SEATTLE HEARING EXAMINER

In the Matter of the Appeal of THE BALLARD COALITION Of the adequacy of the Final Environmental Impact Statement, prepared by the Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project.	No. W-17-004 BALLARD COALITION'S REPLY IN SUPPORT OF ITS DISPOSITIVE MOTION

I. INTRODUCTION

SDOT writes its Response as if it were writing on a clean slate, and as if the minimum level of design for the Missing Link had not already been litigated. SDOT's Response implicitly asks the Hearing Examiner to ignore years of litigation and prior remands from both the Superior Court and the Hearing Examiner.

The FEIS under appeal affirmatively misleads the public and City decision-makers into thinking that SDOT has conducted thorough environmental review of the Missing Link when in fact SDOT has lowered the level of design from what it was in 2012, is concealing rather than disclosing the traffic hazards that its Project will create, and is again improperly deferring critical design decisions until after it completes its SEPA review. The FEIS is inadequate as a matter of law.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

II. REPLY ARGUMENT

A. In Reply to SDOT's Argument A, the level of design SDOT used for its FEIS is insufficient as a matter of already-litigated fact and law

1. In reply to SDOT's Argument A.1, SEPA requires that the level of design be determined in light of the facts and circumstances of a specific proposal

The Ballard Coalition agrees with Judge Rogers' oral statement that "SEPA does not dictate the specific degree of project completion for SEPA review." Judge Rogers' oral decision goes on to explain, however, that SEPA requires that the degree of project completion be determined on a project-by-project basis, in light of specific facts. His decision determines that a ten percent (10%) level of design is not sufficient for the Shilshole segment of the Missing Link because "SDOT has not sufficiently planned the project in order to even be able to consider whether there would be impacts in certain limited situations" since "what hasn't been decided can't be reviewed."[1]

The tension Judge Rogers recognized between the need to do environmental review as early as possible, and the simultaneous need to have enough information to properly conduct such review, is reflected in multiple provisions of the SEPA rules, including SMC 25.05.055.B (emphasis added):

> Timing of Review of Proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the *earliest possible point* in the planning and decisionmaking process, ***when the principal features of a proposal and its environmental impacts can be reasonably identified.***

Professor Settle repeatedly discusses this tension in his seminal treatise on SEPA, including in §13.01[4] regarding threshold determinations and in §14.01 regarding environmental impact statements. In the context of environmental impact statements, pages 14-4 – 14.5, Professor Settle states:

> Acceptance of the proposition that environmentally protective government decisions ***depend not only upon appropriate policies but also sufficient information necessitates a determination of how much information is enough.***

[1] Schneider Decl., Exhibit C., Transcript of Proceeding, page 5, line2.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

> SEPA's conceptual answer is that the ***requisite amount of environmental information is directly proportional to an action's potential adverse environmental consequences***. . . .
>
> SEPA's fundamental principles suggest that the appropriate level of environmental analysis varies along a continuum with a proposal's potential adverse environmental effects. . . . Proposals which, although not exempt, are environmentally insignificant, must undergo the modest scrutiny and process requirements of threshold environmental review. ***Proposals that are environmentally significant are subject to the intense environmental scrutiny and elaborate process requirements of the environmental impact statement (EIS)***. . . .
>
> The nature and extent of the environmental analysis to be included in an EIS must not be determined ritualistically or mechanistically. Rather, the EIS must be tailored to fit both the specific proposal and SEPA's ultimate purposes.[2]

SDOT's argument turns SEPA on its head by arguing that a proposal may be less fully defined for purposes of an EIS than for a threshold determination: Just the opposite is true. In this case, Hearing Examiner Watanabe, reviewing a more fully developed design (20% – 30%) compared to that of the new FEIS (10%), concluded that "the proposal would have significant adverse impacts in the form of traffic hazards along the Shilshole Segment because of conflicts between truck movements and the other vehicle traffic and trail users along the Segment." Conclusion 8, Findings and Decision, W-12-002.[3] Significant traffic hazards along Shilshole mean that vulnerable users will be injured and killed. To properly evaluate these significant hazards under SEPA, the level of design in the FEIS must be proportionate to the seriousness of such impacts so that City decision-makers can be informed about the hazards of the proposal before making a decision whether and how to proceed.

