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CITY OF SEATTLE

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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	)))))))))	Hearing Examiner File W-17-004 SEATTLE DEPARTMENT OF TRANSPORTATION'S PRE-HEARING BRIEF

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I. INTRODUCTION

The Burke-Gilman Trail (BGT) is a 20-mile multi-use trail that runs east from Golden Gardens Park in Seattle to the Sammamish River Trail in Bothell. The trail is used by walkers, runners, cyclists, skaters, commuters, and children. The BGT is complete except for a 1.4 mile segment in the Ballard neighborhood, known as the "Missing Link." A plan to complete the Missing Link has been included in the City's comprehensive plan since the 1990s and is identified as one of the City's top trail priorities.[1] The Missing Link Project will result in construction of a marked, dedicated route passing through the Ballard neighborhood that will safely serve multi-use trail users of all ages and abilities, and will fulfill the long-standing goal of completing the BGT.

The City has undertaken a thorough and comprehensive environmental analysis of the Missing Link Project. This analysis is fully documented in the Missing Link Final Environmental Impact Statement (FEIS) and its appendices. The sole issue for resolution at this hearing is the adequacy of the FEIS. The Examiner's inquiry should begin and end with the facts, data and analysis set forth in this document.[2] Regardless of any collateral evidence the Coalition may present at hearing, the Coalition cannot meet its heavy burden to sustain its challenge to the FEIS's adequacy.

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[1] FEIS at 1-1.

[2] *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.") (emphases added).

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II. BACKGROUND FACTS

The Seattle Department of Transportation (SDOT) is both the project proponent and SEPA lead agency for the Missing Ling Project. In fulfilling these roles, SDOT has sought to both develop a trail that meets the City's objectives for the Missing Link and fully assess any environmental impacts associated with the Project. The SEPA review of the Missing Link Project and related appeals has resulted in a long and complicated procedural history. The first step relevant to the current appeal occurred in November 2008: following the preparation of a SEPA checklist, SDOT issued a Determination of Non-Significance (DNS) for the Project, determining that the Project would not have a probable significant adverse impact on the environment. The Coalition's predecessor-in-interest (collectively referred to as the Coalition) filed an administrative appeal of that DNS, which was affirmed by the Seattle Hearing Examiner.[3]

The Coalition then filed its first appeal to the Superior Court challenging the Hearing Examiner's decision and the underlying action to proceed (Cause No. 09-2-26586-1 SEA). The Court ruled in SDOT's favor on a number of issues, but remanded for additional environmental analysis of a 0.3 mile segment of the Project along Shilshole Ave. NW, between 17th Ave. NW and NW Vernon Place (the Shilshole Segment).[4] SDOT performed that additional review and issued a Revised DNS, which superseded the original DNS. The Coalition appealed the Revised DNS, which was affirmed by the Hearing Examiner.[5]

In 2011, the Coalition filed its second appeal to the Superior Court, challenging the Hearing Examiner's decision affirming the Revised DNS. The Court remanded on a limited

[3] Findings and Decisions of the Hearing Examiner, W-08-007.
[4] Order of Remand, Cause No. 09-2-26586-1SEA, signed June 7, 2010.
[5] Findings and Decision of the Hearing Examiner, W-11-002.

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basis, requiring additional design of the Shilshole Segment so that the potential impacts could be evaluated.[6] SDOT did additional design of the Shilshole Segment and reissued the Revised DNS, again superseding any prior threshold determinations, which the Coalition again appealed to the Hearing Examiner. The Hearing Examiner reversed and remanded for preparation of an EIS related to traffic hazard impacts along the Shilshole Segment only.[7]

Following the Hearing Examiner's decision requiring preparation of an EIS, the City decided to prepare a full EIS studying the entire length of the Missing Link, reasonable alternatives, and all relevant elements of the environment. In July 2013, SDOT began the EIS scoping process for the Project and obtained public input on what alternatives and elements of the environment would be analyzed.[8] SDOT published the DEIS on June 16, 2016 and received and responded to approximately 4,400 comments to the DEIS.[9]

The FEIS, published on May 25, 2017, is the product of this long and challenging process. The FEIS alone is 300 pages, not including technical appendices and responses to public comments. Although the Coalition continues its opposition to the Project, both before the Hearing Examiner and the Superior Court,[10] this hearing will demonstrate that the FEIS is thorough, informed by SDOT and its consultants' expertise and by public input, and is more than adequate.

