BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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 POST-HEARING BRIEF

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Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

I. INTRODUCTION

The Environmental Impact Statement that is the subject of this appeal documents the Seattle Department of Transportation's ("SDOT") environmental review of the Burke-Gilman Trail Missing Link Project ("Project"). The Project would complete the last 1.4 miles of the existing regional multi-use, otherwise continuous, Burke-Gilman Trail ("BGT").

SDOT has completed a thorough and comprehensive environmental analysis of the Missing Link Project, which is fully documented in the Final Environmental Impact Statement ("FEIS"), the Draft Environmental Impact Statement ("DEIS") and their appendices. The FEIS relies on experts who used methodologies that are commonly employed in their respective professions to identify and disclose impacts. The Project location presents design challenges and demands policy judgments because of its proximity to arterial routes, Major Truck Streets, industrial and water-dependent businesses and a growing commercial neighborhood. The EIS fully informs decision-makers charged with siting and designing the Project about the Project's impacts. It discloses impacts associated with construction of five different alternatives, enabling decision-makers to resolve the Project challenges and make appropriate policy judgments.

The sole issue for resolution at this hearing is the adequacy of the FEIS. The Coalition has not met its heavy burden to sustain its challenge to the FEIS's adequacy and cannot overcome the substantial weight that the Examiner must accord to SDOT's determination of adequacy. Over the course of the hearing, the Coalition argued that SDOT should have completed its FEIS analysis differently, used different methodologies, and performed additional analysis. But the evidence at hearing established otherwise—SDOT's approach was thorough and comprehensive. A challenger can almost always argue that an EIS should have contained more or different analysis, but an EIS is not supposed to be "a compendium of every conceivable

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

effect or alternative to a proposed project, but is simply an aid to the decision-making process."[1] The purpose of the Examiner's review is not to "fly speck" the FEIS.[2] At best, the Coalition's evidence amounts to a difference of opinion, which is insufficient to establish that the FEIS is inadequate. The Coalition cannot meet its heavy burden to sustain its challenge to the FEIS on these grounds.

Also, the Coalition's contested evidence supporting its underlying subjective opinion of the Project (or, more typically, of the preferred alternative) is not relevant to this appeal. Although SDOT disagrees with the Coalitions opinion, it is beyond the province of the Examiner to rule on the wisdom of the proposed project. Instead, the Examiner is tasked with deciding whether the EIS provides the decision-maker with sufficient information to make a reasoned decision.[3] The FEIS's analysis meets the rule of reason, and the Coalition's appeal has no merit. The adequacy of the FEIS should be affirmed.

II. ARGUMENT

A. The Coalition misstates both the purpose of an EIS and EIS adequacy standards.

Washington courts apply the deferential "rule of reason" standard when considering EIS adequacy. The rule of reason is a broad, flexible cost-effectiveness standard, and does not require a discussion of every conceivable impact or an exhaustive discussion of alternatives.[4] Rather, because an EIS is simply an aid to the decision-making process, an EIS need only present decision-makers with a "reasonably thorough discussion" of the project's probable significant

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[1] *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 230, 951 P.2d 812, 815 (1998).
[2] *Mentor v. Kitsap Cty.*, 22 Wn. App. 285, 290, 588 P.2d 1226, 1230 (1978)
[3] *Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995) ("CAPOW").
[4] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn. 2d 619, 641, 860 P.2d 390 (1993).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

impacts to the environment.[5] As explained further below, the FEIS meets or exceeds this standard. It utilizes commonly accepted methodologies and approaches to quantify and assess the Project's potential impacts. SDOT even included additional analysis that is not required or typically contained in an EIS precisely so it could better assess issues of importance to various stakeholders.

