BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	)	
	)	Hearing Examiner File
THE BALLARD COALITION	)	
	)	W-17-004
of the adequacy of the Final Environmental Impact Statement, prepared by the Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project	)	RESPONSE IN OPPOSITION TO BALLARD COALITION'S MOTION TO CONTINUE PREHEARING ORDER DATES

I. INTRODUCTION

In his Prehearing Order, the Examiner established a reasonable schedule for this appeal, based on a joint recommendation of all the parties. That schedule allowed ample time for parties to prepare for a relatively narrow and technical appeal over the adequacy of the EIS for the Project. In its Motion to Continue Prehearing Order Dates Until Discovery is Complete (Motion), filed less than a month before the hearing is scheduled to begin, the Ballard Coalition (Coalition) now seeks to extend that schedule. The Coalition relies exclusively on its mischaracterization of its expansive discovery requests and of the Seattle Department of Transportation's (SDOT) response to those requests. Contrary to the description in the Coalition's Motion, SDOT worked diligently to respond to the Coalition's unreasonable and overly broad discovery requests. SDOT objected to the requests on a variety of grounds, including the sweeping nature of the requests that exceed the standard for discovery. Nevertheless, SDOT responded in writing to the interrogatories and produced tens of thousands

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of responsive documents in an effort to be cooperative. SDOT invited the Coalition to narrow the scope of its requests in order to facilitate a quicker response to the broad requests, but the Coalition declined.

Rather than taking up the discovery dispute in the proper manner with the Examiner through a motion to compel, the Coalition instead now seeks a hearing delay it has manufactured. Notably, the Coalition has waited five and a half weeks after SDOT offered to meet and confer to resolve the underlying discovery dispute to file this motion. Ironically, the Coalition relies on the volume of documents it requested to justify a delay that could have been avoided with a more targeted discovery request. All the while, the Coalition repeats the mantra that it is "entitled" to discovery, but never explains why such extensive and expansive discovery is warranted or needed in the context of an EIS appeal. That context is important. SDOT's approach and methodology is already documented in an extensive EIS and accompanying technical reports that have been publicly available for months. In light of the availability of that information, the Coalition's assertion that it could not begin preparations until wading through the tens of thousands of documents it requested rings hollow. The Coalition's tactics do not warrant a continuance.

II. ARGUMENT

A. Delay is not warranted because SDOT Responded in Good Faith to The Coalition's Unreasonable Discovery Requests

The sole grounds upon which the Coalition seeks to justify the delay of the hearing is the purported deficiencies in SDOT's responses to the Coalition's extensive and voluminous discovery. The Coalition's claims are without merit. On June 30, 2017, the Coalition served their "First Set of Interrogatories and Requests for Production" to SDOT ("Request").[1] Contrary to the Coalition's claims that it "crafted targeted discovery requests" and "made every

[1] Declaration of Erin Ferguson ("Ferguson Decl.") at 3, Exh. A. The Coalition claims it made its request "soon after this Examiner's pre-hearing conference." Motion at 4. In fact, the Coalition served its Request at 4:40 p.m. on the Friday June, 30, almost a full week *before* the pre-hearing conference, and before any discussion with the Hearing Examiner regarding the scope of hearing issues or discovery.

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attempt" to limit its requests to hearing issues, these discovery requests were unreasonably broad. The Coalition's Request included 31 requests for production. These requests are sweeping and ask for "all documents" that relate to broad categories of topics over a four year span.[2] The Request also included 19 interrogatories, many with five to seven subparts, and almost all of the interrogatories included an accompanying request to identify documents.[3] Ferguson Decl. Exh. A at Interrogatory Nos. 1 – 9, 11 – 19. The expansive nature of these requests is best demonstrated by the responsive documents that were produced. In total, SDOT has produced nearly 22,000 responsive documents.

SDOT objected to the overly burdensome scope of the Coalition's Request. *Id.* at 11, 13, Exh. D, E. In particular, the scope of discovery far exceeds the needs of the appeal, which addresses the adequacy of the Missing Link Project's FEIS. "EIS 'adequacy,' in its narrow and usual sense, refers to the legal sufficiency of the environmental data contained in an impact statement." R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[1][a] (2016). *See also Glasser v. City of Seattle*, 139 Wn. App. 728, 739, 162 P.3d 1134, 1139 (2007) ("EIS adequacy refers to the legal sufficiency of the environmental data contained in the document."); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 508, 306 P.3d 1031, 1037 (2013) ("We examine the legal sufficiency of the environmental data contained in an EIS to determine whether the EIS is adequate under SEPA.").