Judge Rogers decided that a ten percent (10%) level of design for this particular project along Shilshole is not adequate for SEPA review[4] and Hearing Examiner Watanabe concluded that, at a twenty percent-to-thirty percent (20% – 30%) level of design, the traffic hazards are

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[2] Exhibit A to the Second Declaration of Patrick J. Schneider ("Second Schneider Decl.") (emphasis added).

[3] Exhibit A to Schneider Decl.

[4] SDOT is correct that Judge Rogers' Second Order of Remand, and Hearing Examiner Watanabe's decision requiring preparation of an EIS, addressed the Shilshole segment, which is the central portion of SDOT's missing link proposal. When this Reply refers to these prior decisions about the Missing Link, it is referring to prior decisions about the Shilshole segment.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

significant. Despite these clear findings, SDOT reduced the level of design in the FEIS to the ten percent (10%) level that Judge Rogers found inadequate for SEPA review of this project, and to the level at which Hearing Examiner Watanabe could not identify significant traffic hazards. SDOT thus has undermined the very purpose of an EIS, which, in Professor Settle's words, is to provide intense environmental scrutiny of significant impacts.[5]

SDOT is playing "hide the ball," contrary to both the SEPA rules and to Judge Rogers' Second Order of Remand, by lowering the level of design to the point where significant impacts cannot be identified and analyzed in order to inform City decision-makers.

2. In Reply to SDOT's Argument A.2, a fact-dependent analysis of the nature of the project has already been done

The Ballard Coalition agrees that a "fact-dependent analysis of the nature of the project" is needed in order to determine the appropriate level of design for purposes of SEPA review. This is what SMC 25.05.055.B (quoted above), for example, requires. But SDOT ignores, and implicitly asks the Hearing Examiner to ignore, the fact that SDOT has already litigated and lost this issue.

Judge Roger's statement that "SEPA does not dictate the specific degree of project completion for SEPA review" is an undisputed interpretation of law, it is not a finding of fact. Judge Rogers' factual determination is that for the Shilshole segment of the Missing Link, ten percent (10%) design is not adequate for purposes of SEPA review: Based on that level of design, he reversed Hearing Examiner Watanabe's conclusion No. 9 in the second SEPA appeal, File W-11-002, that ten percent (10%) is sufficient, and he remanded "for the limited purpose of

[5] SDOT submitted the Declaration of Darby Watson in support of its Response, but this Declaration fails to raise any issue of material fact. The Declaration talks in general terms and does not attempt to make any assertions about the level of design used in the FEIS. The FEIS admits that its level of design is at the ten percent level that Judge Rogers determined to be insufficient. Schneider Decl., Exhibit D (Volume 2 – Page 26 of FEIS).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

more fully designing the Shilshole Segment so that the impacts of the proposal on the adjoining land use, and any proposed mitigation of those impacts, may be identified."[6]

Hearing Examiner Watanabe's next Decision, File W-12-002, confirmed the wisdom of Judge Rogers' Second Order of Remand by concluding that traffic hazards are significant at a twenty percent-to-thirty percent (20% – 30%) level of design, even though she had not been able to determine such significance at a ten percent (10%) level of design.

Not only is SDOT bound by these prior adjudications because of collateral estoppel, discussed in the next subsection of this Reply, but SDOT is bound because Judge Rogers retains jurisdiction to enforce his Second Order of Remand, and the Superior Court on May 18, 2017 denied SDOT's Motion to Dismiss the Court's on-going supervisory jurisdiction. In so doing the Court necessarily rejected SDOT's argument that "the [prior appeals'] record is simply not relevant, because it was created in challenging DNSs for a project that have [sic] since been modified and further evaluated through preparation of an EIS."[7]

The purpose of an EIS is to identify significant impacts, and SDOT has gone back to a level of design where, as a matter of already-decided fact, the significant impacts of its proposal cannot be identified. The Coalition should not be forced to relitigate this already-decided issue.

