally on the site. However, 100 of these units will be restricted for occupancy by elderly or disabled households only and the bedroom configurations of the units will differ substantially from current bedroom configurations.[6]

While a number of the new units to be constructed under the current HOPE VI plan are described as "affordable" and targeted to families at certain income levels, the term "affordability" is not defined in the MOA. The plan also addresses the opportunity of displaced residents to occupy new units to be constructed under the HOPE VI plan. According to the MOA, displaced residents in "good standing" will be permitted to return to the redevelopment site. The term "good standing" is not defined in the plan, nor is it defined under any relevant HUD regulation.[7]

Under the current version of SHA's HOPE VI plan, it is impossible for plaintiffs and other Rainier Vista families that will be displaced to know whether they will be able to return to Rainier Vista after HOPE VI demolition and construction activities are complete. The new units may be occupancy-restricted, may not have the proper number of bedrooms, or may not have a rent that is affordable. In addition, the family does not know what criteria may be used to assess their suitability as tenants after redevelopment.[8]

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[5] Fredrickson Dec. Ex. A, Att. 4, p. 5; Att. 2, p. 3.8-2
[6] Fredrickson Dec. Ex. A, Att. 4, pp. 15, 16
[7] Fredrickson Dec. Ex. A. Att. 4, pp. 3-6
[8] Decs. of Laurine Harris (Ex. B), Kathryne Smith (Ex. C), Susan Bossert (Ex. D), Carolee Colter (Ex. E), John Fox (Ex. F)

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On May 2, 2001, SHA published a draft Environmental Impact Statement (DEIS) in accordance with the State Environmental Policy Act (SEPA) on the Rainier Vista HOPE VI redevelopment. SHA prepared the DEIS after a determination that the proposed redevelopment would have a significant environmental impact in southeast Seattle. SHA published the Final Environmental Impact Statement (FEIS) under the SEPA on October 1, 2001. SHA commented in the FEIS that the responsibility for National Environmental Policy Act (NEPA) compliance was delegated by HUD to the City, as the responsible entity under NEPA.[9]

On December 4, 2001, the City published its environmental assessment (EA) under NEPA and finding of no significant impact (FONSI). The City also submitted a Request for Release of Funds (RROF) with the environmental certification to HUD to allow SHA to access HOPE VI funds. In its EA, the City discounted the significance of the displacement of Rainier Vista residents, stating that "no impact [was] anticipated" because only "temporary relocations" would result from the HOPE VI redevelopment.[10]

On December 31, 2001 and January 4, 2002, plaintiffs submitted their written objections to the City's environmental assessment and FONSI. In particular, plaintiffs objected to the City's failure to adequately consider effects related to the displacement of Rainier Vista residents.[11] The City did not respond to plaintiffs' written objections. On January 18, 2002 and January 22, 2002, plaintiffs also submitted similar written objections to HUD opposing the City's RROF and environmental certification.[12]

[9] Fredrickson Dec. Ex. A, Att. 2, p. 1-1
[10] Fredrickson Dec. Ex. A, Att. 3, p.8
[11] Fredrickson Dec. Ex. A, Att. 3; Atts. 5, 6
[12] Fredrickson Dec. Ex. A, Atts. 7, 8

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On March 14, 2002, HUD notified plaintiffs that the City had made two additions to the Environmental Review Record (ERR). The City supplemented the ERR to directly reference the environmental justice evaluation contained in the DEIS and FEIS prepared by SHA (under SEPA). The City also clarified the water and sewer capacity impacts from the project.[13] Plaintiff's again submitted their written objections to the revised ERR and RROF. Plaintiff's further renewed their prior objections regarding the adequacy of the EA.[14] In June 2002, plaintiffs received a response from HUD stating that it had no basis to disapprove the City's RROF.[15]

III. Evidence Relied Upon: This motion is based on the declarations of Steve Fredrickson (Ex. A), Laurine Harris (Ex. B), Kathryne Smith (Ex. C), Susan Bossert (Ex. D), Carolee Colter (Ex. E), John V. Fox (Ex. F), the attachments to exhibits, and the pleadings and file.

IV. Authority and Argument:

A. A Preliminary Injunction Should be Granted in Favor of the Plaintiffs.

A preliminary injunction is appropriate where plaintiffs demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious legal issues are raised and the balance of hardships tips in plaintiffs' favor. *See Dr. Seuss Enterps. v. Penguin Books USA*, 109 F.3d 1394, 1397 (9th Cir. 1997); *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 847 F.2d 1389 (9th Cir. 1988); *Associated General Contractors v. Coalition for Equality*, 950 F.2d 1401, 1410 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992).

The Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be remedied by money damages and is often permanent, or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to

[13] Fredrickson Dec. Ex. A, Att. 9
[14] Fredrickson Dec. Ex. A, Atts. 10, 11

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protect the environment." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Absent unusual circumstances, injunction is the appropriate remedy for a violation of NEPA. See *Thomas v. Petersen*, 753 F.2d 754, 763 (9th Cir. 1985); *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995). The irreparable harm caused by the demolition of 481 public housing units, the destruction of water, sewer, electrical, telephone, and street infrastructure,[15] and the removal of trees and landscaping is self-evident.

B. There is a Probability of Success on the Merits

1. The NEPA Framework

The purposes of NEPA are to "help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b)-(c). To accomplish these goals, NEPA requires that all federal agencies prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement (EIS).

The Council on Environmental Quality (CEQ) -- an agency within the Executive Office of the President -- has promulgated regulations implementing NEPA. *See* 40 C.F.R. § 1500-1508. The CEQ regulations set forth general factors agencies must consider in determining whether a contemplated action is a "major federal action significantly affecting the quality of the human environment," thus requiring preparation of an EIS. *Id.* at § 1508.27.

[15] Fredrickson Dec. Ex. A, Att. 13

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2. The EA Process

The NEPA inquiry proceeds in a two-step process. First, to determine whether an EIS is required, federal agencies typically must prepare an EA with sufficient evidence and analysis to support the agency's determination whether a proposed action will "significantly" affect the environment. 40 C.F.R. § 1501.4; 40 C.F.R. § 1508.13. The EA must analyze the impacts of the proposed federal action on the environment both in terms of "context" and "intensity." 40 C.F.R. § 1508.27. Second, if the EA shows that the environment may be significantly impacted by the project, the agency must prepare an EIS. 40 CFR § 1501.4. Alternatively, the agency will issue a finding of no significant impact (FONSI). 40 CFR § 1501.4(q). These are the core requirements of NEPA.

If, after preparing an EA, an agency determines not to prepare an EIS, the agency must set forth "a convincing statement of reasons to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal citations and quotations omitted). If, however, the EA reveals that the agency's proposed action "may have a significant effect upon the . . . environment, an EIS must be prepared." *Foundation for N. Am. Wild Sheep v. USDA*, 681 F2d 1172, 1178 (9th Cir. 1982) (emphasis added). Thus, in order to prevail on a claim that an agency has violated its statutory duty to prepare an EIS, a "'plaintiff need not show that significant effects will in fact occur.' It is enough for the plaintiff to raise 'substantial questions whether a project may have a significant effect' on the environment." *Blue Mountains Biodiversity Project*, 161 F.3d at 1212, quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (internal citations omitted).

As described above, an agency's determination whether a particular action may have significant impacts on the environment is guided by the CEQ "significance" factors. *See* 40 C.F.R. § 1508.27. If an examination of any one of the CEQ factors reveals that the proposed action may have significant

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impacts, an EIS must be prepared. *See National Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722, 731 (9rh Cir. 2000); *National Audubon Soc'y v. Butler*, 160 F. Supp.2d 1180, 1188 (W.D. Wa. 2001) ("The agency must prepare an EIS if any factor applies."). Here, not one, but many of the factors delineated by the CEQ are clearly implicated by the defendants' redevelopment plans.

3. The City's EA Responsibilities

Section 24 of the U.S. Housing Act, codified at 42 U.S.C. 1437v, provides statutory authority for the HOPE VI grant program and states that a major purpose of the program is "[i]mproving the living environment for public housing residents of severely distressed public housing projects through the demolition, rehabilitation, reconfiguration, or replacement of obsolete public housing projects..."

The Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriation Act of 1999, Pub. L. No. 105-276, Tit. II (Oct. 21, 1998) authorized the Secretary of Housing and Urban Development to make up to $625,000,000 in fiscal year 1999 HOPE VI awards. The 1999 Appropriation Act further provided:

> That for purposes of environmental review pursuant to the National Environmental Policy Act of 1969, a [HOPE VI] grant ... shall be treated as assistance under title I of the United States Housing Act of 1937 and shall be subject to the regulations issued by the Secretary to implement section 26 of such Act.

HUD has issued regulations at 24 C.F.R. Parts 50 and 58 to implement these NEPA requirements. These regulations provide instruction and guidance to recipients of HUD assistance and other responsible entities for conducting an environmental review for a particular project, including public housing programs and the HOPE VI program, and for obtaining approval for a Request for Release of Funds.

