BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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| In the Matter of the Appeal of:<br><br>**THE BALLARD COALITION**<br><br>of the adequacy of the Final Environmental Impact Statement, prepared by the Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project | Hearing Examiner File<br><br>W-17-004<br><br>SDOT'S SECOND MOTION *IN LIMINE* |

## I. INTRODUCTION & RELIEF REQUESTED

The Hearing Examiner has set aside five days—and only five days—for hearing on the Ballard Coalition's appeal of the Burke-Gilman Trail Missing Link EIS, with that time to be allocated equally between the parties. The volume of documents and number of witnesses the Coalition has included in its Final Disclosure of Witnesses and Exhibits (Final Lists) is more than can possibly be presented in two and a half days, vastly exceeds the needs of this case, and fails to meet the basic expectations set by the Examiner at the second prehearing conference. The purpose of exchanging witness and exhibit lists is to provide opposing parties and the Examiner with a clear indication of the evidence to expect at hearing, thereby allowing everyone to prepare. The Coalition has failed to meet that basic and simple requirement.



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While the Coalition has identified some specific documents it may present at hearing, the Coalition also lists tens of thousands of pages of broad categories of documents, a vast majority of which are irrelevant including: **all** documents obtained through the Coalition's wide-ranging public records requests; **all** documents obtained through discovery in this matter; and **all** comments or correspondence related to the Draft and Final environmental review or any drafts thereof. By listing these broad categories of documents, the Coalition continues to "hide the ball" and avoids identifying relevant documentary evidence with specificity, thereby circumventing the entire purpose of evidentiary disclosures. Accordingly, and as described below, SDOT requests that the Examiner exclude these and other generic categories of documents identified in the Coalition's Final Lists.

Additionally, the Coalition has not meaningfully limited its witnesses to those needed to present testimony relevant to the issues raised in this EIS appeal. The Coalition continues to identify 34 witnesses[1] despite the Examiner's expectation that the Coalition work to narrow its list.[2] In particular, the Coalition has listed 13 City witnesses, including nine whose testimony would be either irrelevant or duplicative of witnesses SDOT has identified that will be available for questioning. While the Examiner earlier denied SDOT's first motion *in limine* challenging the inclusion of these City witnesses on the Coalition's preliminary list, the Examiner ruled on the basis that it was too early to resolve SDOT's challenge.[3] Now that the discovery cutoff has

[1] While the Coalition listed 27 numbered descriptions of witness testimony, seven of those entries name two witnesses using the conjunctive "or" or "and/or."

[2] Audio of Second Prehearing Conference at 40:38-41:16 (Hearing Examiner: "I do strongly encourage a winnowing of the list … I hear you saying that you are going to do that and that's important … What I see … when I get that list of folks that are all going to be saying the same thing … it's a long list and that could be narrowed by the final one…I see that and I want you to know that I do see that at this point and we need to narrow it down…") (emphasis added). The entire audio file of the Second Prehearing Conference is available at the following link under "Hearing on Motions": https://web6.seattle.gov/Examiner/case/W-17-004

[3] Audio of Second Prehearing Conference at 1.24:54 ("I just don't have enough information now to know whether they should be in or out and I think we have all expressed the concern here that we need to limit that. I recognize



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passed and the parties are less than three weeks from hearing, SDOT requests that the Examiner grant SDOT's motion and preclude the City witnesses identified below. If the Examiner does not grant SDOT's request for relief, SDOT will be forced to expend unnecessary resources in making these witnesses available, for no legitimate purpose.

While SDOT expressly reserves the right to object to specific witness testimony and documents as they are presented at hearing, SDOT has filed this Second Motion *In Limine* to avoid unnecessarily wasting hearing time resolving objections to exhibits and witness testimony.[4] Granting SDOT's motion will allow the Examiner and the parties to focus on the issues in the case and relevant evidence needed to resolve the Coalition's claims.

## II. ARGUMENT

### A. The Coalition must be limited to the evidence that can be presented in the reasonable amount of time the Examiner has allocated for this hearing.

In resolving this motion, the Examiner must take into account the reasonable amount of time he has allocated for this case. Based on agreement of all the parties, the Examiner has already limited the hearing to five days.[5] The Examiner also confirmed that the five days would be allocated equally between the opposing parties.[6] The Coalition's Final Lists raise serious concerns about the Coalition's ability and intention to abide by that schedule (i.e., present its

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that that's still, what that probably does is, it still helps us with the hearing and not necessarily discovery for the City and that's still a potential burden, but I just don't have enough to work with at this point.")

[4] SDOT cannot reasonably be expected to stipulate to the admissibility of a majority of the documents included in the final lists without some effort on the Coalition's behalf to narrow the list to what will actually be used at hearing.