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[2] Just by way of example, the Coalition requested the following:

- "[A]ll documents prepared between January 2013 and May 2017 that relate in any way to the discussion and evaluation of 'safety' as that term is used throughout the DEIS and FEIS";
- "[A]ll documents, including without limit, unpublished drafts, working copies, notes, memoranda, and any other document prepared between January 2013 and May 2017" that pertain to thirteen technical reports and studies;
- "[A]ll documents that relate to Burke Gilman Trail Missing Link Design Advisory Committee prepared since September 1, 2016";
- "[A]ll drafts of all evaluations, data collections, studies, or other reports that you considered, evaluated, or relied upon that relate to the Environmental Impacts of the Missing Link, whether or not they are referenced in the DEIS or FEIS and were prepared between January 2013 and May 2017."

Ferguson Decl. Exh. A at pp. 24, 27, 29. The other requests for production were similarly expansive and request documents dating back from 2012 and 2013.

[3] The Federal Rules of Civil Procedure, Rule 33 limits interrogatories to no more than 25, including all subparts. While the federal rules are not binding here, they are persuasive in demonstrating the extensive nature of the Request.

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The FEIS is a nearly 300-page document, not including the technical appendices or the detailed responses to DEIS comments, and has been publicly available since May 25, 2017. The expansive discovery is not necessary given the narrow scope of this hearing and the extensive existing record.

SDOT has never agreed that the responsive documents are necessary, relevant, or within the scope of permissive discovery.[4] Nevertheless, to avoid unnecessary discovery disputes and without waiving its objections, SDOT worked diligently to produce responsive documents beginning on July 31, 2017, the date SDOT's response was due.[5] SDOT simultaneously and repeatedly communicated the delay it anticipated in production due to the sweeping scope of the discovery requests. Ferguson Decl. at 14, Ex. F. In good faith, SDOT offered to meet and confer and twice offered to work with the Coalition on focusing the Request. The Coalition never responded to SDOT's offers. Ferguson Decl. Exh. F, G. As described in the Coalition's Motion, SDOT has produced nearly 22,000 documents since July 31, 2017.

While SDOT was preparing its preliminary witness and exhibit list, SDOT and its consultants discovered that some responsive documents were inadvertently not provided. SDOT promptly produced those documents and, in good faith, emailed the Coalition's counsel a description of the additional documents and identified categories of documents that were likely duplicative. Ferguson Decl. at 19, Exh. H. The rules contemplate this type of supplementation of discovery responses.[6]

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[4] The Coalition baldly asserts that SDOT has "waived" its objections "by failing to state with particularity its objections to relevant requests within the time set for responses to discovery." Motion at 5, n. 4. It cites no authority for this premise because there is none. First, SDOT identified its objection regarding the scope of the request in its email transmittal of July 31, 2017, and produced responsive documents while expressly reserving its objections. Ferguson Decl. at 11, Exh. D. Second, even if SDOT had taken no action whatsoever on July 31, 2017, in response to the interrogatories and requests for production, the remedy available to the Coalition is through a motion to compel discovery, not waiver of SDOT's objections.

[5] The Coalition misleadingly and incorrectly claims "SDOT's responses were due on or before July 30, 2017," Motion at 4, and that SDOT's initial production on July 31, 2017, was late. July 30, 2017 was a Sunday. Per HER 2.04 SDOT's responses were due on July 31, 2017. While a minor detail, this, yet again, demonstrates a mischaracterization and disregard of facts that undermine the Coalition's credibility.

[6] *E.g.*, CR 26(e). Further, the Request states that the Request is continuing and instructs, "any additional information relating in any way to these Discovery Requests which you acquire subsequent to the date of answering these Discovery Requests, and up to and including the time of trial, shall be furnished to the Ballard Coalition promptly

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Ironically, the unreasonable nature of the Coalition's expectations is emphasized by the Coalition's response to SDOT's targeted discovery requests. As set forth in SDOT's concurrently-filed Motion to Compel, the Coalition is taking the groundless and hypocritical position that it need not produce responsive documents or meaningfully respond to SDOT's interrogatories until October 6, 2017, the deadline for final witness and exhibit lists and ten days before hearing. Thus, while the Coalition lambasts SDOT for its purported discovery violations which resulted in production of tens of thousands of documents, the Coalition has not produced any documents or substantively responded to any of SDOT's interrogatories in that same time period despite the fact that their responses are past-due. By the Coalition's interpretation of the governing rules, SDOT's discovery responses would not have been due until the date of final exhibit and witness lists. Under that theory, the City would have would have been several weeks early in its production.