To prevail in its appeal, the Coalition must establish that the FEIS is unreasonable. It has not, and cannot, do so. Instead, and as explained in detail below, the Coalition presented testimony that, at best, reveals a difference of opinion regarding the way the analysis could have been completed or conveyed. The Coalition's argument that the additional studies or analyses it advocates are typical or otherwise required to assess the Project's impacts are without merit. The mere existence of a difference of opinion is insufficient to support the Coalition's adequacy challenge. As Hearing Examiner Sue Tanner previously observed, "[i]t is not unusual for experts to disagree on the appropriate analytical approach to a given assignment."[6] Thus, "when 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."[7] The reviewing body must defer to the agency's expertise and affirm its analysis of environmental impacts absent definitive contrary expert testimony showing that SDOT's experts failed to meet industry standards or the rule of reason.[8]

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[5] *Klickitat County*, 122 Wn.2d at 644 (upholding EIS and holding that a general discussion in a document incorporated by reference was sufficient to satisfy the rule of reason).

[6] Findings and Decision of the Hearing Examiner for the City of Seattle, MUP-14-016(DR,W)/S-14-001, at p. 15.

[7] *City of Des Moines v. Puget Sound Regional Council*, 98 Wn.App 37 (1999) (according deference to SEPA agencies' choice of methodologies and affirming hearing examiner's decision to uphold the agencies' conclusions, despite contrary expert opinion).

[8] *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"); Findings and Decision of the Hearing Examiner, *supra* n. 16, at p. 15 (rejecting an appellant's challenge to an FSEIS noting, "The

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

More generally, the Coalition advanced several theories during the hearing that reflect a distorted view of SEPA's standards.

1. *The purpose of an EIS is to disclose significant impacts, not to design or select the safest project.*

Contrary to the Coalition's arguments and supporting witness testimony, the purpose of an EIS is to disclose probable significant impacts; not to choose the alternative with the least impact or to design the safest project. Even the Coalition's expert, Claudia Hirschey, confirmed this principle, albeit reluctantly.[9] The Coalition's criticisms of the FEIS for allegedly failing to present the safest design—for example, Ms. Hirschey's claim that the Preferred Alternative is not the safest alignment, or Mr. Bishop's claim that it is unsafe for trucks to cross the centerline[10] (even though local and national guidelines allow this maneuver)—are simply not relevant to the question of whether or not the FEIS properly identified probable significant adverse impacts.

An EIS's purpose is to inform decision-makers who are responsible for weighing the trade-offs of each decision. As the Coalition's witnesses admitted, any decision-making requires weighing trade-offs.[11] The decision-maker, not the EIS, must resolve these trade-offs. SEPA only requires the EIS to inform the decision-maker about the impacts so that the trade-offs can be resolved as part of the ultimate Project decision.[12]

Appellants have shown that the transportation analysis could have been done differently. They have not shown that [the applicant's expert's] analysis failed to meet industry standards, or that it failed to present . . . a reasonably thorough discussion of the significant aspects of the proposal's probable transportation impacts.").

[9] 12/5/17 Tr., at 1908:21 – 1909:10 (testimony of C. Hirschey).

[10] *Id.* at 1878:22 – 1879:6 (testimony of C. Hirschey); 11/27/17 Tr., at 63:16-25 (testimony of V. Bishop).

[11] 11/28/17 Tr., at 595:6-11 (testimony of S. Kuznicki). For example, as Brad Phillips testified, to preserve lanes, sidewalk space may need to be eliminated.11/30917 Tr., at 1069:12-17; 1227:15-25. Similarly, Bill Schultheiss testified that the choice of bicycle facility type requires evaluating trade-offs, as described in the national AASHTO guidelines. *Id.* at 1227:15-25.

[12] *Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816, 820 (1983) (stating, "SEPA is essentially a procedural statute" and "was not designed to usurp local decisionmaking or to dictate a particular substantive result").

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

2. *The purpose of an EIS is to disclose impacts to the environment as a whole, not to individuals.*

Contrary to the suggestion of several Coalition witnesses and counsel, the purpose of an EIS is to disclose and discuss probable impacts to the environment as a whole, and should not over-emphasize impacts specific individuals or their preferences.[13] Yet, much of the Coalition's testimony decried the sufficiency of discussion of impacts to specific individuals and businesses. For example, the Coalition's counsel repeatedly asked SDOT's economics expert, Morgan Shook, whether he had examined the Project's impacts to an individual business,[14] and the Coalition's witnesses highlighted impacts to specific driveways.[15] The Coalition failed to establish that any potential impact to individual businesses amounted to an undisclosed significant impact to the environment as a whole. Although SDOT *did* include some information related to specific businesses to aid in its analysis of the broader impact, EISs are not required to account for the types of limited individual impacts described by Coalition witnesses because such an approach is not consistent with the purpose of an EIS.[16]