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[6] Second Order of Remand, Cause No. 09-2-26586-1SEA, signed March 2, 2012.
[7] Findings and Decision of the Hearing Examiner, W-12-002, at p. 9 and 10.
[8] FEIS at 1-3.
[9] FEIS at 1-34.

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III. STANDARD OF REVIEW

A. The Coalition bears the burden of proof, and SDOT's determination of the FEIS's adequacy must be accorded substantial weight.

SDOT has determined that the FEIS satisfies all legal and technical requirements and, as such, is adequate. The Coalition bears the heavy burden to establish otherwise.[11] The Hearing Examiner must give substantial deference to the agency's adequacy determination:

> In any action involving an attack on a determination by a governmental agency relative to . . . the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded **substantial weight**.

RCW 43.21C.090 (emphasis added).[12] The adequacy of an EIS is a question of law subject to de novo review.[13] Yet, the burden of an appellant challenging an EIS is high. Of the many EIS challenges in Washington State, only three reported court decisions have held an EIS inadequate.[14] Such decisions are rare because of the comprehensive nature of the EIS process and the outcome of that process, as reflected in the final environmental documents such as the FEIS at issue in this case. Although the SEPA case law is replete with references to the de novo standard of review, as modified by the statutory command to give substantial weight to the agency decision, in practice Washington courts give far more deference to a determination of EIS adequacy than other agency SEPA determinations, such as threshold determinations.[15]

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[10] As discussed further below at Section IV(B), since filing their Notice of Appeal to the Hearing Examiner, the Coalition has filed two motions to the Superior Court seeking to invalidate the FEIS.

[11] Seattle Municipal Code (SMC) 25.05.680(B)(3).

[12] *See also* RCW 43.21C.075(3)(d) (confirming that when an agency provides for administrative appeal of EIS adequacy, the responsible official's decision must receive "substantial weight").

[13] *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 37-38, 873 P.2d 498 (1994).

[14] R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, §§ 14.01[1][b] at 14-25 (2016) (noting that a "strong argument can be made that such judicial practice is consistent with SEPA's central purposes" because "an agency determination of EIS adequacy is a more relative, incremental, less dramatic and consequential decision which the courts are arguably less competent to oversee").

[15] *Id.*, § 14.01[1] at 14-12 to 14-14.

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B. The Adequacy of the FEIS is Reviewed under the "Rule of Reason."

EIS adequacy is judged under the "rule of reason."[16] An EIS is adequate if it provides decision makers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decision.[17]

When impacts are disclosed at a general level of detail, the rule of reason is satisfied and additional detail is not required.[18] The rule of reason is "in large part a broad, flexible cost-effectiveness standard,"[19] and it does not require a fully developed mitigation plan or a "worst case analysis."[20] Moreover, minor technical errors or nondisclosures will not render an EIS inadequate.[21] An EIS is not expected to be perfect in all respects. The evidence at hearing will demonstrate that the Missing Link FEIS meets or exceeds the rule of reason standard.

C. An EIS need not address all conceivable environmental impacts of a proposal.

Washington courts flatly reject challenges like those of the Coalition in this case, in which the appellant seeks to "flyspeck" an EIS by arguing that it should have contained more information or that the responsible agency should have done things differently. [22] Washington courts reject such challenges because an EIS is "simply an aid to the decision making process,"

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[16] *Id.*; *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993).
[17] *Klickitat County*, 122 Wn.2d at 644 (quoting *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 522 P.2d 184 (1976)). *See also King County v. Central Puget Sound Growth Management Hearings Bd*., 138 Wn.2d 161, 183, 979 P.2d 374 (1999).
[18] *See Citizens All. To Protect Our Wetlands v. City of Auburn* (CAPOW), 126 Wn.2d 356, 368-69, 894 P.2d 1300 (1995) (rejecting challenge to traffic analysis as "one of detail" that "does not survive the rule of reason.").
[19] *Id.*, 126 Wn.2d at 362.
[20] *Solid Waste Alternative Proponents v. Okanogan Cty*., 66 Wn. App. 439, 447-48, 832 P.2d 503, 508 (1992)
[21] *E.g.*, *Toandos Peninsula Ass'n v. Jefferson Cty*., 32 Wn. App. 473, 483, 648 P.2d 448, 454 (1982) (finding EIS adequate even though it should have included relevant modifications of a comprehensive plan where the modifications and their applicability to the proposal were known to the decisionmakers); *Mentor v. Kitsap Cty*., 22 Wn. App. 285, 290-91, 588 P.2d 1226, 1230 (1978) (EIS's failure to indicate the comprehensive plan's "open space" designation of the proposal was "unfortunate but not fatal" since the decision-makers were aware of the provision and its meaning); *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp*., 90 Wn. App. 225, 232, 951 P.2d 812, 816 (1998) (holding that EIS was adequate even though a study of cultural impacts, which was not formally incorporated but should have been, was instead circulated along with the EIS and considered by the decision-makers).