[5] Audio of Second Prehearing Conference at 1:19:33-48 (Hearing Examiner: "…the nature of the request is to cut off at 5 days, not try to do our best … Then I will set … it at 5 days for hearing."). The entire audio file of the Second Prehearing Conference is available at the following link under "Hearing on Motions": https://web6.seattle.gov/Examiner/case/W-17-004. This is consistent with general administrative practice and with the Examiner's rules of procedure which directly authorize the Examiner to limit the length of testimony to expedite proceedings. Hearing Examiner 2.14(e).

[6] Audio of Second Prehearing Conference at 1:20:43-54 (Hearing Examiner: [in response to question of whether the hearing time will be allocated equally] "Yes, and that is what's traditional when a date is set, is that each party gets equal time. So it's not 2 days, its 2 and a half days to the Appellants."); *Id.* at 1:22:37 (Hearing Examiner: ""I'm



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entire case in chief, cross examine respondent witnesses, and present rebuttal testimony in two and half days). The Coalition's inclusion of volumes of irrelevant pages of documentary evidence and its inclusion of 34 witnesses does not justify any additional hearing days. SDOT will object to any effort to extend the schedule on the grounds that the Coalition has not been able to present all of its witnesses or documentary evidence.

Additionally, in light of the concerns raised by the Coalition's Final Lists, SDOT requests that the Examiner take efforts to ensure the time at hearing is managed to avoid any efforts to "filibuster" and consume hearing time beyond what has been allotted to the Coalition. The time attributable to each party should include direct and re-direct examination of a party's witnesses (presented in the party's case-in-chief and rebuttal) and cross-examination of opponent witnesses. SDOT respectfully requests that the Examiner employ a "chess clock" or other device, as is common in other administrative adjudicative proceedings, to ensure fair allocation of hearing time. To facilitate this request, SDOT can provide one for use at the hearing.

**B. The Examiner should exclude generic placeholders for categories of exhibits.**

The Hearing Examiner Rules expressly require the Examiner to "ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the proceedings, to gather facts necessary for making the decision or recommendation, and to maintain order." Rules of Procedure 2.11. The rules acknowledge that the Examiner has "all powers necessary to these ends" including ruling on evidence, and establishing procedures, and requiring pre-hearing submittals.[7] The Final Exhibit List is among the various procedural tools required by the

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giving you two and a half days to do it, do your case."). The entire audio file of the Second Prehearing Conference is available at the following link under "Hearing on Motions": https://web6.seattle.gov/Examiner/case/W-17-004

[7] *Id.* The rules also allow the Examiner to exclude documentary evidence that is irrelevant, immaterial, or unduly repetitive. Rule 2.17(b). Similarly, ER 403 provides that even relevant evidence may be excluded if its probative



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Examiner in this case that are designed to provide a fair and efficient hearing. While the Coalition has identified many exhibits with specificity, the Coalition continues to list blanket categories of documentary evidence, which circumvents the entire purpose of those final evidentiary disclosures. The proper remedy is to exclude these generic placeholders of large categories of exhibits, leaving the Coalition with the many specific documents it has included in its list to support its case. SDOT, like any party, is entitled to a fair hearing and should not be left guessing which of the thousands of documents the Coalition might present at hearing.

**1. All drafts, comments, and correspondence related to the Final EIS and Draft EIS (Exhibits A-332; A-333.1 – 333.3; A334.1 – 334.3; A-335; A-336.1 – 336.6; A-337).**

In addition to the Final and Draft EISs and the technical appendices that are the focus of this appeal, the Coalition continues to list without specificity, the right to enter as evidence "**all** drafts, comments thereto, and correspondence related thereto." Final Lists at 13-14 (emphasis added). These generic categories include a vast number of documents that address a wide range of topics, much of which is not relevant to the issues the Coalition has raised.[8] This generic, categorical listing of documents is inappropriate in a Final List submitted only weeks before hearing. The Coalition should by now be able to identify the specific drafts, correspondence, or comments related to the Draft and Final EISs that are relevant to their case. Indeed, in other instances, the Coalition has identified specific comments, drafts and correspondence. *See, e.g.*, A-350.10; A-350.11; A-350.12; A-350.42; A-350.43; A-350.44. The Coalition should not be permitted to leave catch-all descriptions as placeholders and leave SDOT prejudiced, with no

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value is substantially outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence."

[8] For example, the Coalition has not raised any issues related to the analysis of cultural resources, geology, soils and hazardous materials, fish, wildlife, and vegetation, and others, and so comments and drafts related to those sections of the EIS are irrelevant.



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way to know what it needs to be prepared to respond to at hearing. Moreover, having obtained a continuance for the express purpose of reviewing and identifying documents, the Coalition cannot now continue to assert the right to name generic categories of documents.