3. In Reply to SDOT's Argument A-3, SEPA requires preparation of an EIS at the earliest point that environmental impacts can be reasonably identified.

SDOT begins subsection 3 of its argument with this sentence:

> As noted above, SEPA requires that an EIS should be prepared "**at the earliest possible point** in the planning and decision-making process."

(Emphasis by the City). SDOT cites SMC 25.05.055.B as authority for this sentence, but this section of the SEPA Rules in facts says:

> The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning

[6] Schneider Decl., Exhibit C.

[7] Exhibit B to the Second Schneider Decl. (City's Reply in Support of Motion to Dismiss, King County Cause No. 09-2-26586-1SEA, page 3, line 14 – page 4, line 2).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

> and decision-making process, ***when the principal features of a proposal and its environmental impacts can be reasonably identified.***

(the language omitted by SDOT is emphasized) SDOT's argument A-3 thus depends upon elision of the portion of SMC 25.05.055(b) that is inconsistent with SDOT's argument.

SEPA requires that an EIS be prepared, not at the earliest possible point in the planning and decision-making process, but at the earliest possible point "***when the principal features of a proposal and its environmental impacts can be reasonably identified.***" In this case, that is at least the twenty percent-to-thirty percent (20% – 30%) level of design that SDOT achieved in 2012.

In 2012, after two appeals to the Hearing Examiner and two remands from Judge Rogers, SDOT finally designed the Shilshole Segment to the point where the impacts of the Missing Link could be reasonably identified, and Hearing Examiner Watanabe concluded that those impacts, in the form of traffic hazards, are significant and adverse. Instead of preparing an EIS based on this same twenty percent-to-thirty percent (20% – 30%) level of design at which significant adverse impacts can be identified, and thereby fulfilling the purpose of SEPA by informing decision-makers about significant traffic hazards, SDOT reduced the level of design back to the ten percent (10%) level that Judge Rogers determined to be inadequate and that Hearing Examiner Watanabe's two decisions demonstrate is not adequate to allow significant impacts to be identified.

Hearing Examiner Watanabe's 2012 decision demonstrates that the twenty percent-to-thirty percent (20% – 30%) level of design is, as a matter of already-litigated fact, the "point in the planning and decision-making process, ***when the principal features of a proposal and its environmental impacts can be reasonably identified.***" SMC 25.05.055.B.

Having taken years to un-design its project and revert back to the level of design where significant impacts cannot be identified – the same level of design it was at in 2008 – SDOT now argues that the Ballard Coalition's argument "would necessarily delay environmental review and

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

inhibit the City's ability to issue its EIS 'at the earliest possible point in the planning and decision-making process.'" SDOT may not recognize the absurdity of its argument, but its FEIS must recognize and comply with the requirements of SEPA and the Orders and Decisions of Judge Rogers and Hearing Examiner Watanabe.

B. In reply to SDOT's Argument B, SDOT is collaterally estopped from re-litigating the Superior Court's determination that a ten percent level of design is inadequate for purposes of SEPA review of the Shilshole segment of the Missing Link

SDOT's argument ignores the totality of Judge Rogers' Order and his admonition that "what hasn't been decided can't be reviewed." No one challenges Judge Rogers' oral statement that SEPA does not prescribe any particular level of design in the abstract. But the City is collaterally estopped from relitigating the level of design needed to identify significant impacts for the Shilshole segment of the Missing Link since that was litigated before Hearing Examiner Watanabe in 2011, and Judge Rogers' decision reversed Hearing Examiner Watanabe's Conclusion No. 9 that a ten percent (10%) level of design was adequate for SEPA review of the Shilshole segment. Judge Rogers' decision remanded the Missing Link proposal to SDOT "for the limited purpose of more fully designing the Shilshole Segment so that the impacts of the proposal on the adjoining land use, and any proposed mitigation of those impacts, may be identified."[8] This means that SDOT cannot use and rely on a ten percent (10%) level of design, which is exactly what it is doing in the FEIS.