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not "a compendium of every conceivable effect or alternative to a proposed project."[23] The Examiner should reject the Coalition's appeal on the same grounds.

SEPA does not require analysis of remote, hypothetical, speculative, or insignificant impacts.[24] Rather, SEPA only requires the analysis of "probable adverse environmental impacts that are significant"[25]—those with "a reasonable likelihood of more than a moderate adverse impact on environmental quality."[26] A careful review of the FEIS shows that this is precisely what SDOT accomplished in this case.

D. SDOT's expert analyses must be affirmed absent definitive contrary expert testimony.

As the primary City agency with transportation expertise, SDOT's choices about how to analyze environmental impacts of transportation facilities, such as the Missing Link, are afforded considerable deference.[27] SEPA does not require that an EIS be based on best available scientific methodology, that it conform to any one expert's recommended approach, or that it be perfect. The EIS must simply be reasonable in light of SDOT's expertise.

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[22] *Mentor*, 22 Wn. App. at 290.
[23] *Concerned Taxpayers*, 90 Wn. App. at 230.
[24] WAC 197-11-060(4), 197-11-782 (distinguishing "probable" from "remote" and "speculative" impacts).
[25] WAC 197-11-402(1).
[26] WAC 197-11-794(1). Notably, although SDOT chose not to argue for categorical exemption from SEPA review, this Project qualifies for an exemption. *See* SMC 25.05.800(B)(4)(i) (exempting the "construction or installation of minor road and street improvements by any agency or private party that include . . . [a]ddition of bicycle lanes, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes"); WAC 197-11-800(d) (stating substantially the same, with exemptions for safety structures such as pavement markings, adding or removing turn restrictions, and physical measures to reduce motor vehicle traffic speed or volume). The exemption applicable to this Project reflects a legislative determination that projects of this type should not be considered as having significant environmental effect and should not be subject to SEPA review for policy reasons. The undertaking of SEPA review, followed by an EIS for the entire Project (as opposed to the 0.3 mile segment called out in Hearing Examiner Watanabe's decision) is an indication of the extraordinary attention that SDOT has given this Project.
[27] *City of Des Moines v. Puget Sound Regional Council*, 106 Wn. App. 836, 852, 988 P.2d 27 (1999) ("The Port and the FAA are agencies with expertise in forecasting aviation demand and should receive deference in choosing the appropriate methodology for forecasting aviation activity."); *see also Seattle Community Council Federation v. Federal Aviation Administration*, 961 F.2d 829 (9th Cir. 1992) ("[I]t is within an agency's discretion to determine which testing methods are most appropriate.")

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At hearing, SDOT expects the Coalition to second-guess the FEIS and suggest alternative analysis that SDOT could have employed, but this misses the point. A mere conflict of opinions does not render an EIS inadequate. Absent definitive contrary expert testimony, the reviewing body must defer to the agency's expertise and affirm its analysis of environmental impacts.[28] "[W]hen an agency is presented with conflicting expert opinion on an issue, it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences."[29] Here, SDOT considered alternative approaches to the environmental analysis of the Missing Link Project, including those suggested by project opponents, and resolved those differences based upon its expertise.

E. Because SEPA is "primarily a procedural statute" to promote agency decision-making, the reviewing body does not rule on the wisdom of the proposed development.