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[13] *See* WAC 197-11-444 (listing the elements of the environment) and RCW 43-21C-020 ("Legislative recognitions – Declarations – Responsibility," indicating that the legislature viewed SEPA as based on importance of the "overall welfare and development of human beings" and that SEPA should be applied, in part, to "foster and promote the general welfare." Moreover, RCW 43-21C-020(2) requires the state and agencies to work, in part, to "assure for all people of Washington safe, healthful productive, and aesthetically and culturally pleasing surroundings").

[14] 12/1/17 Tr., at 1410:15-17 ("[W]hat does that tell me as a business along Shilshole about the economic impact on my business?"), 1427:18-22 (same).

[15] *E.g.,* testimony of Scott Kuznicki, 11/28/17 Tr., at 494:5 – 503:25 (regarding videos of truck movements at Salmon Bay Sand and Gravel driveway); testimony of Tim Olstad (employee of Salmon Bay Sand and Gravel)

[16] 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. Impacts to individual 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). *See also* discussion *supra*, Section H.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

3. *The FEIS disclosed all probable impacts and potential mitigation of said impacts; whether those impacts were labeled as "significant" or not is not grounds for invalidating the FEIS.*

Contrary to the Coalition's assertions at hearing, the lack of "significant impacts" identified in the FEIS is irrelevant. The question of whether an impact is significant is only germane to the question of whether or not an EIS is required. It does not bear on the question of EIS adequacy. Here, SDOT has prepared an EIS that discloses all probable impacts and discusses potential mitigation of those impacts. Whether the EIS labels those impacts as significant or not is beside the point.[17] Indeed, the Supreme Court has recognized the difficulty in defining significance, observing, "[A] precise and workable definition [of significance] is elusive because judgments in this area are particularly subjective—what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequence to another."[18] Because the FEIS discloses all probable impacts, the Coalition's subjective judgments about the significance of those impacts are not grounds for finding the FEIS inadequate.

4. *The Coalition cannot rely on evidence that was not reasonably available at the time SDOT prepared the FEIS.*

EIS adequacy must be decided on the basis of evidence predating EIS issuance. "Under the rule of reason, it would be preposterous to expect an EIS to disclose and analyze facts that were not known and not reasonably knowable at the time the EIS was issued."[19] To the extent the

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[17] 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."

[18] *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 277, 552 P.2d 674, 680 (1976).

[19] Settle, *supra*, at 14-27.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Coalition raised facts that were not known and not reasonably known at the time the EIS was issued, those facts cannot be a basis for finding the EIS inadequate.[20]

B. The Examiner must give substantial weight to SDOT's EIS adequacy determination.

As explained in SDOT's Pre-Hearing Brief, SEPA requires the Examiner to give substantial weight to SDOT's determination of EIS adequacy. In relevant part, RCW 43.21C.090 provides:

> 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**.

(Emphases added).[21]

Washington courts routinely recognize this statutory mandate. *City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn. App. 23, 849–50, 988 P.2d 27, 35 (1999) (citing "SEPA's statutory requirement that agency determinations of EIS adequacy are entitled to substantial weight"); *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447, 455 (1990) (stating "this court will give the agency's decision 'substantial weight'"); *see also* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, at 14-23 (2016) (stating that EIS adequacy decisions are "subject to the statutory directive that the agency's determination 'shall be accorded substantial weight'").[22] There is no merit to the Coalition's argument that SDOT is not entitled to this statutorily-mandated deference.

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[20] *E.g., infra*, at Section F(d)(8).

[21] *See also* RCW 43.21C.075(3)(d) (confirming that when an agency provides for administrative appeal of EIS adequacy, the responsible official's procedural determinations must receive "substantial weight"); WAC 197-11-680(3)(viii) (stating the same).