Pursuant to 24 C.F.R. Part 58, HUD delegates responsibility for conducting an environmental review to another responsible entity (RE). The RE assumes the same responsibility for environmental

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review, decision-making, and action that would apply to HUD. *See* 24 C.F.R. § 58.4. The City is the RE for the Rainier Vista HOPE VI project. In assuming the responsibilities for environmental review of the proposed action, the City is required to certify that it has complied with all the laws and authorities that would apply to HUD had it conducted the environmental review itself. *See* 24 C.F.R. § 58.5. The City, acting under its authority under NEPA, 42 U.S.C. § 4321 *et seq.*, and HUD's implementing regulations, 24 C.F.R. Part 58 and 40 C.F.R. 1508.27, prepared an EA that failed properly to consider the criteria for determining when a project will significantly affect the human environment.

4. The Standard for Review

Plaintiffs' NEPA claims are reviewed under the Administrative Procedures Act (APA), 5 U.S.C. § 706. *See Marsh v. Oregon National Resources Council*, 490 U.S. 360, 375-76 (1989). Under the APA, courts must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observation of procedure required by law." *See* 5 U.S.C. § 706(2)(A) & (D). In determining whether an agency action is "arbitrary, capricious, or an abuse of discretion," the court considers whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). The court must ensure that the agency took a "hard look" at the environmental effects of the proposed action. *See Vermont Yankee v. National Resources Defense Council*, 435 U.S. 519, 535 (1978); *Kleppe v. Sierra Club, 427 U.S. 390, 410, n. 21 (1976).* In interpreting NEPA, the courts give substantial deference to the regulations issued by the CEQ. *See* 42 U.S.C. § 4342 *et. seq.*; *Marsh v. Oregon National Resources Council*, 490 U.S. 360, 378 (1989) (holding CEQ regulations entitled to substantial deference).

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5. The EA is inadequate

The City is required under NEPA to take a "hard look" at the project's environmental consequences in its EA before issuing a FONSI. *See National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). The FONSI must include a "convincing statement of reasons to explain why a project's impacts are insignificant." *Id.* (citing *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.2000)). If an EA indicates that a project "*may* have a significant effect upon the . . . environment, an [environmental impact statement] must be prepared." *Id.* (emphasis in original)(citing *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir.1982)). The criteria for determining whether a project will "significantly" affect the environment are provided at 40 C.F.R. § 1508.27 (incorporated by reference by 24 C.F.R. § 58.2(a)).

a. The EA failed to consider adverse impacts

Defendant's EA addressed only the beneficial impacts of the proposed HOPE VI redevelopment, ignoring the adverse impacts in violation of 40 C.F.R. § 1508.27(b)(1). Prior to the EA, a DEIS and a FEIS were prepared pursuant to SEPA. Although these documents, which were available to, and, indeed, cited by the City in its EA, indicate that the HOPE VI redevelopment will have both adverse and beneficial impacts on the human environment, the City only addressed the beneficial impacts in its EA and FONSI.[16]

This deficiency is most evident in the City's refusal to note and consider the benefits of the "no action" alternative; namely, that "no action" would preserve the existing public housing and not dislocate hundreds of residents from Rainier Vista. The City preferred to consider the adverse impacts of the "no action" alternative, while only considering the beneficial impacts of the redevelopment options. The City's failure to address both the adverse and beneficial impacts of all alternatives is a

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basis for objecting to the RROF and the City's certification. *See* 24 C.F.R. § 58.75(c) (citing 24 C.F.R. Part 58, Subpart E).

The FEIS indicates that over 200 households will be permanently relocated into the surrounding community.[17] The FEIS goes on to state that "this [permanent relocation] could shift and increase the demand for similar units in other SHA housing facilities or in other neighborhoods throughout the City of Seattle." *Id.* The City not only ignored the permanent relocation impacts but also failed to address the adverse impact the relocation of these families will have on the community, especially the impacts on the limited supply of decent, safe and affordable housing in the Rainier Valley and the City as a whole.

Further, it is impossible to know whether the estimate of the number of permanently relocated residents is accurate because SHA has failed to provide key information about its redevelopment plans and policies. First, the October 17, 2001 MOA between the City and SHA only provides residents determined to be in "good standing" with the right to return.[18] "Good standing" has not been defined and there is no way to know how many residents can meet this requirement. Second, while SHA has ostensibly committed to "one-for-one" replacement of the units affordable to extremely low-income families, one-fifth of the planned replacement units will be restricted for occupancy by elderly or disabled households only. SHA has not specified which units, according to bedroom size, will be designated for restricted occupancy.[19] As such, it is not clear whether returning families will be eligible for the units with the number of bedrooms they will need.