**2. All documents the Coalition obtained or produced through discovery (Exhibits A-341.1 – 341.xxxxx; A-342.1 – 342.xxxxx; A-349.1 – 349.xxxxx).**

Similarly, the Coalition should be precluded from including <u>everything</u> the Coalition obtained in response to its wide-ranging and broad discovery requests. By its very definition, the scope of discovery is broader than what is relevant to these proceedings. *See* CR 26. The categorical inclusion of all documents provided in response to discovery includes irrelevant evidence and should be excluded on those grounds. More importantly, the blanket listing of everything obtained is inconsistent with the specificity expected in a Final Exhibit list. In other instances in its list, the Coalition has listed specific documents it obtained through discovery. *See, e.g.*, A-350.10; A-350.11; A-350.12; A-350.42; A-350.43; A-350.44. The Coalition should be held to that similar level of specificity and should not be permitted to leave catch-all descriptions as placeholders.

**3. All documents the Coalition obtained through public records requests (Exhibits A-343.1 – 343.xxxxx; A-344.1 – 344.xxxxx; A-345.1 – 345.xxxxx; A-346.1 – 346.xxxxx; A-347.1 – 347.xxxxx; A-348.1 – 348.xxxxx).**

For the same reasons, the Examiner should similarly preclude the Coalition from listing as evidence every document it obtained in any of its wide-ranging public records requests. Those requests were from a variety of offices and departments including the Department of Construction and Inspection and the Offices of Economic Development, the Mayor, Councilmember Mike O'Brien, and City Budget. These broad categories of documents include irrelevant information that is unrelated to the Coalition's claims in this case. The generic listing



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of these categories of documents is inconsistent with the basic expectations for a Final List, circumvents their intended purpose, will lead to additional time spent dealing with objections to evidence at hearing, and will prejudice SDOT's ability to prepare for hearing.

### C. The Hearing Examiner should exclude witnesses identified as presenting unduly repetitive or irrelevant testimony.

Hearing Examiner Rule 12(b) provides that the "Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged."[9] In addition, the Hearing Examiner may limit the length of testimony to expedite the proceedings.[10]

The team of experts and City employees involved in the Project is voluminous. In its list, SDOT has identified a testifying witness on each subject raised by the Coalition, including seven who were involved in drafting and reviewing the FEIS that is the subject of this appeal. In its list, the Ballard Coalition identifies 13 witnesses who are either City employees or hired by the City to work on the Project. Only four of those 13 are also on the City's witness list: Mark Mazzola; Mark Johnson; Erinn Ellig; and Morgan Shook. As discussed during the second prehearing conference, those SDOT witnesses will be available for direct examination by the Coalition. The Coalition should be precluded from calling the remaining nine City witnesses that do not appear on SDOT's list because their testimony would be irrelevant, have no probative value, and would be unduly repetitive. Although SDOT could obviously wait and object at hearing, it will be more efficient and avoid using limited hearing time to resolve these disputes in advance.

First, numerous witnesses identified on the Coalition's Final Witness List, including Ron Scharf, Art Brochet, Sharon Boswell, Eileen Heideman, Roque DeHerrera, and Brian Surratt,

[9] Similarly, ER 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence."



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had limited or no involvement in the issues raised in the appeal and did not perform any of the analysis included in the EIS that is the subject of the appeal. Their testimony should be excluded as irrelevant and a waste of time.[11] Second, to avoid unduly repetitive testimony and to facilitate an orderly and efficient hearing the Hearing Examiner should preclude the Coalition from calling City witnesses to testify regarding a particular subject matter where SDOT and the Coalition have identified a different testifying witness on that topic.[12] Instead, the Coalition insists on calling multiple witnesses on individual topics. This will result in unduly repetitive testimony and waste of City resources.

Accordingly, the Coalition should be precluded from calling the following witnesses:

- **Ron Scharf:** Mr. Scharf was the former project manager for the Project, but was out on medical leave beginning in early 2016, prior to issuance of the DEIS, and did not return as project manager.[13] Mr. Scharf was not involved in performing any analysis or drafting any part of either the Draft or Final EIS. Although he provided comments on one or more drafts of the EIS and associated reports, his role was limited to reviewing the technical work prepared by others in his role as a project manager during the time he was involved in the project. Accordingly, because of his limited role, he will not provide relevant testimony on the technical issues raised in this appeal. Moreover, even if Mr. Scharf's limited involvement was relevant to the subject matter of this appeal, Mr. Scharf's testimony from the perspective of a general "reviewer" should also be excluded on alternate grounds because any testimony would be duplicative of other witnesses the Coalition has also named. Both the City and the Coalition

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[10] Hearing Examiner 2.14(e).
[11] See HER 12(b) and ER 403.
[12] See HER 12(b) and ER 403.
[13] *See,* Ex. A to Declaration of Tadas Kisielius (Kisielius Decl.)(excerpt of transcript of Mark Mazzola) at p. 26, line 24 through p. 28, line 1; Kisielius Decl., Ex. D (excerpt of transcript of Mark Johnson) at p. 102, lines 6-10.