[22] SEPA, as originally enacted in 1971, contained no standards of judicial review. Settle, *supra*, at 4-4. However, in 1973 the legislature amended SEPA by enacting RCW 43.21C.090 directing courts to accord "substantial weight" to EIS adequacy determinations. 1973 Wash. Laws ch. 179, § 3. This type of statutory amendment to add a standard of review is an "unusual additional step" that requires giving effect to "the legislature's explicitly stated intent." *See Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 237-38, 110 P.3d 1132, 1139 (2005) (holding

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Even under general principles of agency deference, where there is no specific statutory mandate to grant deference or substantial weight, courts refrain from extending deference to an agency action only when the agency acts in manner that is "arbitrary, capricious, and contrary to law," meaning the action was "willing and unreasoning, and taken without regard to the attending facts or circumstances."[23] The Coalition has not cited any authority to support applying these general principles when the applicable statute mandates deference. Moreover, even if these principles applied, there is no evidence that SDOT's actions were arbitrary, capricious or contrary to law. Rather, the Coalition attempts to erode the deference owed to SDOT by focusing on decisions that are not relevant to SDOT's determination of the FEIS's adequacy, such as work on advancing design initiated shortly before the FEIS's publication. As the Examiner already concluded, these allegations of purported impropriety are outside the scope of the Coalition's appeal,[24] and are not relevant to the adequacy of the FEIS. In short, the Coalition has not provided any legal authority supporting its argument that statutorily required deference can be overcome by allegations of impropriety related to issues that are beyond the scope of the appeal, and which are entirely unrelated to the adequacy of the EIS. The Coalition's argument that the Examiner should refrain from extending the deference owed to SDOT in this case is no more than a thinly veiled attempt to expand the scope of the Coalition's appeal and undermine SDOT's credibility.

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that the legislative intent to grant deference under the Growth Management Act supersedes deference granted by the Administrative Procedure Act).

[23] *Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 716, 66 P.3d 640, 645 (2003) (quotation marks omitted).

[24] The Examiner has already ruled that issues relating to SDOT's actions after the FEIS's completion were not raised in the Coalition's appeal and constitute a different SEPA challenge; thus, any post-FEIS evidence will not be considered as part of this appeal except in the context of the deference issue. 12/1/17 Tr., at 1501:13 – 1502:2. To the extent the Coalition relies on SDOT's actions before the EIS process (e.g., prior appeals or designs), such evidence is also irrelevant to this appeal.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

In any event, the Coalition's argument fails because SDOT's actions were consistent with both SEPA and the Seattle Municipal Code ("SMC"). The Coalition tried to show that an agency is prohibited from taking *any* action prior to the issuance of an FEIS,[25] but the provision they cited includes an exception that expressly allowed SDOT to proceed with project design. Specifically, the exception allows "developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection 25.05.070.A,"[26] which limits the taking of an action that will limit the choice of reasonable alternatives. As established by the only testimony presented about this topic at hearing, SDOT's actions fit squarely within this exception. SDOT's Environmental Manager, Mark Mazzola, testified that SDOT's only action before FEIS issuance (in May 2017) was the commencement of discussions with a consultant (around late March 2017) to develop the Preferred Alternative's design.[27] As Mr. Mazzola testified, this action was consistent with the exception set forth in SMC 25.05.070(D) to the prohibition on further action because it was limited to development of project design and did not in any way limit SDOT's choice of alternatives.[28] The Coalition's interpretation of SMC 25.05.070 would render the express exception set forth in SMC 25.05.070(D) meaningless because an agency would be barred from performing even the limited work allowed under SMC

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[25] SMC 25.05.070(A) states in full, "Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would: 1. Have an adverse environmental impact; or 2. Limit the choice of reasonable alternatives."

[26] SMC 25.05.070(D).

[27] 12/1/17 Tr., at 1494:4 – 1495:7 (testimony of M. Mazzola).