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[16] Fredrickson Dec. Ex. A, Att. 3
[17] Fredrickson Dec. Ex. A, Att. 2, p.3.8-3
[18] Fredrickson Dec. Ex. A, Att. 4, p. 5
[19] Fredrickson Dec. Ex. A, Att. 4, p. 16

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Moreover, the proposed occupancy restrictions and the proposal to rebuild 71 of the rental units for extremely low-income families off-site indicate that the redevelopment will result in the net loss of almost 200 units of family rental housing for extremely low-income families in the Rainier Valley. However, there is no mention of these adverse impacts in the EA and FONSI.

Despite the wide-reaching effects posed by SHA's HOPE VI plan, the City concluded that "no impact [is] anticipated" based on a finding that only "temporary relocations" would result from the HOPE VI redevelopment.[20] The City's conclusion is directly contrary to the requirements of NEPA regulations and is entirely without factual basis. First, although NEPA regulations specifically caution that "[s]ignificance cannot be avoided by terming an action temporary," the City does just this in its EA. *See* 40 C.F.R. § 1508.27 (incorporated by reference by 24 C.F.R. §58.2(a)). Second, the FEIS directly contradicts the City's finding that the redevelopment will result only in the temporary relocation of residents. As described above, the City ignored the information in the FEIS indicating that approximately 200 families will be permanently relocated as a direct result of the redevelopment project. Instead, the City cites only those sections of the FEIS that describe the beneficial impacts of the HOPE VI redevelopment, skipping over sections of the FEIS addressing the permanent relocation and other adverse impacts.[21]

b. The EA failed to consider reasonable alternatives

The EA failed to discuss reasonable alternatives to the three alternative that were considered, including one-for-one replacement of like-kind units on site, as required by NEPA and implementing regulations. See 40 C.F.R. § 1508.9(b) (requiring the EA to consider the "environmental impacts of the proposed action and alternatives"). Nor did the City consider alternatives that would maintain the

[20] Fredrickson Dec. Ex. A, Att. 3, p.8 (plaintiffs' pagination) citing FEIS §§ 3.8.2, 3.8.4, Ex. A, Att. 2

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quantity and quality of public housing at Rainier Vista or the existing public utilities and street lay-out. In deciding whether the City acted arbitrarily by not considering certain alternatives, the decision concerning which alternatives to consider is necessarily bound by a "rule of reason and practicality." *Committee to Preserve Boomer Lake Park v. DOT,* 4 F.3d 1543, 1551 (10th Cir. 1993); *Environmental Defense Fund, Inc. v. Andrus,* 619 F.2d 1368, 1375 (10th Cir. 1980). The Ninth Circuit has consistently held that "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate." *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

c. The EA fails to consider indirect and cumulative impacts

Defendants' duty under NEPA to provide a "detailed statement" of the environmental impacts of the proposed action, 42 U.S.C. § 4332(2)(c), extends beyond direct impact to include the evaluation of indirect and cumulative impacts as well. 40 C.F.R. §§ 1508.25(c); *See* 40 C.F.R. § 1508.8 (including direct and indirect effects as effects that must be considered when reviewing environmental effects).

The City's EA is deficient because it fails to consider the cumulative impacts of the many HOPE VI projects completed or planned for the City of Seattle. A cumulative effect "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions." 40 C.F.R. § 1508.7. In *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the court held that a NEPA document must "catalogue adequately the relevant past projects in the area." It must also include a "useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed . . . project will affect the environment." *Id.* Moreover, where there are "several foreseeable similar projects in a geographical

[21] Fredrickson Dec. Ex. A, Att. 3

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region [that] have a cumulative impact, they should be evaluated in a single EIS."[22] *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990); *LaFlamme v. Federal Energy Regulatory Commission,* 852 F.2d 389, 401-02 (9th Cir. 1988); 40 C.F.R. §1502.4(a); 40 C.F.R. §1508.25(a)(1).

At a minimum, the cumulative impacts from all of Seattle's HOPE VI redevelopment projects should have been considered in the EA prepared for the Rainier Vista project. More likely, the City should have prepared one EA for all expected HOPE VI projects. Unfortunately, the City neither considered the cumulative impacts of the City's HOPE VI projects nor evaluated the impacts from these projects in one NEPA document. These failures constitute violations of NEPA and justify the Court in granting plaintiff's motion for preliminary injunction.

The City's EA also fails to consider all of the indirect effects that will result from the redevelopment of Rainier Vista. Indirect effects are caused by the action and are later in time or further removed in distance, but are still reasonably foreseeable. Indirect effects may include, *inter alia*, growth inducing effects and other effects related to induced changes in the pattern of land use and/or population density or growth rate. 40 C.F.R. §1508.8(b) (emphasis added).