It is Judge Rogers' project-specific factual determination and remand that SDOT is collaterally estopped from disputing today. Judge Rogers did not prejudge whether an EIS would be required, he instead concluded that it is not possible to determine, at a ten percent (10%) level of design, whether the impacts of SDOT's proposal for the Missing Link are significant. When SDOT increased the level of design to twenty percent-to-thirty percent (20% – 30%) in response to the Court's remand, Hearing Examiner Watanabe then made another

[8] Schneider Decl., Exhibit C.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

factual determination that the impacts were significant and adverse, and she thus ordered SDOT to prepare an EIS.

SDOT's response does not acknowledge Judge Rogers' factual determination and remand, let alone attempt to explain why SDOT is not collaterally estopped from re-litigating this factual determination. And just as SDOT is bound by this factual determination, it is bound by Judge Rogers' Order, which he retains jurisdiction to enforce, that SDOT increase the level of design above ten percent (10%) so that the environmental impacts of the Shilshole segment of the Missing Link can be identified in compliance with SEPA.

The Ballard Coalition should not be put to the expense of re-litigating an issue it already has litigated and won twice, before both Judge Rogers and Hearing Examiner Watanabe. The fact that SDOT *lowered* the level of design for purposes of its EIS makes its violation of Judge Rogers' Order, and its violation of SEPA, particularly egregious, because the purpose of an EIS is to *disclose* significant impacts to decision-makers, and SDOT has lowered the level of design from the level where the significant traffic hazards identified by Hearing Examiner Watanabe can be identified and disclosed.

C. The FEIS violates Judge Rogers' Order by improperly deferring identification and disclosure of significant impacts

Judge Rogers was clear in his oral decision, stating SDOT cannot defer identification and disclosure of significant impacts until later because "what hasn't been decided can't be reviewed" and because "[i]t is simply not fair to defer decisions and to trust the party making the decisions to reach the right outcome because this defeats the entire policy of [SEPA]. But that is exactly what SDOT did in its FEIS, as it admits in nearly every section of the FEIS, e.g.:

- "Final design and permitting are expected to be complete by early 2018....";[9]
- "***Potential roadway design and safety features*** are shown on Figures 1-4 to 1-6.";[10]

[9] FEIS, page FS-III (Second Schneider Decl., Exhibit C).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

- Under Roadway Design, SDOT states:
  - "Lane Configuration....These changes ***could include the removal of parking and vehicle lanes*** as well as the removal or addition of intersection or center turn lane."
  - "Curb Radii—Curb radii ***would be modified*** to accommodate the turning requirements for different vehicles such as large freight trucks."
  - Sight Lines—***Sight lines are important for safety and would be considered throughout the corridor***...Where possible, the trail would be shifted to allow greater sight distances around buildings adjacent to property lines.";[11]
- "Trail Crossing Warning Devices-***Several possible design features could be used to warn both trail users and drivers of upcoming trail crossings***.";[12]
- "Barriers, Fences and Buffers—***In some locations, barriers, fences, or buffers would be used*** to separate nonmotorized trail users from moving vehicular traffic or the railroad.";[13]
- "However, ***there is potential for some new impacts depending on final design, including sight distances at driveways and conflicts between drivers and trail design features such as planter strips***.";[14]
- "***A number of design solutions will be considered in the final design to delineate and provide adequate sight distance*** for both nonmotorized users and vehicles at trail crossings.";[15] and,

[10] FEIS, page 1-13 (emphasis added) (Second Schneider Decl., Exhibit D).
[11] FEIS, page 1-17 (emphasis added) (Second Schneider Decl., Exhibit E).
[12] FEIS, page 1-19 (emphasis added) (Second Schneider Decl., Exhibit F).
[13] *Id.*
[14] FEIS, page 4-19 (emphasis added) (Second Schneider Decl., Exhibit G).
[15] FEIS, page 7-32 (emphasis added) (Second Schneider Decl., Exhibit H).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