[28] Notably, Mr. Mazzola did not testify that the consultant even advanced the Preferred Alternative's design before the FEIS's issuance. The Coalition's counsel also mischaracterized Brad Phillips' testimony about the costs of advancing design. The Coalition's counsel claimed Mr. Phillips said that it cost $250,000 to $350,000 to advance designs from ten percent to 30 percent. 12/1/17 Tr., at 1515:11-13. In fact, Mr. Phillips stated that that was the cost to advance designs for construction (i.e., 100% final design). 11/30/17 Tr., at 1031:1-8.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

25.05.070(D), such as the work that SDOT did in this case. Such a result is contrary to basic rules of statutory construction.[29]

The Coalition's reliance on SMC 25.05.070(E) is also unavailing. SMC 25.05.070(E) provides that "*[n]o final authorization of any permit* shall be granted until expiration of the time period for filing an appeal in accordance with Section 25.05.680, or if an appeal is filed, until the fifth day following termination of the appeal." (Emphasis added.). It is uncontested that the City has not authorized any permits for this Project.[30]

C. SDOT's role as lead agency was proper.

As the Examiner has already ruled, SDOT's role as both project proponent and lead agency "as a matter of law does not serve as a basis upon which the Coalition may challenge the FEIS."[31] Regardless, the Coalition continues to advance a theory that SDOT improperly influenced its consultants. Contrary to the Coalition's claims, SDOT's work with its consultants is entirely consistent with its role as lead agency under SEPA.

WAC 197-11-420 contemplates an active, controlling role for lead agencies. "Preparation of the EIS is the responsibility of the lead agency," and "[n]o matter who participates in the preparation of the EIS, it is the EIS of the lead agency."[32] The lead agency bears the responsibility of "assur[ing] that the EIS is prepared in a professional manner and with appropriate interdisciplinary methodology, and the responsible official bears the responsibility of "direct[ing] the areas of research and examination to be undertaken."[33] Without exception, all of

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[29] *State v. Lilyblad*, 163 Wn.2d 1, 11, 177 P.3d 686, 690 (2008) ("This court may not interpret any part of a statute as meaningless or superfluous.").

[30] As Mr. Mazzola testified, since the FEIS's publication, SDOT has not made a formal decision or taken any action as defined under SEPA. 12/1/17 Tr., at 1514:1-6.

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

[32] *Id.*

[33] *Id.*

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

SDOT's witnesses who testified on this subject, each of whom has extensive EIS experience, testified that it is common for the lead agency or project applicant to provide comments and feedback to the consultants involved in EIS preparation, and that SDOT did not interfere with their independent professional judgment.[34] SDOT's role in this FEIS was no different than any other lead agency these witnesses had worked with.

It is apparent from the evidence at the hearing that SDOT staff's comments on its consultants' work product were simply suggestions, feedback, or questions to which the consultants ultimately agreed.[35] For example, as Ms. Ellig testified, she adopted SDOT's comment to revise language from "traffic hazards" to "incident response data," because the latter term was more appropriate and was, in fact, supported by data.[36] Morgan Shook testified that he removed the monetization of traffic delay that was in his draft report because he agreed with SDOT's comment that the calculation was not precise and could be misinterpreted as showing the actual cost to businesses.[37]

The Examiner should reject the suggestion that SDOT's working relationship with its consultants was improper.

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[34] 11/29/17 Tr., at 977:3 – 978:24 (testimony of E. Ellig); 11/30/17 Tr., at 1204:22 - 1205:25 (testimony of M. Johnson); 12/1/17 Tr., 1386: 1-8; 1384:2-12 (testimony of M. Shook); 12/1/17 Tr., 1456:25; 1457:1-23; 1466:8-16 (testimony of M. Mazzola).

[35] *See* 12/1/17 Tr., at 1540:18 – 1548:14 (testimony of M. Mazzola regarding SDOT's comments).

[36] 11/29/17 Tr., at 921:4-17 (testimony of E. Ellig).

[37] *Compare* 12/1/17 Tr., at 1378:4 – 1384:1 (testimony of M. Shook regarding changes to draft report) *with id.* at 1547:4-20 (testimony of M. Mazzola regarding his comments to the draft report noting "I don't think it's appropriate to monetize the delay . . . . Having said that, I'd like to understand the methodology and the calculation that went into this analysis").

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

D. SDOT's analysis of alternatives satisfies the rule of reason.

1. SEPA allows agencies to use its proposal to define its alternatives and to limit its alternatives analysis to a single type of facility or design.