Despite the clear requirements of NEPA, the City did not consider how the redevelopment of Rainier Vista will encourage gentrification, substantially raise property values to effectively exclude from the "new" Rainier Vista and surrounding neighborhoods people of color and those with lower incomes, or how the project will erode the neighborhood's cultural diversity and the availability of unique social services. The EA also completely failed to consider whether the loss of 171 public housing units will cause or perpetuate homelessness. Nor did the City consider the impacts on trees,

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[22] An EA which leads to a FONSI is subject to the same requirements as an EIS. *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1247 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic Sprays v. Clark* (SOCATS), 720 F.2d 1475, 1480 (9th Cir. 1983).

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traffic patterns and safety in and around the Rainier Vista neighborhood, or other demographic trends that may be caused or exacerbated by the redevelopment.

The failure adequately to consider the indirect impacts of the project renders the EA legally deficient. The City must be required to prepare an Environmental Assessment that considers all indirect effects resulting from the redevelopment of Rainier Vista.

d. The project is highly controversial

By any reasonable measure, the effects of the Rainier Vista redevelopment -- particularly on the residents -- are "highly controversial," 40 C.F.R. § 1508.27(b)(4). The court has stated that a "controversy" exists within the meaning of the CEQ significance factors when there is "a substantial dispute [about] the size, nature, or effect of the major Federal action." *Blue Mountains Biodiversity Project*, 161 F.3d at 1213. A "substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusion." *National Parks*, 241 F.3d at 736 (internal citations omitted). Here, among other important controversies, there is a dispute, based on evidence before the agencies when they issued their EA and FONSI, concerning the effect of the agencies' preferred alternative on the residents in the community.[23]

The City makes no mention of the long-standing controversy surrounding SHA's redevelopment plans. Some 170 residents signed a petition opposing SHA's application to demolish and redevelop their community. Hundreds of community members and residents attended the September 25, 2001 public hearing on the MOA between the City and SHA regarding the Rainier Vista redevelopment. NEPA regulations specifically require consideration of "[t]he degree to which the effects on the quality of the

[23] Moreover, the Ninth Circuit has stated that where the overwhelming majority of public comments oppose an agency action, a "controversy" is created within the meaning of the CEQ significance factors. *See National Parks and Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001). Here, the overwhelming majority of comments on the DEIS either opposed or expressed serious concerns about the redevelopment. Fredrickson Dec. Ex. A, Att. 2, Letters 1-17; Public Hearing transcript

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human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). However, even in the face of an actual controversy, the City failed to address this issue in preparing the FONSI.

c. The City did not fully describe the degree and impact of displacement

In preparing the FONSI, the City failed to properly consider the impacts the Rainier Vista redevelopment will have on the human environment — in particular, those impacts related to the relocation of public housing residents — under the factors provided in 24 C.F.R. § 1508.27. Although NEPA regulations specifically caution that "[s]ignificance cannot be avoided by terming an action temporary," the City does just this. 40 C.F.R. § 1508.27(b)(7). It concludes that "no impact [is] anticipated" based on a finding that only "temporary relocations" would result from the HOPE VI redevelopment. *See fn. 20, infra.*

The City incorrectly states in the EA that the redevelopment project will only result in temporary displacement of residents despite contrary statements in the FEIS (prepared by SHA) that over 200 families will be permanently displaced by the project.[24] The FEIS goes on to state that "this [permanent relocation] could shift and increase the demand for similar units in other SHA housing facilities or in other neighborhoods throughout the City of Seattle."[25] The City has failed to address the impact the relocation of these families will have on the community, especially the impacts on the limited supply of decent, safe and affordable housing in the Rainier Valley and the City as a whole. The City also failed to adequately address the impact the temporary and permanent relocation of hundreds of predominately minority families will have on their access to crucial language and culturally-competent services available in the Rainier Valley.

[24] Fredrickson Dec. Ex. A, Att. 2, p. 3.8-3
[25] Fredrickson Dec. Ex. A, Att. 2, p. 3.8-3

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Further, it is impossible to know whether the estimate of the number of permanently relocated residents is accurate because SHA has failed to provide key information about its redevelopment plans and policies. As previously discussed, it is not clear how many Rainier Vista residents will be eligible to return after redevelopment is completed because of "good standing" requirements and the restrictions on occupancy of replacement units for elderly or disabled households only. SHA has not specified which units, according to bedroom size, will be designated for restricted occupancy and it remains unclear whether returning families will be eligible for the units with the number of bedrooms they will need.

f. The City failed to review environmental justice issues

In assuming the responsibilities for environmental review of the proposed action, the City is required to certify that it has complied with all the laws and authorities that would apply to HUD had it conducted the environmental review itself. *See* 24 C.F.R. § 58.40(c) (citing 24 C.F.R. § 58.5). Among those laws and authorities with which HUD is required to comply is Executive Order 12898, which requires a review of the environmental justice issues in minority and low-income communities, and the Fair Housing Act, 42 U.S.C. § 3608(e), which requires HUD affirmatively to further fair housing. The City's failure to analyze the impacts of the proposed redevelopment under these legal authorities is a basis for objecting to the RROF and the City's certification. 24 C.F.R. § 58.75(c).

