BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In re: Appeal of Bruce Struthers, Appellant, vs. Seattle Public Utilities and Seattle Department of Planning and Development Respondents.	No. MUP-12-016 APPELLANT'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

The case is an appeal of a land use decision by respondent Seattle Department of Planning and Development (DPD), permitting respondent Seattle Public Utilities (SPU) to proceed with the Meadowbrook Pond and Improvements Project. Appellant Bruce Struthers filed a timely appeal of this land use decision with the Seattle Hearing Examiner. The appellant cited sections 23.60.012, 23.60.014, 23.60.22, 23.60.030, 23.76.015, 25.05.400, 25.06.110, 25.06.120, 25.09.020, 25.09.100, 25.09.200, 25.09.300 and 25.11.050 of the

Seattle Municipal code to support his objections. Environmental policies and procedures are regulated under Chapter 25.05. The appellant agreed with the DPD Director's decision that Meadowbrook Pond should be dredged, but took issue with proposed "improvements" of the existing facility. The parties filed a joint motion to bifurcate and affirm the decision in part. The Hearing Examiner issued an order allowing dredging to proceed. A pre-hearing meeting ordered by the Hearing Examiner was held on July 18, 2012. On July 19, 2012 the Hearing Examiner issued an order setting schedules for motion practice in this appeal, including several filing deadlines related to discovery. Respondents filed a motion to dismiss the appeal on August 15, 2012.

II. ARGUMENT

The City Attorney's Motion to Dismiss categorizes the appeal exclusively as requests to impose additional SEPA conditions to those imposed by DPD on SPU's project proposal. This position completely misses the point of the appeal. The appellant maintains that applicant SPU did not completely specify the boundaries of the project in the permit application to DPD. As such, SPU presented an incomplete and inaccurate picture of the actual environmental impact of the resulting Meadowbrook Pond. Additionally, SPU did not incorporate considerable public response to a belated disclosure of the details. The Director of the Department and Planning and Development erred in her decision because she expected a complete, transparent and rigorous analysis of the proposed project by applicant SPU.

The City's Motion to Dismiss attempts to deflect the Hearing Examiner's attention from the true issues at hand, which stem primarily from a misstatement of the project boundaries. The resulting environmental impact analysis of the project was carefully tailored

to achieve approval and spend capital investment dollars on a long-delayed project. No evidence presented by Seattle Public Utilities explains how the design deficiencies of the Meadowbrook Detention Pond are addressed by the proposed "improvements".

Project Boundaries

Seattle Public Utilities did not accurately represent the project boundaries to the Department of Planning and Development, the State Department of Ecology and the Army Corps of Engineers. Since the DPD was provided incomplete material information on the project boundaries and the environmental effects of the completed project, the Director of DPD inadvertently made an erroneous decision to allow the work to proceed. On that basis alone, the Hearing Examiner has authority to repeal.

Attachments A, B and C on pages 27-29 of the SEPA Environmental Checklist[1] present what Seattle Public Utilities would like to be perceived as project boundaries. The Preliminary Assessment Report published with the project application shows DPD's understanding[2]. On page 2 of that report, DPD indicates that the storm drainage main location is through the center of the pond, and that the storm drainage main size is a 72" diameter pipe. Presumably, DPD believed all storm water would leave at what is described as the "overflow pipe to the high flow bypass pipe". What was not understood by DPD is this bypass pipe joins another 90" pipe, the Sand Point Tunnel, which discharges untreated storm water directly into Lake Washington at Meadowbrook Outfall. Meadowbrook Outfall is where the significant environmental and flow effects of the project are experienced. SPU

[1] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/01_016312.pdf
[2] Declaration of Bruce Struthers: Exhibit A

did not provide complete and accurate plans of the project, as specified in DPD Client Assistance Memo 103 [3]:

> 14. If existing or proposed building structures (e.g.: building overhangs, chimneys, gutters, sky-bridges, tunnels, underground parking, etc.) extend into, over, or under the ROW, a utility easement, or known utility for which there is no easement, the dimensions of these structures and their locations must be provided.

SPU proposes to modify the upstream end of the high-bypass diversion tunnel. The entire length of the Sand Point Tunnel and the Meadowbrook Outfall should have been reflected in the required basic plans, and the following items added to an enhanced site plan:

> 33. Identify drainage ditches, natural watercourses, and culverts (near shorelines)
> 35. Sewer mains (sanitary only{pss} and/or combined sewers{ps})
> 36. Storm drains {psd} and catch basins

These features at Riviera Place NE and Lake Washington are within the Shoreline District, and fall under Chapter 23.60 of the Seattle Municipal Code.