SEPA requires agencies to ensure that project proposals are "properly defined."[38] The agency may then use a properly defined proposal as the benchmark for identifying and comparing alternatives.[39] Under the rule of reason, a project proponent need only look at reasonable alternatives—"actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation."[40]

An agency's decision as to what is or is not a reasonable alternative is afforded "great weight."[41] Courts defer to agency definitions of proposals and the use of such proposals as a starting point in identifying reasonable alternatives.[42] For example, in *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, the agency defined its proposal as a four-lane bypass highway around Sequim, and the court held that the EIS was not deficient for considering only four-lane alternatives and excluding two-lane alternatives.[43] Notably, that project was funded for only a two-lane highway, and the Washington State Department of Transportation ("WSDOT") stated in the FEIS that the remainder of the project (expanding the bypass to four lanes) would be constructed "as warranted and as money is available."[44] Despite the lack of funding, the court cited WSDOT's commitment to eventually building the four-lane highway and upheld the consideration of only four-lane alternatives.

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[38] WAC 197-11-060(3).
[39] *Id.*; WAC 197-11-440.
[40] WAC 197-11-440(5)(b)
[41] *Solid Waste Alternative Proponents v. Okanogan Cty.*, 66 Wn. App. 439, 445, 832 P.2d 503, 507 (1992)
[42] Settle, *supra*, at 14-65 (stating, "the proponents' purpose is necessarily the starting point in identifying reasonable alternatives").
[43] *Concerned Taxpayers*, 90 Wn. App. at 230, 951 P.2d 812.
[44] *Id.* at 228.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

In *Solid Waste Alternative Proponents v. Okanogan Cty.*, the agency defined its proposal as an in-county solid waste landfill, and the court upheld EIS exclusion of an out-of-county alternative.[45] The court stated that the decision to look only at in-county sites was a policy decision, not an environmental decision, and upheld Okanogan County's policy decision because the environment is not the only consideration in situating a landfill.[46] The court also upheld the EIS's analysis of only two in-county sites, even though a County study had rated four sites as equally suitable.[47] As the court stated, no matter which alternative the County selected, "someone would have been unhappy," but "community displeasure cannot be the basis" for selecting alternatives.[48]

For the same reasons, the alternatives analysis here is adequate. SDOT, like WSDOT and Okanogan County, is committed to completing the BGT, an existing regional multi-use trail. This commitment is expressed not only by SDOT, but also as a matter of policy in several City plans. The BGT's completion has been in the City's comprehensive plan since the 1990s.[49] The Bicycle Master Plan identifies the Project as a "catalyst project" that "reduce[s] critical barriers to bicycling by closing network gaps and increase[s] safety by building all ages and abilities friendly bicycle facilities to the maximum feasible extent."[50] The Pedestrian Master Plan identifies the Preferred Alternative corridor as part of the "Priority Investment Network" for pedestrian travel.[51] The FEIS presented five build alternatives that could reasonably fulfill the

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[45] 66 Wn. App. at 444, 832 P.2d 503, 506.
[46] *Id.* at 444.
[47] *Id.* at 445.
[48] *Id.* at 446.
[49] Exhibit R-1 at 1-1.
[50] Exhibit R-8 at p. 40.
[51] Exhibit R-36 at p. 56; 12/1/17 Tr., at 1462:1-12 (testimony of M. Mazzola).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Project's objectives and the City's plans. The Coalition's displeasure with these alternatives cannot be the basis for finding the alternatives analysis inadequate.

In addition to identifying reasonable alternatives, the FEIS comprehensively analyzed each of the alternatives in detail. The FEIS need only devote sufficiently detailed analysis to each alternative to permit a comparative evaluation, and may vary the amount of consideration given to each alternative.[52] As illustrated by the FEIS's table of contents, it provided an in-depth assessment of each alternative. For every section devoted to the Preferred Alternative, a separate section is provided for the four other build alternatives and the no build alternative. The number of alternatives considered and the level of scrutiny provided in the FEIS clearly surpasses the requirements necessary to demonstrate sufficient alternatives analysis.[53]