There can be no doubt that SHA's HOPE VI plans impact an area with large numbers of minority and low-income families.[26] In a letter to SHA dated July 24, 2001,[27] Michael Letourneau of the Environmental Protection Agency Office of Civil Rights and Environmental Justice expressed his concerns regarding SHA's finding that the proposed redevelopment would have no significant impact on the large immigrant community at Rainier Vista. He noted that the Rainier Valley Community had the

[26] Fredrickson Dec. Ex. A, Att. 1, p. 3.10-2
[27] Fredrickson Dec. Ex. A, Att. 14

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highest population of low income and people of color in Seattle, that there was a significant recent immigrant population where some 40 languages and dialects are spoken, that there were numerous and diverse services to support this community, and that relocating residents from Rainier Vista to other communities distances them from those valuable community services. Although a copy of the Letourneau letter was included in the FEIS along with SHA's comments,[28] the ~~City~~, in preparing the FONSI, did not mention the issues raised by Letourneau or indicate that it had considered the environmental justice impacts of the proposed action in any way.

In preparing its FONSI, the City only considered excerpts from SHA's DEIS that described beneficial impacts of the redevelopment for current and future residents of Rainier Vista neighborhood. This type of blinkered assessment is insufficient under NEPA. The applicable regulation requires more than just the consideration of the beneficial impacts. The City is required to consider "[i]mpacts that may be both beneficial and adverse." 40 C.F.R. § 1508.27(b)(1). "Both short- and long-term effects are relevant." 40 C.F.R. § 1508.27(a).

g. The EA fails to provide a convincing statement of reasons why impacts from the project are insignificant

The EA is also inadequate because it does not supply a "convincing statement of reasons" to explain why the historical, cultural, economic, social and health impacts of the project are insignificant. Throughout the EA the City merely checks boxes, stating without explanation that the redevelopment will have "no impact" on the human environment.[29] The EA does not indicate that the City considered demographic and housing impacts and then reasonably concluded that the impacts are insignificant. Rather, the EA indicates that the City never even considered how the redevelopment would affect the availability of public housing, how it would affect people of color, people now waiting

[28] Fredrickson Dec. Ex. A, Att. 2, Section 4. Responses to Comments, Letter 4

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for access to public housing, people relocated for two to six years during the redevelopment, or how the redevelopment would encourage other demographic changes such as gentrification and homelessness.

The failure of the EA to supply a convincing statement that the impacts from the redevelopment will be insignificant renders the EA fatally deficient. Allowing the project to go forward based on a flawed EA violates NEPA and warrants granting this Motion for Preliminary Injunction.

6. HUD's release of funds is contrary to law

HUD's decision to approve the City's RROF and environmental certification is contrary to law in violation of the APA, 5 U.S.C. § 701 *et seq.*, because HUD failed to address the City's omission of one or more steps in preparing, publishing and completing the EA and FONSI as required by 24 C.F.R. § 58.75(c). Specifically, HUD failed to require the City to address both the beneficial and adverse impacts of the proposed HOPE VI redevelopment as required by 24 C.F.R. Part 58, Subpart E.

The EA prepared by the City, as RE, pursuant to 24 C.F.R. Part 58, omitted required decisions, findings and steps regarding the significance of the human impacts posed by the proposed redevelopment project as required under NEPA, 42 U.S.C. §§ 4321, *et seq.*, and applicable NEPA regulations, 24 C.F.R. Part 58, Subpart E. The City's EA also failed to consider the significant environmental justice impacts posed by the proposed redevelopment as required by Executive Order 12898, the Fair Housing Act, and NEPA regulations, 24 C.F.R. § 58.5(j).

Under NEPA, the City must take a "hard look" at the relocation impacts of the Rainier Vista HOPE VI redevelopment. To do this adequately, it must gather additional information about SHA's "good standing" requirements and the size of and occupancy restrictions placed on affordable replacement units. The City must also assess the environmental justice impacts of the redevelopment. Had the City prepared an EA in accordance with NEPA, it is apparent even from the information

[29] Fredrickson Dec. Ex. A, Att. 3, pp. 7-10

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currently available that a FONSI would have been improper. The redevelopment clearly calls for the displacement and permanent relocation of hundreds of Rainier Vista families.