Under-assessment of environmental impact

The appellant raised questions of the project's environmental impact to SPU with his appeal of the original SEPA DNS on September 27, 2011 before this examiner[4] (W-11-008). The appellant raised the issue of increased diversion of storm water, from modification of the diversion structure at Thornton Creek. SPU withdrew their original DNS at the pre-hearing conference on October 17, 2011. The City Attorney did not specify the reasons for his client's withdrawal of the original DNS. SMC 25.05.340(C)(1) holds:

> The lead agency shall withdraw a DNS if:
> a. There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;
> b. There is significant new information indicating a proposal's probable significant adverse environmental impacts; or

[3] http://www.ci.seattle.wa.us/dclu/Publications/cam/cam103.pdf
[4] http://web6.seattle.gov/Examiner/case/W-11-008

c. The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

On February 29, 2012 SPU issued a new environmental checklist[5], and restated the project definition. No substantial changes were made to the proposal. The re-issued environmental checklist added one new reference:

> Jacobs, Dave (SPU Separated Systems Modeling and Monitoring Lead). December 13, 2011. Results of modeling for Meadowbrook Pond expansion. Email to Greg Stevens (SPU Project Manager)

and a new description of the proposed project:

> This project would dredge accumulated sediment in all areas of Meadowbrook Pond (Pond) as it exists now, enlarge the Pond, improve trash removal at the inlet to the high flow bypass pipe, improve employee access and safety, and improve Pond habitat. The project **would not alter any flow control features** affecting Thornton Creek or the Pond, **including the high flow bypass pipe inlet**, the Pond entrance dike, the Pond outlet weir, or the overflow pipe to the high flow bypass pipe.

Dave Jacobs, of SPU produced a "model", or simulation, of flows through the inlet to the bypass pipeline in a theoretical 25 year and 100 year storm event[6]. Mr. Jacobs concluded there was no noticeable change in the hydraulic performance of the bypass pipeline in the 25-year storm, and a slight increase in the time that the bypass pipeline was "surcharged", or full, in a 100-year storm. This is not significant new information, simply a rehash of past hydrological modeling.

Mr. Jacob's conclusion flies in the face of reason, in that the proposed project would significantly change the profile of the diversion structure to Thornton Creek. The reason for

[5] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/01_016312.pdf

the project is to remove sediments accumulated throughout the system. Sediments have accumulated in the forebay and the cells of the detention pond. The Pond was dredged this summer as part of the work allowed by this Examiner. Sediment has also accumulated at the inlet to the bypass pipeline, to an estimated depth of two feet[7]. A 2000 photographs of the inlet and diversion structure illustrates active and passive flow control structures[8] that would be modified by the proposed project.

This sediment, and grasses that have taken root on well-established mounds of sediment, block high flows from entering the inlet to the bypass pipeline, and divert storm water further downstream to the forebay and into the Pond[9]. Vactor trucks have had difficulty in reaching the inlet to remove accumulated sediment. That is why a second maintenance road is proposed as an "improvement" to the existing inlet structure. There is no discussion in the project filings of why the existing trash rack at the forebay, and the existing maintenance road from NE 105th Street to that trash rack, are not adequate.

A concrete apron at the upstream "wing wall" deflects storm water away from the diversion structure and back towards the main channel of Thornton Creek[10]. This causes turbulence and eddies, which slows flow at the inlet, which promotes deposition of sediment at the diversion structure. Proposed "improvements" to the diversion structure would:

1. lower and reduce the in-stream profile of this concrete base of the wing wall, (Please refer to the cross-hatched area of plan sheet 20[11]),

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[6] Declaration of Bruce Struthers, Exhibit B
[7] Declaration of Bruce Struthers: Exhibits D and E
[8] Declaration of Bruce Struthers: Exhibit C
[9] Declaration of Bruce Struthers: Exhibit D and E
[10] Declaration of Bruce Struthers: Exhibit F
[11] Declaration of Bruce Struthers: Exhibit I

2. remove existing accumulated sediment and displace boulders that provide passive flow control and
3. divert debris downstream to the trash rack at the forebay.