SEPA is "primarily a procedural statute" intended to promote fully informed government decision-making and ensure that environmental values are given appropriate consideration.[30] It does not compel a particular substantive result in government decision making.[31] SEPA further acknowledges that environmental considerations "may be rationally subordinated to weightier non-environmental values."[32] Thus, the Examiner and the courts do not "rule on the wisdom of the proposed development," but only on whether the EIS provides the decision-maker with sufficient information to make a reasoned decision.[33]

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[28] *Org. to Pres. Agr. Lands v. Adams Cty.*, 128 Wn.2d 869, 881, 913 P.2d 793, 801 (1996) (affirming adequacy of EIS where appellant's expert witness "did not testify definitively that the studies are inadequate").
[29] *City of Des Moines*, 106 Wn. App. at 852 (affirming hearing examiner's decision to uphold conclusions of SEPA agencies with expertise, despite contrary expert opinion).
[30] *Glasser*, 139 Wn. App. at 742 (quotation marks and citations omitted); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).
[31] *Glasser*, 139 Wn. App. at 742
[32] Settle, *supra*, § 14.01, at 14-9.
[33] *CAPOW*, 126 Wn.2d at 362.

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The Coalition is expected to raise questions about the City's decision to pursue the Missing Link Project, but such questions are not relevant to the adequacy of the FEIS and distract from the central issue in this appeal: whether the FEIS adequately discloses probable, significant environmental impacts under the rule of reason. The issue is not whether SDOT designed the safest or best trail, or whether the project should ultimately be approved.

The evidence at hearing will establish that the FEIS's analysis is based on standard industry-accepted methodologies and principles. SDOT responded to comments to the Draft EIS (including the Coalition's comments) and fully considered those comments during preparation of the FEIS. The FEIS is consistent with the City's guidelines and policies, as well as state law. The Coalition's expert and technical challenges do not render the FEIS inadequate or overcome the substantial weight and deference due to SDOT. The Coalition simply cannot meet its burden to establish that the FEIS does not satisfy the rule of reason.

IV. ISSUES FOR RESOLUTION AT HEARING

A. SDOT's role as lead agency is proper.

It is undisputed that SDOT is both the Missing Link Project proponent and the lead agency responsible for SEPA review of the Project. The Hearing Examiner has ruled that SDOT's role as lead agency "as a matter of law does not serve as a basis upon which the Coalition may challenge the FEIS," and previously dismissed the issue challenging the FEIS's adequacy based on SDOT's role as lead agency.[34] Based on written discovery and depositions, it is anticipated that the Coalition will nevertheless persist in arguing that SDOT acted improperly because of its level of control over the SEPA process and its involvement with those directly responsible for preparation of the FEIS.

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[34] Order on Motion to Dismiss entered September 28, 2017.

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The level of SDOT's control over the EIS process is a direct result of its role as lead agency. SDOT's active participation in preparing the FEIS, including review of, and substantive feedback pertaining to its consultants' work is appropriate and consistent with its responsibility as lead agency. "Preparation of the EIS is the responsibility of the lead agency,"[35] and ultimately the FEIS is SDOT's work product. The Coalition may seek to present evidence at hearing to infer that SDOT exercised improper control over the FEIS process or that the FEIS is the product of inappropriate bias in favor of the Project. Such assertions based on SDOT's role as lead agency ignore the legally mandated role that SDOT serves in this capacity.[36] The Hearing Examiner should reject any Coalition effort to re-litigate objections to the FEIS based on SDOT's role in its preparation.

B. The Project was sufficiently designed to evaluate impacts, and the Coalition fails to identify any significant impacts not disclosed in the FEIS.

SEPA requires that an EIS be prepared "**at the earliest possible point** in the planning and decision-making process."[37] Similarly, WAC 197-11-406 and SMC 25.05.406 both mandate that "[t]he lead agency shall commence preparation of the environmental impact statement **as close as possible to the time the agency is developing or is presented with a proposal**." (Emphasis added).

SEPA does not require a project to be completed to a specific level of design before environmental review can be undertaken. The Coalition's pre-hearing attempts to invalidate the

[35] WAC 197-11-420(1).
[36] During the deposition of SDOT's environmental lead, Mark Mazzola, the Coalition also challenged the fact that Mr. Mazzola took over the responsibilities of the project manager for a time. The challenge has no merit. First, the Notice of Appeal did not allege that SDOT failed to comply with WAC 197-11-926(2) ("Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal."). Second, even if the Coalition had raised such a claim, WAC 197-11-926(2) is not mandatory, by its plain language. Finally, as Mr. Mazzola testified, for almost the entire time he acted as project manager, the only work on the Project that occurred was the EIS preparation—the same work that he oversaw as environmental lead.
[37] WAC 197-11-055(2); SMC 25.05.055(b).