2. The FEIS analyzed and reasonably rejected the Coalition's preferred alternative facility types.

"An EIS is not required to include all reasonable alternatives but a reasonable number and range."[54] The FEIS analyzed a reasonable number and range of alternatives consistent with the properly defined project. Conversely, the alternatives proffered by the Coalition—an elevated bridge and bicycle-only facility (either a one-way or two-way cycle tracks) do not meet the Project's objective to provide a multi-use trail. They are different types of transportation facilities. As the court held in the Sequim bypass case, different facility types or types of design are not necessary for a reasonable alternatives analysis. In that case, the FEIS considered only one type of design for one type of facility—a four-lane highway—that the agency lacked funding

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[52] WAC 197-11-440(5)(c).

[53] *E.g.*, *Solid Waste Alternative Proponents.*, 66 Wn. App. at 445, 832 P.2d 503, 507 (holding that the EIS's consideration of two alternative sites for an in-county landfill was sufficient); *CAPOW*, 126 Wn.2d at 367 (holding that the EIS sufficiently considered alternative sites where it identified and examined three sites and concluded they all contained flaws that rendered them infeasible);

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

to build.[55] The court concluded that this approach was reasonable. Similarly, SDOT's policy decision to focus on building a facility that matches the existing BGT is reasonable.

The evidence in the record also demonstrates that the alternative facility types proposed by the Coalition are unreasonable and supports SDOT's decision documented in the FEIS to reject those alternatives.[56] For example, the elevated bridge alternative is unreasonable because, as the Coalition admitted, this alternative has a "significantly higher cost than an at-grade trail" and provides "no intermediate access to the trail,"[57] meaning that users would be forced to travel the entire length, from 22nd Avenue to 17th Avenue, to exit the bridge. The lack of access is inconsistent with the project objective of accommodating all users, which would require a bridge with additional access points, would require a much bigger footprint, and would cost significantly more than the already significant cost of the Coalition's proposal.[58]

With respect to the bicycle-only facilities, it is important to note that the Examiner previously dismissed the Coalition's claims based on that type of facility alternative because the Coalition failed to provide any supporting argument or evidence to support the alternative when the City challenged it in a pre-trial motion.[59] Therefore, no further discussion is necessary. Nevertheless, the evidence in the record supports SDOT's decision to exclude that alternative from further analysis and the Coalition has not met its burden to prove otherwise. Although the Coalition challenged the safety of two-way trails because of the contraflow movement, the Coalition presented no evidence about the feasibility of one-way trails or any other design

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[54] Settle, *supra*, at 14-66.
[55] *Concerned Taxpayers*, 90 Wn. App. at 230.
[56] In fact, the FEIS specifically considered both but rejected them because these facilities. Exhibit R-1, at 1-33.
[57] Exhibit A-1, at p. 046.
[58] 11/30/17 Tr., at 1091:15 – 1092:1 (testimony of B. Phillips); *see Solid Waste*, 66 Wn.App. at 446 (recognizing cost-effectiveness basis for the rule of reason).
[59] Order on Motion to Dismiss, W-17-004, filed September 28, 2017,4 at 3.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

alternative. The Coalition's displeasure with the Project's design is insufficient to establish that the alternatives analysis is insufficient.

In addition to one-way facilities not meeting the project objective, SDOT's witnesses established other reasons why one-way trail alternatives would not be reasonable here. As Bill Schultheiss explained, placing one-way trails on both sides of Shilshole would introduce several risk factors from the north side of Shilshole, such as additional street intersections, driveway crossings, and higher volumes of traffic turning across the trail's path.[60] Blake Trask explained that the Project is bookended on both ends by the BGT's existing facility type—one-way multi-use trail—making it inappropriate to switch facility types in the middle.[61] SDOT's policy decision to focus on building a facility that matches the existing BGT is reasonable and should be sustained.

E. The Project was sufficiently designed to evaluate impacts.

As has been confirmed repeatedly in these proceedings and in related superior court proceedings, [62] SEPA does not require a project proponent to design a proposal to a uniform, specific percentage of completion before environmental review can be conducted. Instead, SEPA requires design sufficient to reasonably identify the principal features of the proposal and its environmental impacts.[63] The Coalition has failed to present evidence to support its claim that the underlying design is insufficient.