The EA and the FONSI must be prepared in accordance with the criteria set forth at 24 C.F.R § 58.40. The City's failure to consider the criteria under 24 C.F.R. § 58.40 is a basis for objecting to the RROF and the City's certification. *See* 24 C.F.R. § 58.75(c) (citing to 24 C.F.R. Part 58, Subpart E). The EA and FONSI prepared by the City omits several steps required for a proper environmental assessment. The City's findings regarding the human impacts of the HOPE VI redevelopment ignore or are directly contradicted by information in the FEIS and DEIS.[30] The City's EA and FONSI further focus only on the beneficial impacts of the proposed redevelopment despite a clear mandate under the applicable NEPA regulations to also consider the adverse impacts of the project. The City also ignored its obligation to evaluate the environmental justice impacts of the project under Executive Order 12898 and the Fair Housing Act. Each of the City's omissions is a clear basis for objecting to the RROF and the City's certification.

HUD has characterized the HOPE VI program as "the most dramatic transformation of public housing since the public housing program was created in 1937 by President Franklin Roosevelt" and outlined the numerous impacts it expected the program to have on Seattle.[31] A program intended so dramatically to affect the human environment of Seattle and other cities across the country cannot result in a finding of no significant impact.

7. HUD and SHA violated their duty to affirmatively further fair housing

HUD and SHA are subject to special affirmative duties to further fair housing, with which they have failed to comply. Under 42 U.S.C. § 3608(e)(5), defendant Martinez is required to "administer the

[30] Fredrickson Dec. Ex. A, Att. 3; Att. 2.
[31] Fredrickson Dec. Ex. A, Att. 19

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programs and activities relating to housing and urban development in a manner affirmatively to further the policies of the [Fair Housing Act]." The 1999 HUD Notice of Funding Availability (NOFA) for the HOPE VI program, 64 Fed. Reg. 9618, 9627-8 (Feb. 26, 1999), states that successful applicants, such as SHA, "will have a duty to affirmatively further fair housing."

SHA is also subject to an affirmative duty to further fair housing pursuant to its Moving to Work agreement with HUD. Section 204 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (Apr. 26, 1996) created a new Moving to Work (MTW) demonstration program. Under the MTW statute, HUD is authorized to grant special regulatory and statutory flexibility to up to 30 PHAs nationwide to increase cost-effectiveness, promote economic self-sufficiency among low-income families, and increase housing choices for low-income families. The activities of a PHA that successfully applies to participate in the MTW program are governed by an MTW plan and agreement between the PHA and HUD. In January 1999, HUD and SHA entered into an MTW agreement. Article I.K. of this agreement requires SHA to "administer its programs and activities in a manner affirmatively to further fair housing."[32]

The obligation to affirmatively further fair housing has been universally construed to mean more than an obligation simply to refrain from engaging in discriminatory conduct. *See, e.g., NAACP v. Secretary of Dept. of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) ("[E]very court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others).").

[32] Fredrickson Dec. Ex. A, Att. 16, p 5; Public housing authorities, such as SHA, have also been held to be subject to the requirements of § 3608(e)(5) insofar as they administer HUD housing programs. *See Otero v. New York City Housing Authority ("Otero")*, 484 F.2d 1122, 1133 (2nd Cir. 1973). *See also U.S. v. Charlottesville Redevelopment and Housing Authority ("Charlottesville")*, 718 F.Supp. 461, 464-467 (W.D.Va. 1989).

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The duty to affirmatively further fair housing requires an agency, at a minimum, to examine the fair housing impact of its decisions before it makes them. An agency must have in place procedures for evaluating the fair housing implications of its actions and to employ these procedures to inform the decisions it makes. It "must utilize some institutionalized method whereby ... it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under ... [the Fair Housing Act]." *Shannon v. U.S. Dept. of Hous. and Urban Dev. ("Shannon")*, 436 F.2d 809, 821 (3rd Cir. 1970). *See also Anderson v. City of Alpharetta ("Alpharetta")*, 737 F.2d 1530, 1537 (11th Cir. 1984) ("HUD's affirmative fair housing obligation under section 3608([e])(5) may subject it to liability" where it "approv[es] federal assistance for a public housing project without considering its effect on the racial and socio-economic composition of the surrounding area") (citations omitted).

Compliance with affirmative fair housing duties means keeping necessary statistics and conducting studies at significant decision-making junctures, such as deciding to apply for a HOPE VI revitalization award, deciding on the specific proposals included in a HOPE VI application, and deciding whether to fund a HOPE VI revitalization application. In *Shannon*, the court required HUD to conduct a study of the effect of the construction of a new housing development on the racial composition of the area surrounding the site. More recently, in *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991), the court found that HUD had acted arbitrarily and capriciously in failing to consider the impact of a mixed-use housing development on the racial composition of surrounding neighborhoods.