It is difficult to see how the removal of a two foot earth dam that blocks most of the entrance to the diversion structure, and removal of a concrete slab that directs water down stream, away from the diversion structure, would produce "no noticeable change" to hydraulic performance. Removal of these barriers at the entrance to the diversion structure will cause more untreated storm water to enter the diversion structure. An environmental impact analysis in relation to existing conditions is the norm, and should have been performed.

Expert advice ignored

The Determination of Non-Significance refers to a technical memorandum[12] produced for SPU by Derek Booth of Stillwater Sciences. The memorandum presents structural elements of the Pond, describes the environmental impact and effectiveness of the existing Pond, and proposes improvements. A detailed diagram on page 2 of the memorandum shows such active flow control structures such as three weirs, and a temperature control valve. This diagram contradicts the August 13, 2012 declaration of current pond designer Mike Hrachovec. The 2008 Stillwater Sciences memorandum asserts that the Pond treats only a **small** proportion of storm water from the Thornton Creek Watershed (page 4):

> "Reported discharges at the USGS gage capture only a fraction of the flow from the Thornton Creek watershed, however, because varying water volumes are collected by

[12] Declaration of Bruce Struthers: Exhibit J

> the 72" bypass pipeline at Meadowbrook Pond and are routed directly to Lake Washington", and
>
> "Any significant attenuation of flows to the downstream system, at least at high discharges, is almost certainly a result of bypass through the 72" pipe, not detention".

To increase sediment deposition in storm water, Dr. Booth proposes to block the diversion structure and require all water from Thornton Creek to flow through the detention pond:

> "Blocking the upstream diversion structure inlet, on the assumption that the capacity of the Thornton Creek channel downstream to the pond is no less than its capacity immediately upstream (and so flow splitting is not needed to safely convey flows in the channel)".

Dr. Booth also pointed out that storm water that is diverted to Lake Washington before flowing through Meadowbrook Pond is not treated. Lake Washington is still polluted, just at a different site. Pollution that does not reach the Thornton Creek delta at Matthews Beach is instead deposited further north at the Meadowbrook Outfall.

> "A related concern articulated by SPU, that of high turbidity discharging from the mouth of Thornton Creek into Lake Washington, has no obvious on-site solutions (i.e., at the mouth itself). Reduction in this load might occur only by greater high-flow diversion into the bypass pipeline (thus **shifting** the site of impacts but obviously not **eliminating** them), enhanced deposition of sediment in Meadowbrook Pond (least effective, however, for the finest sedimentary particles), or improved source control throughout the contributing watershed. Although the latter is a daunting approach, it is almost certainly the only one with any prospect of long-term success".

A SEPA responsible official's duty

The SPU's SEPA responsible official Judith Noble was required to consider this advice, used as a reference in both Environmental Checklists. SMC 25.05.330(C) holds:

> In determining an impact's significance (Section 25.05.794), the responsible official shall take into account that:

1. The same proposal may have a significant adverse impact in one location but not in another location;
2. The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;
3. Several marginal impacts when considered together may result in a significant adverse impact;
4. For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified;"

Ms. Noble was informed of the specific need to carefully scrutinize projects such as the Meadowbrook Pond Dredging and Improvements Project by SMC 25.05.33(E):

> "A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to **improve** the environment, such as sewage treatment plants or pollution control requirements, may also have **significant adverse** environmental impacts".

The process she should have followed is outlined in SMC 25.05.335(B):

> "Make its own further study, including physical investigation on a proposed site or communicating with interested parties;"

Combined Sewer Overflow

Seattle Public Utilities holds that the Meadowbrook Pond is not a combined sewer overflow, and should not be subject to monitoring requirements. That position would contradict the Washington Pollution Control Hearing Board's Findings of Fact, Conclusions of Law, and Order issued on August 7, 2008[13]

> "The Phase I Permit regulates discharges from municipal separate sewer systems (MS4s) owned or operated by the following large and medium municipalities statewide: City of Seattle, City of Tacoma, Clark County, King County, Pierce County and Snohomish County.(9)

[13] http://earthjustice.org/sites/default/files/library/legal_docs/stormwater_order.pdf

> Footnote 9: An MS4 consists of **all** of the conveyances, or systems of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs gutters, ditches manmade channels or storm drains) designed or used for collecting or conveying stormwater. By definition, these systems **cannot** be combined with sanitary sewer systems."