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FEIS based on the level of project design have failed repeatedly, first before the Hearing Examiner, then before the Superior Court.[38] Nevertheless, the Coalition will undoubtedly continue to claim that the Missing Link Project was not sufficiently designed to allow for meaningful environmental review. But in fact, the timing of environmental review in this case was proper, and SDOT is prepared to present evidence establishing the design's sufficiency for purposes of environmental review.

Moreover, despite three attempts at attacking the level of design, the Coalition cannot identify any substantial impact that was not disclosed in the FEIS.[39] The Coalition's argument fails on that basis alone. SDOT's witnesses will nevertheless confirm that it is typical for project applicants to advance design beyond what has been done by the time of the FEIS; and that the design in this case was sufficient to evaluate and disclose potential impacts.

C. The evidence will show that the FEIS's analysis of five build alternatives is adequate under the rule of reason.

The City anticipates that the Coalition will attempt to present evidence about the need to consider construction of a bicycle-only or other type of facility. Such evidence is irrelevant and does not support a challenge to the FEIS's adequacy. The FEIS specifically considered a bicycle-only facility, but excluded it from detailed study because it did not meet the BGT's

[38] Order on Motion to Dismiss filed herein on September 18, 2017; Order on Plaintiffs' Motion to Enforce Second Order of Remand, filed in No. 09-2-26586-1 SEA by Judge Parisien on October 18, 2017. On November 2, 2017, the Coalition filed a "Renewed Motion to Enforce Second Order of Remand" to Judge Rogers. The Coalition's motion was sent back to Judge Parisien. No ruling has been issued, but the motion was based on the same argument as the two prior motions.. The Coalition's motion to the Hearing Examiner argued that the design was insufficient as a matter of law; its motions to the Superior Court argued that the design was insufficient both factually and as a matter of law.

[39] Instead of identifying an undisclosed significant impact, the Coalition may instead challenge the impacts analysis by arguing that some of the impacts disclosed in the FEIS should have been labeled as "significant impacts." The challenge has no merit. The FEIS explains why impacts were not deemed significant, and SDOT's witnesses can elaborate on their analysis and conclusions. *See, e.g.*, FEIS at 4-21, 4-32 (land use impacts from the trail's location are not significant because it would not change land uses within the study area); 8-23 (parking impacts during construction are not significant because City would maintain parking availability to the extent feasible). Moreover,

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1 multi-use purpose.[40] The Examiner previously dismissed this issue because the Coalition failed
2 to provide any supporting argument or evidence to support detailed study when the City
3 challenged the issue in a pre-trial motion.[41]
4 The Coalition may nevertheless persist in an attempt to establish that some other
5 alternative should have been addressed in the FEIS. SEPA, however, only requires a reasonable
6 number and range of alternatives and a reasonably detailed analysis.[42] It does not require
7 consideration of every conceivable alternative. The FEIS satisfies this requirement. It contains
8 an analysis of the "no build" alternative and five "build" alternatives, as well as six connector
9 segments that could be used as connections between portions of the alternative routes.[43] The
10 FEIS fully analyzed the environmental impacts of all of the alternatives and the connector
11 segments and applied the same depth of analysis to each alternative, not just the "Preferred
12 Alternative."
13 The FEIS also addressed other facility types, including an elevated trail and the
14 Coalition's proposed bicycle-only facility. The FEIS fully describes the facilities that were
15 excluded from detailed study, including the determination that they would not meet the Project's
16 objective of completing an existing multi-use trail and, in the elevated trail's case, would cost
17 400% to 500% more than an at-grade structure.[44] As the project proponent, SDOT is obligated
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21 no published Washington case has found an FEIS inadequate on the grounds that the FEIS should have labeled an impact as "significant" or "not significant."
22 [40] FEIS at 1-33.
[41] Order on Motion to Dismiss, W-17-004, filed September 28, 2017,4 at 3.
[42] WAC 197-11-440(b).
23 [43] FEIS 1-7 to 1-13.
[44] FEIS 1-33 to 1-34.