The purpose behind affirmative duties to further fair housing is to counteract the historical tendency towards "bureaucratic myopia" on civil rights by requiring agencies to take into account the effect of their decisions on "the racial and socio-economic composition of affected areas" with clear and open eyes. *See Alpharetta*, 737 F.2d at 1535.

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In this case, HUD and SHA appear to have had no procedures of any kind to assess the fair housing implications of their HOPE VI decisions with respect to Rainier Vista. The SHA HOPE VI application, while it includes general language on the "cultural mix" of the Rainier Vista community, includes no meaningful analysis of the effect the housing authority's redevelopment plans will have on the cultural mix of Rainier Vista and the surrounding area. SHA's application describes no institutionalized method by which data on the racial and socioeconomic effects of SHA's HOPE VI plans — such those effects relating to the displacement and relocation of Rainier Vista families, the criteria under which SHA will permit displaced families to return to the redevelopment site, and the size and affordability of the replacement units SHA plans to construct were assessed.[33] Similarly, HUD's fiscal year 1999 HOPE VI NOFA, soliciting redevelopment applications and describing the criteria under which applications would be scored, includes no procedures for assessing the racial and socioeconomic effects applications pose.[34] Thus, HUD and SHA have failed to comply with their affirmative obligations to further fair housing in violation of the Fair Housing Act and HOPE VI and MTW program requirements.

C. A Preliminary Injunction is in the Public Interest

The public interest is a traditional equitable criteria used by courts when considering whether to grant injunctive relief. *Textile Unlimited, Inc. v. A..BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001). The public interest favors granting of the plaintiffs' motion for a preliminary injunction that would preserve the status quo while requiring the defendants to conduct an adequate environmental review and assess the fair housing impacts of its proposed actions.

[33] Fredrickson Dec. Ex. A, Att. 18
[34] Fredrickson Dec. Ex. A, Att. 17

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D. No Bond Should be Required.

Preliminary relief may be granted without security when the lawsuit is brought on behalf of low-income persons. *See, Pinoleville Indian Community v. Mendocino County*, 684 F.Supp. 1042, 1047 (N.D. Cal. 1988); *Walker v. Pierce*, 665 F.Supp. 831, 843-44 (N.D. Cal. 1987). To require a bond or security for preliminary relief from indigent persons would significantly inhibit their access to such relief. Because the lead plaintiffs are indigent and likely to succeed on the merits, no bond or other security should be required. The other organizational plaintiffs also lack the financial resources to post a bond.

V. Conclusion: The balance of hardship tips sharply in favor of the plaintiffs, the public interest is served by enjoining the demolition of low-income public housing, the expenditure of HOPE VI funds, and related redevelopment activities. The plaintiffs' motion should be granted.

Dated this 22 day of July, 2002.

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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Exhibit A	-	Declaration of Steve Fredrickson & Attachments
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Att. 2.		Final Environmental Impact Statement (FEIS), October 1, 2001
Att. 3.		Environmental Review Record, April 18, 2001 (Start Date)
Att. 4.		City of Seattle (City), Seattle Housing Authority (SHA) Memorandum of Agreement (MOA), October 17, 2001
Att. 5.		Seattle Displacement Coalition (SDC), Friends of Rainier Vista (FORV) objections to City, December 31, 2001
Att. 6.		Northwest Justice Project (NJP), National Housing Law Project (NHLP) objections to City, January 4, 2002
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Att. 12.		Letter from City of Seattle to HUD renewing Request for Release of Funds (RROF), May 3, 2002
Att. 13.		HUD response to NJP, NHLP objections, May 30, 2002
Att. 14.		Michael Letourneau letter to SHA, July 24, 2001
Att. 15.		Description of SHA HOPE VI projects, July 12, 2002
Att. 16.		SHA Moving to Work Demonstration Agreement, January, 1999
Att. 17.		FY 1999 HUD SuperNOFA, 64 Fed. Reg. 9618, 9732-8, February 26, 1999 (Excerpts)

	Att.	18.	SHA HOPE VI Application, May 27, 1999 (Without Attachments & Certifications)
	Att.	19.	HUD HOPE VI press release, HUD No. 99-164, August 26, 1999
	Att.	20.	Rainier Vista Revitalization Plan Update, June 2002 Revised Section 9, Program Schedule
Exhibit B	-		Declaration of Laurine Harris
Exhibit C	-		Declaration of Kathryne Smith
Exhibit D	-		Declaration of Susan Bossert
Exhibit E	-		Declaration of Carolee Colter
Exhibit F	-		Declaration of John V. Fox
Exhibit G	-		Preliminary Injunction (Proposed)