B. SDOT's Discovery Responses Are Consistent with the Rules of Discovery and Procedure

The Coalition's assertion that SDOT "thinks there is no need to comply with discovery" or that it acted with "complete disregard for this tribunal and the rules of procedure"[7] are serious accusations. Yet, once again, the accusations are not supported by the actual facts or the rules.

First, while the Coalition repeatedly asserts it is "entitled" to discovery responses, it is only entitled to discovery within the bounds of the rules.[8] Those same rules authorize SDOT to object to discovery requests. SDOT properly objected to the Coalition's overly burdensome, unnecessary and broad requests. The Coalition never directly contested SDOT's objections (except as addressed in this motion for delay), and SDOT has never waived them. As explained, above, those objections were legitimate and borne out by the sheer volume of the responsive

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after such information is acquired, as supplemental answers." SDOT's supplemental production complied with the rules and the Request itself.

[7] Motion at 6.

[8] HER 3.11 (permitting "appropriate" discovery); CR 26(b) (discovery must be "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence").

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information in this relatively narrow and technical appeal. SDOT's objections have particular weight in proceedings before the Examiner, because the Examiner's Rules include a more exacting scope of discovery. Specifically, those rules also exclude discovery that is "unnecessary under the circumstances of the appeal." HER 3.11. Thus, on a very basic level, the Coalition is incorrect when it suggests that discovery before the Examiner is broader than in superior court. As explained above, extensive discovery of the kind sought by the Coalition is unnecessary in this appeal of the adequacy of an EIS,[9] and therefore is not permissible under the Hearing Examiner Rules. It is also worth repeating that, without waiving these objections, SDOT nevertheless responded to interrogatories and produced responsive documents – nearly 22,000.

Second, the Coalition is in error when it argues that SDOT failed to provide responsive documents in the proper form. SDOT complied with the rules. CR 34(b)(3)(F) states, "A party who produces things, electronically stored information, or documents for inspection shall produce them as they are kept in the usual course of business . . . ." Accordingly, SDOT produced its records as kept in the usual course of business. The Coalition may not find this method of production convenient for their needs, but it is permissible under the rules and is not a valid ground for continuance.

Moreover, the Request did not request that the documents be organized in a particular manner, and did not instruct that the documents be bates stamped. Ferguson Decl. Exh. A, C. The rules do not obligate SDOT to read the Coalition's mind or attempt to re-organize its records to the Coalition's liking. Even if the Coalition had timely requested such organization, organizing four years of documents according to the 50 requests for production and interrogatories would have required even more time to produce. Because neither the rules nor the Request call for such steps, SDOT focused on producing its documents in as timely a manner as possible.

[9] *See* Section II.A., *infra.*

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The Coalition complains that the fact that SDOT's document were produced in "native format" is causing additional delay, but neglect to inform the Hearing Examiner that they specifically *requested* that SDOT produce them in native format when the City inquired. Ferguson Decl. at 8, Exh. C. Coalition's claims that SDOT "promised" to produce documents as a Concordance load file format is unsupported and contradicts the Coalition's request to SDOT.[10] The Motion's exhibits only show that SDOT asked the Coalition's counsel what document management software they used and offered to "try to save" the production in their requested format. Silverthorn Decl., Exh. B. the Coalition responded by requesting documents in native format, and SDOT cooperated by producing the documents in native format. Ferguson Decl. at 9. Needless to say, the Coalition has no grounds for denouncing SDOT's efforts to cooperate with its own request.

Finally, the Coalition's various complaints about the responses to its public records requests are misplaced. SDOT contests the veracity of the Coalition's allegations about its responses to public records requests. But most importantly, they are not relevant to its Motion. SDOT's response to the Coalition's discovery requests arising in this litigation is entirely separate from the agency's duty to disclose public records requests pursuant to the Public Records Act. Therefore, even if the Coalition's contested and inaccurate assertions about SDOT's public records requests were correct, those complaints are outside the scope of this hearing and the Motion.[11]

C. The Coalition's Discovery Tactics Were Designed to Create Delay from the Outset

HER 2.06 states, "Hearings shall be conducted expeditiously. At every stage in the proceedings, all parties shall make every effort to avoid delay." At every stage, however, the Coalition's tactics have been designed to create delay.

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[10] See Motion at 5, n.5.

[11] The Coalition never conferred with SDOT's counsel about any issues relating to its public records requests or asked for SDOT's counsel's assistance with expediting the responses. Ferguson Decl. at 12. The lack of conference indicates the Coalition understands that the public records process is a separate process, and also undercuts the Coalition's attempt to re-characterize it as a discovery issue here.