Seattle Public Utilities would represent that the aggregate of the Meadowbrook Pond, the diversion structure at Thornton Creek, the Sand Point Tunnel and the Meadowbrook Outfall are a municipal separate sewer system (MS4), because it is owned and operated by the City of Seattle. Unfortunately, a 42" sewer main line operated by King County Metro bisects Meadowbrook Pond. The PCHB order does not allow SPU to ignore the sewer main running through Meadowbrook Pond simply because the line is operated by King County:

> "Finding 10. … More specifically, S5.C.3 requires the permittee to establish coordination mechanism to remove barriers to stormwater management created by the need to coordinate efforts both internally within one governmental entity, and externally within jurisdictions that share drainage basins".

King County readily acknowledged its responsibility for sewage spills into Meadowbrook Pond in 2007[14] and 2010[15]. This makes the Meadowbrook Pond facility a CSO as long as sewage and stormwater combine in one facility. Water quality monitoring is not just required for CSOs, but for all storm water treatment facilities by the PCHB:

> "Finding 13: Special Condition S8.C.1 specifies that the primary permittees' and the Ports' monitoring programs **must** contain three components: 1) stormwater outfall monitoring, which is intended to characterize stormwater runoff quality and quantity at a limited number of locations, 2) Targeted stormwater management program effectiveness monitoring, which is intended to improve stormwater management efforts by evaluating at least two stormwater management practices that significantly

[14] http://www.kingcounty.gov/environment/dnrp/newsroom/newsreleases/2007/december/1204Meadowbrook.aspx

[15] http://www.kingcounty.gov/environment/dnrp/newsroom/newsreleases/2010/december/1212-1300-pm-wastewater-overflows.aspx

affect the success of, or confidence in, stormwater controls, and 3) BMP evaluation monitoring, which is intended to evaluate the effectiveness and operation and maintenance requirements of stormwater treatment and hydrologic management BMPs".

Seattle Public Utilities **does** understand what a CSO is, and does not apply the qualifiers found in the August 13, 2012 declaration of Andrew Lee. This understanding is presented in the SEPA Environmental Checklist for Genesee Area Combined Sewer Overflow (CSO) Reduction Projects[16] (Exhibit 01_013086.pdf), which describes a CSO:

> "For combined systems and partially separated systems, under wet weather conditions, flows are a combination of sewage and stormwater. As long as the flow volumes are within the capacity of the sewer system, all of the flows are sent to the wastewater treatment plant. However, if the flow volumes exceed the capacity of the sewer system, the excess volume of sewage and stormwater is discharged into receiving water bodies through outfalls. This is called a combined sewer overflow (CSO). To reduce untreated discharges, facilities are required to treat the combined sewage and stormwater, or temporarily store until the combined sewer system can again handle the flow volumes".

Mr. Lee may not have read the SEPA Environmental Checklist, which states that the Sand Point Tunnel, now used as a high flow bypass pipeline, was designed and constructed to carry treated sewage and storm water from the Lake City Sewage Treatment Plant to Lake Washington at the Meadowbrook Outfall. Contrary to the Mr. Lee's assertions, the 42" sewer main is not "under" the Pond; it is visible directly under the pedestrian walkway and is usually above the water level of Meadowbrook Pond. A photograph[17] of the previous dredging project in 2001 shows the normally submerged 72" bypass pipeline, and the 42" sewer line. The 42" pipeline itself acts as a weir, by only allowing storm water to flow into the northern cells from the forebay at certain heights. Meadowbrook Pond is a CSO by all

[16] Declaration of Bruce Struthers: Exhibit K. Also found at http://www.cityofseattle.net/util/groups/public/@spu/@usm/documents/webcontent/01_013086.pdf

definitions, and as such should be subject to storm water monitoring at all outfalls. DPD erred in not requiring SPU to include such monitoring in their project proposal, wherever storm water is diverted to Lake Washington.

III. RELIEF REQUESTED

Appellant Bruce Struthers respectfully requests that the Hearing Examiner deny the Respondents' Motion to Dismiss. The appellant also respectfully respects that the Hearing Examiner visits the site and see for herself the complex structure of the Meadowbrook Pond.

DATED this 12th day of September 2012.

By: _____/s/_____
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[17] Declaration of Bruce Struthers: Exhibit H