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and authorized to define its proposal and project objectives. Alternatives that fail to fulfill those project objectives are not reasonable and can be eliminated.[45]

The FEIS considered several realistic, reasonable options, and its review of alternatives satisfies the rule of reason. To sustain an EIS challenge based on insufficient alternatives analysis, the Coalition has the burden to establish that the FEIS failed to consider a reasonable number and range of feasible alternatives that meet the project's objectives, and must overcome the "great weight" afforded an agency's determination that an alternative is not reasonable.[46] The Coalition cannot meet that burden.

D. The FEIS's transportation and parking analyses are reasonable.

An EIS must provide a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decision.[47] The FEIS devotes 96 pages to discussion of transportation and parking issues, supported by detailed technical appendices, including the Transportation Discipline Report and Parking Discipline Report, which were prepared by Parametrix for the DEIS and updated for the FEIS. This thorough and painstaking analysis is more than reasonable.

The FEIS thoroughly described and analyzed the existing conditions under the "no build" alternative. It did not sugarcoat the existing traffic issues in the Project vicinity. Rather, the FEIS disclosed the projected increase in vehicular and non-motorized traffic, the conflicts between vehicles and non-motorized users using existing surface streets and sidewalks, the presence of industrial and commercial driveways, and the number of collisions between cyclists

[45] WAC 197-11-440 (allowing designation of the proposal as the preferred alternative or benchmark for the alternatives analysis); *Solid Waste Alternative Proponents*, 66 Wash. App. at 443–45 (upholding Okanogan County's consideration of only two sites for waste disposal, stating that the County's decision to narrow its choice to two sites was a policy rather than an environmental decision).

[46] *Solid Waste Alternative Proponents*, 66 Wash. App. at 443-45 (rejecting challenger's claim that an EIS must consider and evaluate all potential alternatives, and giving great weight to agency's decision to exclude alternatives)

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and vehicles in this area to date.[48] In short, the FEIS laid bare the fact that existing traffic conditions in the Project vicinity are challenging. This provided a realistic background and reasonable baseline against which to measure the "build" alternatives.

Additionally, the Draft EIS was subject to both public and SDOT scrutiny. The FEIS included every comment and criticism of the Draft EIS (including the Coalition's) elicited during the public comment process and SDOT's responses addressing those comments. This discussion is set forth in the 783-page FEIS Volume 2. The evidence at hearing will show that the public review process was rigorous and meaningful. It resulted in corrections, revisions, further study, and confirmation of underlying assumptions and analysis. For example, based on comments to the Draft EIS, SDOT collected additional transportation data from 2016-2017, PM peak hour traffic volume data, daily traffic volume data and vehicle classification information at 44 driveways, interviews with a sample of driveway owners,[49] weekend parking occupation and utilization data, and weekday data at later hours.[50]

The evidence will also demonstrate that the FEIS was based on national and local design guidelines, standards, and methodologies that are consistent with the City's policies, have been used on other transportation facilities in the City, are accepted by the industry, and are therefore legally adequate, notwithstanding opposing views held by the Coalition's witnesses. As the City's primary agency with expertise in evaluating transportation facilities, SDOT's choice of methodologies and practices are entitled to deference.

As will be demonstrated at hearing, the FEIS used reasonable, conservative methods and assumptions to ensure identification of potential impacts. For example, the transportation

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[47] *Klickitat County*, 122 Wn.2d at 644.
[48] FEIS at 1-7, Technical Appendix B at 4-1, 4-33, 5-7 to 5-8
[49] FEIS Technical Appendix B at 3-1, 4-1, 4-5, 4-13.

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1 analysis assumed that all bicycle traffic would shift to the applicable trail corridor for each build
2 alternative, rounded up vehicle and non-motorized user counts, and applied higher growth
3 rates.[51] Similarly, the parking analysis counted unpermitted and unregulated parking areas as
4 part of the existing parking supply and assumed greater removal of loading zone spaces even
5 though some spaces could be retained.[52] As a result, the FEIS's analysis erred in favor of
6 disclosing impacts, not minimizing or hiding them.