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The Hearing Examiner issued the pre-hearing order on July 7, 2017, giving the Coalition ample notice of the hearing dates and schedule. Instead of narrowing their discovery requests to fit the hearing schedule, the Coalition ignored SDOT's warnings about the scope of the production and refused to narrow the scope of its request. It is ironic that the Coalition now complains about the obvious result of its overly broad Request and the hundreds of hours of work that they manufactured for themselves by propounding overly broad and unnecessary discovery requests.

The form and timing of the motion in which the Coalition is airing these discovery grievances is further evidence of its underlying intent to delay. A party may invite the Examiner to resolve a discovery dispute by motion. *See* CR 37. A necessary precursor to that motion is the obligation on parties to meet and confer to seek to resolve the dispute. CR 26(i). In this case, SDOT objected to the scope and identified the delay in responding. When the Coalition complained about the delay, SDOT offered to meet and confer on August 11, 2017. Ferguson Decl. at 14, Exh. F. The Coalition never responded. *Id.* at 17. Rather than bringing a motion to directly address the Coalition's meritless discovery allegations, the Coalition instead waited over a month to bring this Motion to delay the hearing schedule, without actually asking the Examiner to directly address the underlying discovery issues (which, by this point are irrelevant because the responses are complete). This demonstrates the Coalition's modus operandi all along of refusing to coordinate and sitting on its hands, then denouncing SDOT for the resulting delay.

The Coalition is using the same delay tactics in other aspects of this litigation. As explained in its own Motion, the Coalition complains about SDOT's objections to its deposition plans without actually asking the Examiner to resolve the dispute. Motion at 6. SDOT's objections to the Coalition's depositions are well-founded. The Coalition intends to depose eight City representatives or consultants. Ferguson Decl. at 20, Exh. I. SDOT has made those of the eight that are City witnesses available for deposition and sought to cooperate on scheduling, *Id.* at 21, Exh. J, but the Coalition refuses to schedule the depositions until it finishes its review

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of the 22,000 documents it obtained from SDOT. *Id.* at 22. SDOT has objected to other intended deponents due to their limited involvement in the EIS or their duplicative roles and subject matter expertise with other testifying witnesses SDOT has made available.[12] In response, the Coalition asserts it is entitled to take depositions of any City employees or contractors but did not expedite resolution of this dispute via subpoenas until September 22, 2017, the date this response was filed.[13] Again, the Coalition is sitting on its hands and denouncing SDOT for its self-inflicted inability to complete its depositions on time. Similarly, as explained in SDOT's *motion in limine*, the Coalition has overstated its preparation needs by creating a voluminous list of unnecessary and duplicative witnesses and exhibits. The Coalition included 38 witnesses proposed to testify at the hearing and hundreds of documents or categories of documents proposed as exhibits. The Coalition makes no attempt to explain why it needs 18 witnesses to testify about "traffic hazard impacts" or 17 witnesses to testify about "safety" and "access."

Finally, as set forth in SDOT's Motion to Compel, the Coalition is refusing to respond to SDOT's discovery request until October 6, 2017, ten days before the hearing. Despite the Coalition's efforts to force SDOT into requiring a continuance, SDOT remains ready and able to proceed with the hearing as scheduled in this Hearing Examiner's pre-hearing order.

D. A Six-Week Delay Prejudices SDOT

Contrary to the Coalition's disingenuous claims, continuing this lawsuit and moving the hearing date prejudices SDOT's ability to develop the Project. SDOT has continued to advance the design and hold some meetings for the Project. However, the outcome of this appeal could affect some or all of that ongoing work. Most importantly, the Project cannot move forward as scheduled until this suit is resolved. A delay is not only contrary to the HER, but also causes prejudice to SDOT.

[12] For example, its list includes three people who worked on the same analysis in the FEIS, even though SDOT has identified the lead author of the relevant FEIS section as a witness and does not intend to call the other two contributors as witnesses.

[13] Motion at 6. The Coalition's confusion over the City's objection is perplexing. Motion at 6, n. 6. The City has objected and provided reasonable grounds for those objections. Ferguson Decl. at 11, 13, Exh. D, E.

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Because the Coalition has not raised any valid reason for a continuance, SDOT respectfully requests that its Motion be denied. The Coalition has certainly not justified its request for a six week delay. Thus, if the Examiner is inclined to continue the hearing to address the prehearing issues being raised, SDOT requests that the Examiner minimize any ensuing delay and continue the hearing dates by no more than one or two weeks, depending on the Examiner's availability.

III. CONCLUSION

Based on the above, SDOT respectfully requests that the Coalition's Motion be denied.

DATED this 22nd day of September, 2017.

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