

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

R. BRUCE STRUTHERS

from a SEPA decision issued by the
Director, Department of Planning
and Development

Hearing Examiner File:
MUP-12-016(W)

Department Reference:
3013236

**ORDER ON MOTION
TO DISMISS APPEAL**

Background

Meadowbrook Pond is a 10½ acre constructed stormwater management facility (Facility) located on Thornton Creek. The Facility collects and detains stormwater in order to reduce downstream flooding, streambed scouring and the deposit of sediments into Lake Washington. During dry periods, the water flows through the forebay trash rack and into the facility's forebay and then continues downstream. During periods of higher flow, part of the water flows from the forebay into the pond through an entrance dike. During periods of high flow, some of the water flows through a high flow bypass pipe inlet upstream of the forebay trash rack and into a high flow bypass pipe, ultimately emptying into Lake Washington. Water that enters the pond flows through three cells before passing through an outlet weir and back into Thornton Creek. During high flows, part of the water flowing from Cell 2 to Cell 3 enters the high flow bypass pipe through an overflow pipe in the pond.

Seattle Public Utilities (SPU) proposed to construct improvements to the Facility and sought approval from the Department of Planning and Community Development (DPD or Department) for the following:

- Dredging the forebay to its original sediment storage design specifications;
- Constructing two new service roads to the forebay to improve service vehicle access;
- Modifying the existing forebay trash rack to improve employee safety by demolishing the existing stairway and concrete platform, installing a new service walkway, and installing a new concrete pedestal to create access to a new walkway;
- Dredging all three cells of the pond to their original sediment storage design specifications
- Expanding the pond volume by approximately 10 percent by excavating approximately 10,600 cubic yards from the northwest corner of the pond, constructing a service road into this new lobe, and

constructing a flood control berm along the north perimeter of the pond. This would require relocation of the entrance kiosk and the dogwood trees that comprise Anne's Memorial tree grove to other locations on the project parcel;

- Installing permanent sediment depth gauges in all pond cells;
- Improving habitat conditions in the pond by planting native vegetation around the perimeters of the pond and islands;
- Improving habitat conditions in the pond by installing five floating habitat islands;
- Adding a second trash rack at the inlet to the high flow bypass pipe, a new concrete slab and two walls to accommodate the new trash rack, a new service walkway, and a new service ladder; and
- Modifying pedestrian and service vehicle access to the existing bypass trash rack and inlet structure to improve worker safety by widening existing asphalt pathways to 15 feet and adding safety features such as railings at the bypass trash rack and inlet structure.

These improvements (hereafter "the Project") are intended to increase the Facility's sediment-trapping capacity and efficiency, and to alleviate occasional flooding that occurs in the surrounding neighborhood and downstream areas.

SPU issued a determination of nonsignificance (DNS) for the Project on March 8, 2012. The Appellant, R. Bruce Struthers, filed an appeal of the DNS with the Hearing Examiner, but failed to timely pay the filing fee, and the appeal was returned. SPU also issued an Environmentally Critical Areas exemption for the Project. Review of such an exemption must be sought under Chapter 23.88 SMC by requesting a land use interpretation from the DPD Director concerning the applicability of the exemption criteria to a proposal. The Appellant did not request such an interpretation for the Project.

DPD reviewed the Project for purposes of determining whether substantive SEPA conditions should be imposed on it. On June 14, 2012, DPD issued its decision imposing several SEPA conditions concerning informational flyers for neighboring properties and construction-related matters.

The Appellant filed an appeal of the DPD decision and, at the request of the parties, the Examiner issued an order bifurcating the DPD decision and affirming the decision on the "Dredging Work". SPU filed a motion to dismiss the Appellant's appeal of the DPD decision on the "Other Work". The Appellant filed a response to the motion, and SPU filed a reply to the response. The Examiner has considered the record in this case, including all briefing on the motion.

Analysis

SPU seeks dismissal of the Appellant's claim that the DPD Director erred in not requiring an environmental impact statement (EIS) for the Project. This claim constitutes an untimely challenge to the DNS issued by SPU for the Project in March of 2012 and is therefore **DISMISSED**.

SPU requests dismissal of the Appellant's claims related to compliance with Chapter 25.09 SMC, the Environmentally Critical Areas (ECA) Ordinance. SMC 25.09.017.F expressly provides that an appeal "of a decision by the Director as to the meaning, application or intent of any provision of this chapter" must be pursued through SMC 23.88.020. That Code section addresses requests for interpretations from the Director. The Appellant did not seek an interpretation as to the application of the ECA Ordinance to the Project. Consequently, the Examiner lacks jurisdiction over all claims in this appeal that relate to the Project's compliance with Chapter 25.09 SMC, and they are **DISMISSED**.

SPU requests dismissal of the Appellant's claim that the Department erred in not requiring a shoreline substantial development permit for the Project. A decision that a proposal does not require a shoreline substantial development permit constitutes a "Type I" decision under SMC 23.76.004, and may not be appealed to the Hearing Examiner other than through the formal interpretation process set forth in SMC 23.88.020. Again, the Appellant did not seek an interpretation as to whether the Project required a shoreline substantial development permit under Chapter 23.60 SMC. Consequently, the Examiner lacks jurisdiction over the claim that it did, and that claim is **DISMISSED**.