7 The evidence will establish that the FEIS in fact exceeds SEPA's disclosure policy
8 because it identified and analyzed even less-than-significant potential impacts. For example, the
9 parking analysis disclosed the number of parking spaces that will be lost under each alternative,
10 the location of those spaces, and an analysis of why the impacts are not significant. The
11 Coalition may argue that the impacts should have been characterized as significant, but even if
12 the Coalition's characterization is adopted, the information disclosed and the underlying analyses
13 are sufficient to satisfy the rule of reason.[53]

14 Finally, the FEIS more than adequately addresses measures to mitigate, minimize, or
15 avoid potential transportation or parking issues (either from existing conditions or from the
16 Project). SEPA does not require specific remedies for each environmental impact or a fully
17 detailed mitigation plan; general descriptions of mitigation measures are sufficient.[54]
18 Nevertheless, the mitigation measures described in the FEIS include safety features such as
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[50] FEIS Technical Appendix C at 3-4.
[51] FEIS Technical Appendix at B at 3-2, 3-6, 4-10, 4-27.
[52] FEIS Technical Appendix C at 3-4, 5-4.
[53] *See CAPOW*, 126 Wn.2d at 369, where the Washington Supreme Court held that asserted deficiencies in the traffic analysis for a proposed racetrack did not "survive the rule of reason" because the FEIS disclosed that the project "will make a bad situation worse" and described the impact as "Worse LOS F."
[54] *Solid Waste Alternative Proponents*, 66 Wn. App. at 447 (upholding adequacy of an EIS that contained "general descriptions of mitigation measures that could be used"); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 312, 197 P.3d 1153, 1171 (2008) (upholding adequacy of EIS that

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buffers, pavement markings, raised crosswalks, curb treatments, signage, lighting, and advanced warning systems to delineate potential conflict points.[55] As SDOT's witnesses will testify, these measures are widely accepted in the transportation design field and are used throughout the City of Seattle. SEPA imposes no requirement that mitigation measures be fully designed for the purpose of environmental review, as the Coalition has suggested. In any event, the Coalition's disagreement about how SDOT conducted its environmental review and technical design does not render the FEIS inadequate. The FEIS contains no material error warranting a remand for further study of transportation or parking issues.

E. The FEIS's land use analysis is adequate.

The City's SEPA rules provide that an EIS should include a summary of existing land use and shoreline plans and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them.[56] Additionally, the City's SEPA rules require that an EIS discuss significant environmental impacts to land and shoreline use, which includes housing, physical blight, and significant impacts of projected population on environmental resources.[57]

SDOT's "reasonably thorough discussion" of the potential land use impacts of the Project spans approximately 150 pages, including Chapter 4 of the FEIS and the Updates and Errata to the Land Use Discipline Report, in addition to the analysis included in the DEIS and associated discipline report. In addition to a comprehensive discussion of the applicable plans, goals, and policies, the original Land Use Discipline Report included a reader-friendly table summarizing the Project alternatives consistency with the Seattle Comprehensive Plan Goals and Policies.

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did not analyze specific turbine setback distances as a mitigation measure for the turbines' visual impact, but identified the principles and variables relevant to reducing visual impact).

[55] FEIS Technical Appendix B at 5-19 to 5-20.

[56] SMC 25.05.440.E.4.a.

[57] SMC 25.05.440.5.

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That table was updated for the FEIS, to reflect changes to the Comprehensive Plan, which was updated between the issuance of the DEIS and FEIS.

Despite the Appellant's representations to the contrary, the FEIS clearly acknowledged the importance of the maritime industrial nature of the area in the Project's location, the prioritization of water-related and water-dependent uses, and the fact that Shilshole is a designated "Major Truck Street."[58] The FEIS also considered the potential land use impacts to adjacent businesses, including consideration of, and discussion about, whether any businesses are likely to go out of business or relocate as a result of the project.[59] Although the Coalition will likely present evidence in and attempt to show that SDOT failed to identify miscellaneous goals or policies related to the Project or to argue that SDOT failed to identify what the Coalition views as significant land use impacts, they will not be able to meet their burden to establish that the FEIS is inadequate.