- "The final design ***would also include safety considerations so that the trail operates safely***, such as buffers, pavement markings, raised crosswalks, curb treatments, signage and lighting."[16]

SDOT's numerous admissions throughout the FEIS show it has not sufficiently designed the Missing Link in conformance with Judge Rogers' Second Order of Remand to be able to properly and adequately identify and disclose the myriad safety and traffic hazards that will be created by the Missing Link. Despite Judge Rogers' clear admonition to the contrary, SDOT is once again asking decision-makers to "trust it" – to trust that SDOT will, at some time in the future, after SEPA is done, identify, disclose and mitigate the significant safety and traffic hazards created by the Missing Link. But this is exactly what Judge Rogers already rejected. The FEIS is inadequate as a matter of law and SDOT must more fully design the trail so it can properly identify and disclose these safety and traffic hazards pursuant to SEPA.

III. CONCLUSION

SDOT takes the absurd position that having more fully designed the Shilshole segment of the Missing Link to a level that allowed the Hearing Examiner to determine that the traffic hazards are significant, SDOT can un-design its proposal and revert to the prior level of design – ten percent (10%) – that the Superior Court found to be inadequate for identifying environmental impacts. SDOT's FEIS violates SEPA's most fundamental purpose – to inform decision-makers about significant environmental impacts – and SDOT's FEIS deceives anyone who has not been a participant in this litigation and does not know that SDOT has reduced the level of design back to the level where significant traffic hazards cannot be identified.

For all the reasons set forth in the Ballard Coalition's Dispositive Motion, and in this Reply, SDOT's FEIS is inadequate as a matter of law.

[16] FEIS, page 7-62 to 7-63 (emphasis added) (Second Schneider Decl., Exhibit I).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700

DATED this 10th day of August, 2017.

s/ Joshua c. Brower
Joshua C. Allen Brower, WSBA #25092
Leah B. Silverthorn, WSBA #51730
Danielle Granatt, WSBA #44182
VERIS LAW GROUP PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
Telephone: (206) 829-9590
Facsimile: (206) 829-9245
Email: josh@verislawgroup.com
leah@verislawgroup.com
danielle@verislawsgroup.com
Attorneys for Appellant The Ballard Coalition

s/Patrick J. Schneider
Patrick J. Schneider, WSBA #11957
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: pat.schneider@foster.com
Attorneys for Appellant The Ballard Coalition

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed a copy of Ballard Coalition's Reply in Support of its Dispositive Motion and Second Declaration of Patrick J. Schneider with the Seattle Hearing Examiner using its e-filing system. I also certify at on this date, a copy of this document was sent via email agreement to the following parties listed below:

PETER S. HOLMES, Seattle City Attorney
Erin Ferguson
City of Seattle
701 5th Avenue, Suite 2050
Seattle, WA 98104
Telephone: (206) 684-8615
Email: erin.ferguson@seattle.gov
alicia.reise@seattle.gov
Attorney for Respondent
Seattle Department of Transportation

X by E-mail (per agreement)
☐ by Facsimile Transmission
☐ by First Class Mail
☐ by Hand Delivery

Matthew Cohen
Rachel H. Cox
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
206-386-7569
Fax: 206-386-7500
matthew.cohen@stoel.com
rachel.cox@stoel.com
Attorney for Intervenor Cascade Bicycle Club

X by E-mail (per agreement)
☐ by Facsimile Transmission
☐ by First Class Mail
☐ by Hand Delivery

Tadas A. Kisielius, WSBA #28734
Dale Johnson, WSBA # 26629
Clara Park, WSBA #52255
Van Ness Feldman
719 2nd Avenue, Suite 1150
Seattle, WA 98104
206-623-9372
tak@vnf.com
dnj@vnf.com
cpark@vnf.com
map@vnf.com
Attorney for Respondent City of Seattle

X by E-mail (per agreement)
☐ by Facsimile Transmission
☐ by First Class Mail
☐ by Hand Delivery

DATED this 10th day of August 2017.

/s/ Brenda Bole
Brenda Bole

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700