SPU also seeks dismissal of the Appellant's claim that DPD erred by not imposing the requirements of the Floodplain Development Ordinance, Chapter 25.06 SMC, on the Project. That chapter provides no process for appealing a decision made under it to the Hearing Examiner. The Examiner therefore lacks jurisdiction over the Appellant's claims concerning Chapter 25.06, and they are **DISMISSED**.

SPU asks that the Examiner dismiss the Appellant's claim that the Department should have imposed SEPA conditions to address existing circumstances. As part of his appeal, the Appellant asserted that the Department should have imposed conditions pursuant to SEPA that required SPU to remove the existing concrete foundation of the abandoned Lake City Sewage Treatment Plant from the northeast cell of the pond, and to "daylight" the existing high flow bypass pipeline under the pond, thereby allowing stormwater to enter the high flow bypass only at the overflow manhole on the east side of the pond. The Appellant's requests address circumstances that are part of the status quo at the Facility. "Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal," SMC 25.05.660.A.4, not for impacts that may occur as a result of existing circumstances. The Appellant has presented no evidence that imposing the requested conditions would mitigate any adverse environmental impacts of the Project that are disclosed in the environmental documents. These claims are **DISMISSED**.

The Appellant contends that the Department erred in not imposing several other conditions pursuant to SEPA, specifically, conditions

- prohibiting removal of trees from the site or disturbance of plants and shrubs;
- prohibiting modification of the inlet to the high flow bypass to avoid changes in hydraulic performance;
- prohibiting a 15 foot-wide maintenance road from 36th Avenue NE to the western inlet to the high flow bypass;
- prohibiting modification of the forebay trash rack and maintenance roads to the forebay;
- imposing monitoring requirements that would apply to a Combined Sewer Overflow under the citywide CSO Long-Term Control Plan; and
- requiring enhanced instrumentation and monitoring of the operation of the Facility, including flow rate monitors and temperature gauges in all inlets and outlets.

SPU asks that these issues be dismissed. Again, under SEPA, mitigating conditions must be "related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal". SMC 25.05.660.A.2. The Appellant has not cited anything in the SEPA Checklist, the DNS, or any other document addressing the Project that identifies specific, adverse environmental impacts of the Project that would be mitigated by the requested conditions. Without this prerequisite, there is no legal basis for imposing the conditions. These appeal issues are **DISMISSED**.

The Appellant contends that SPU failed to accurately describe the physical boundaries of the Project, and that led to the Project's environmental impacts not being fully identified and analyzed. As a result, the Appellant argues, the Department did not understand the full extent of the Project and thus, did not properly condition it. The Appellant also asserts that the Department erred in not imposing a SEPA condition requiring that the Project be implemented in conjunction with the "Confluence Project," a proposed SPU project upstream of the Facility. SPU asks that both issues be dismissed. In fact, both of these issues are tantamount to collateral attacks on the DNS issued for the Project.


Environmental review under SEPA consists of review of "proposals" or "proposed actions". See SMC 25.05.784. This review involves consideration of the environmental checklist, supporting documents and any other information furnished on the proposal, and an assessment of the significance of the proposal's probable impacts. SMC 25.05.330. An initial step in SEPA review is an evaluation of whether the proposal to be reviewed is properly defined. SMC 25.05.060.C. This evaluation, done by the responsible official of the lead agency, necessarily includes consideration of whether the proposal's boundaries were accurately described. It also includes consideration of whether a proposal is so closely related to another proposal as "to be, in effect, a single course of action [that]

shall be evaluated in the same environmental document.” SMC 25.05.060.C.2. SEPA review culminates in a threshold determination, which is a “decision by the responsible official of the lead agency whether or not an EIS is required for a proposal”. SMC 25.05.797. In this case, SPU, the lead agency, performed this environmental review. It determined that the Project boundaries of the proposal were properly defined, and that the Project was not so closely related to the “Confluence Project” that the two were, in effect, a single course of action. SPU’s environmental review culminated in the DNS issued for the project in March of 2012. Any review of these issues had to be sought through an appeal of the DNS. They are not timely raised in this appeal and are therefore **DISMISSED**.

Finally, the Appellant asserts that the Department erred in not imposing a condition to protect the trees comprising Annie’s Memorial tree grove, which must be relocated as part of the Project. The Appellant cites SMC 25.11.050.B for the applicable protective measures. Chapter 25.11 SMC on “Tree Protection” provides no right of appeal to the Hearing Examiner from decisions made under the chapter. Any appeal would have to be sought pursuant to the formal interpretation process of SMC 23.88.020. This issue is therefore **DISMISSED**. The claim that the Department should have exercised its SEPA conditioning authority to prohibit relocation of the trees is addressed above.

The appeal is **DISMISSED**, and the hearing scheduled for October 10, 2012 is **STRICKEN**.

Entered this 21st day of September, 2012.


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