Moreover, the Coalition misapprehends the role of SEPA in analyzing land use impacts, particularly regarding the economic impacts to specific businesses. SEPA does not require the consideration of strictly economic issues related to individual businesses. Seattle's SEPA code provides that an EIS should analyze certain generalized economic factors, as well as regional, City, and neighborhood goals, objectives, and policies.[60] Seattle's code does not, however, anticipate the micro-economic analysis of specific businesses that the Coalition may advance in its evidentiary hearing. More generally, economics are not an element of the environment under SEPA. SEPA explicitly provides that certain types of information are not required to be discussed in an EIS, including: "Methods of financing proposals, economic competition, profits

[58] FEIS at 4-1 to -2, 4-10, 7-4.
[59] FEIS at 4-16 to 4-34.
[60] SMC 25.05.440.E.6.

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and personal income and wages, and social policy analysis such as fiscal and welfare policies and non-construction aspects of education and communications."[61] For those reasons, SDOT's witnesses will confirm that the detailed level of economic analysis of individual businesses that the Coalition may advance at hearing is essentially infeasible and not done in the context of an EIS.

Lastly, SDOT properly determined that there would be no probable significant land use impacts as a result of the Project. As described in the EIS, an alternative is considered to have a significant impact if it will "likely cause the permanent loss of land uses that are preferred (such as water-dependent, water-related, and industrial uses) under adopted City of Seattle policies." This definition of "significance" in the context of land use impacts is consistent with SEPA and how courts address the issue, essentially defining a significant land use impact as physical blight.[62] Evidence at hearing will show that the FEIS adequately disclosed the potential environmental impacts of the Project.

F. The Coalition will not be able to meet its burden of proving the FEIS is inadequate based on other issues.

The Coalition's Notice of Appeal identifies a number of other issues for hearing, such as potential impacts on the shoreline environment[63] or cumulative impacts. These issues are addressed in the FEIS, which appropriately discloses, discusses, and substantiates the

[61] SMC 25.05.448.C and 197-11-448. For example, in *SEAPC v. Cammack II Orchards*, the court held that a proposal's adverse impact on surrounding property values was not an environmental impact, but was akin to "profits and personal income" expressly exempted from EIS coverage. Reduced profits for businesses adjacent to the proposed trail are likewise not required to be analyzed in an EIS. 49 Wn. App. 609, 616, 744 P.2d 1101, 1105 (1987).

[62] SMC 25.05.440.5. *See, e.g.*, *Barrie v. Kitsap Cty.*, 93 Wn.2d 843, 859, 613 P.2d 1148, 1157 (1980) (holding that County EIS of a shopping center should have covered socioeconomic effects, where evidence indicated the mall could result in a decline of Bremerton's Central Business District); *W. 514, Inc. v. Cty. of Spokane*, 53 Wn. App. 838, 847, 770 P.2d 1065, 1070 (1989) (holding that downtown blighting consequences of a proposed shopping center would be an environmental impact, though plaintiffs failed to establish that such impacts were sufficiently probable to require EIS coverage).

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environmental impacts of the Missing Link Project. *See*, *e.g.*, FEIS Chapter 4 (identifying shoreline environments and discussing impacts); FEIS Chapter 11 (discussing cumulative impacts). The evidence and testimony to be presented by SDOT will demonstrate that the FEIS is adequate under the rule of reason and should be affirmed.

V. CONCLUSION

SDOT asks the Hearing Examiner to weigh the evidence and testimony presented at the hearing in light of the standards of review set out above. The evidence and testimony will demonstrate that the Coalition's challenge is without merit and should be rejected. The FEIS for the Missing Link Project is more than adequate to provide a basis for SDOT's informed decision-making about the Project.

DATED this 20th day of November, 2017.

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[63] Per the Examiner's Order on Motion to Dismiss, any issues concerning the City's determination regarding shoreline permits or exemptions are dismissed and cannot be addressed here.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of THE BALLARD COALITION of the adequacy of the FEIS issued by the Director, Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project.	Hearing Examiner File No.: W-17-004 CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a paralegal in the office of Van Ness Feldman LLP, on November 20, 2017 filed a copy of Seattle Department of Transportation's Pre-Hearing Brief and this Certificate of Service with the Seattle Hearing Examiner using its e-filing system and that on November 20, 2017 I addressed said documents and deposited them for delivery as follows:

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Seattle Department of Transportation Erin E. Ferguson Seattle City Attorney Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104	☐ By U.S. Mail ☐ By Legal Messenger ☒ By Email: (per agreement) Erin.Ferguson@seattle.gov Alicia.Reise@seattle.gov

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 20th day of November, 2017.

s/Amanda Kleiss
Declarant

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