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have listed Mr. Mazzola as a witness. The FEIS identifies both Mr. Scharf and Mr. Mazzola as general "reviewers."[14] Thus, even if Mr. Scharf's limited involvement were grounds to call him as a witness in this matter, Mr. Scharf's testimony from the perspective of a general "reviewer" should also be excluded as duplicative.

- **Art Brochet**: Mr. Brochet is no longer employed by SDOT; he is retired. Mr. Brochet's role in the EIS was limited to public outreach and communication, not the technical issues raised by the Coalition.[15] Although he reviewed and provided comments on drafts of the EIS and associated reports, his role was limited to reviewing the work done by others and providing comment from his perspective related to communications.[16] His testimony is irrelevant to the issues raised in this appeal. Moreover, even if Mr. Brochet's limited involvement was relevant to the subject matter of this appeal, Mr. Brochet's testimony from the perspective of a general "reviewer" should also be excluded on alternate grounds because any testimony would be duplicative of other witnesses SDOT has made available for examination. Like Mr. Scharf, the FEIS lists Mr. Brochet as a general "reviewer." Any testimony he might offer would be duplicative of Mr. Mazzola, whom the Coalition has also named as a witness.

- **Sharon Boswell and Eileen Heideman:** Ms. Boswell and Ms. Heideman were both solely involved in the cultural resources analysis in the EIS.[17] They were not involved in any of the analysis of any of the issues that are related to the Coalition's claims.

- **Brian Surratt and Roque DeHerrera**: Neither Mr. Surratt, the Director of the Office of Economic Development, nor his colleague Mr. DeHerrera, contributed to any analysis in the

[14] Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-1.
[15] *See* Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-1.
[16] *Id.*
[17] Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-2.



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Draft or Final EIS and neither is listed as a preparer in the FEIS.[18] They do not possess the expertise to testify regarding the "business, land use and economic impacts to Ballard-area businesses from the Missing Link," as described as the testimony sought by the Appellants.

- **Jill Macik:** Both Mark Mazzola and Jill Macik are identified as proposed witnesses on the Coalition's preliminary list. They are both staff in SDOT's Environmental Services division and were involved in the same aspects of preparing the EISs for the Project,[19] so there is no need to elicit testimony from both witnesses. SDOT has identified Mr. Mazzola as a witness and the Appellants may obtain the testimony sought on examination of Mr. Mazzola. Ms. Macik's testimony would be unduly repetitive.

- **Claire Hoffman and Jennifer Hagenow**: The Ballard Coalition should be precluded from calling Claire Hoffman and Jennifer Hagenow and limited to the examination of Mark Johnson, whom the Coalition has already named as a witness, because all three of those proposed witnesses are identified as testifying on the same topic.[20] Calling all three would be unduly repetitive and a waste of City resources. Additionally, Ms. Hagenow is no longer employed by the company under contract with SDOT.[21] Calling a witness that is no longer under contract with the City imposes a burden on that witness and is unnecessary under these circumstances.

Allowing the Coalition to call all the City witnesses identified in its list would cause undue delay, unnecessarily increases City costs, and result in the presentation of duplicative evidence. SDOT should not be required to deploy resources and incur costs to prepare nine

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[18] Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-1 through 13-2 (neither Mr. Surratt nor Mr. DeHerrera are listed as a preparer to the EIS).
[19] *See* Kisielius Decl., Ex. A (excerpt of transcript of Mark Mazzola) at p. 49, line 20 through p. 50, line 3. *See also* Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-1.
[20] *See also* Kisielius Decl., Ex. B (FEIS Excerpt) at p. 13-2. All three worked on the land use analysis, with Mark Johnson in the role of project manager of that chapter and other aspects of the EIS. *See, e.g.*, Kisielius Decl., Ex. C (excerpt of transcript of Claire Hoffman) at p. 24, lines 9-23; *id.* at p. 30, line 24 through p. 31, line 12.
[21] *See* Kisielius Decl., Ex. C (excerpt of transcript of Claire Hoffman) at p. 13, lines 6-9.



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additional witnesses for hearing where the testimony would be irrelevant and unduly repetitive. Therefore, the Hearing Examiner should preclude the Ballard Coalition from calling the nine City employees or persons who were or are employed by identified above.

## III. CONCLUSION

Based on the arguments above, SDOT requests that the Hearing Examiner grant its Second Motion *In Limine* and impose reasonable restrictions on the documentary evidence and testimony the Coalition will present at the hearing that take into account the focused and technical subject matter of this appeal, and the reasonable time allotted for the hearing.

DATED this 10th day of November, 2017.

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