First, all of SDOT's experts who testified on the matter agreed that the design was sufficient to evaluate and disclose impacts. The experts also testified that the Project's level of

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[60] 12/1/17 Tr., at 1288:1 – 1289:4 (testimony of B. Schultheiss).
[61] 12/5/17 Tr., at 1732:16 – 1733:8 (testimony of C. Hirschey).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

design is typical for an EIS.[64] To provide an accurate comparison across alternatives, all of the alternatives would need to be designed to the same level. The design fulfills SEPA's mandate that an EIS be prepared "at the earliest possible point in the planning and decision-making process."[65]

Even the Coalition's witnesses support this conclusion. Ms. Hirschey ultimately admitted that she previously worked on an EIS (for the Lynnwood Link Extension) that evaluated impacts based on a "conceptual design," which did not include "design elements [that] would be further detailed in later stages of project design."[66] Brad Phillips, the lead civil designer for the Lynnwood Link Extension and the person who determined that the Project's design was sufficient for the EIS,[67] confirmed that the Lynnwood project's level of design was "very similar" to the level of design here.[68]

Further, the Coalition failed to identify any aspect of the design that was insufficient to allow evaluation of impacts. According to Ms. Hirschey's report, a sufficient design requires survey data, documentation of sight distance, and would enable documentation of truck tracking.[69] The Project's design included survey data and documentation of sight distance,[70] which Ms. Hirschey's report confirmed was not an impact issue based on the level of design

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[62] 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 on October 18, 2017; Order Denying Plaintiffs' LRC 7(b)(70 Renewed Motion to Enforce Second Order of Remand, filed in No. 09-2-26586-1 SEA on November 29, 2017.
[63] WAC 197-11-055.
[64] 11/29/17 Tr., at 918:1-14 (testimony of E. Ellig); 11/30/17 Tr., at 1075:15-19 (testimony of B. Phillips); 11/30/17 Tr., at 1301:16 -1302:25 (testimony of B. Schultheiss); 12/1/17 Tr., at 1466:13-16 (testimony of M. Mazzola).
[65] WAC 197-11-055(2); SMC 25.05.055(b). *See also* WAC 197-11-406 and SMC 25.05.406 (stating, "[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").
[66] to 12/5/17 Tr., at 1906:13 – 1907:15 (testimony of C. Hirschey).
[67] 11/30/17 Tr., at 1078:11 – 1079:4 (testimony of B. Philips).
[68] *Id.* at 1035:18 – 1036:5.
[69] Exhibit A-3 at p. 5.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

completed.[71] And as explained below, "truck tracking" is not an analysis typically required or necessary for an EIS. Nevertheless, SDOT's design was adequate and sufficient to allow SDOT's experts and the Coalition's expert to perform Autoturn analyses to document truck tracking issues for purposes of judging design sufficiency.

The Coalition's witnesses' testimony that the design was based on ranges (for example, ranges of trail and lane widths), and thus was insufficiently designed to determine whether the trail met standards, was also inaccurate. The design drawings prepared by Mr. Phillips show that the Project was designed with specific widths and dimensions.[72] As Mr. Phillips explained, the FEIS describes the widths as a range because the dimensions could change during further design.[73] Thus, the use of ranges more accurately captures and discloses the possibility of future adjustments, but this does not suggest that the Project was not sufficiently designed.

F. The FEIS's transportation and safety analysis meets the rule of reason.

1. SDOT's analysis was based on reasonable and standard methodologies.

Under the rule of reason, an EIS is adequate if it provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decision.[74] The FEIS's transportation and safety analysis meets the rule of reason. The transportation analysis is primarily documented in two locations: chapter 7 of the FEIS[75]; and the Transportation Discipline Report appended to the FEIS.[76] As discussed below and by all of

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[70] Exhibit R-10; 11/27/17 Tr., at 164:21 – 165:7 (testimony of V. Bishop regarding survey data); 11/29/17 Tr., at 892:11 – 893:16 (testimony of E. Ellig).
[71] Exhibit A-3 at p. 8 (noting with respect to sight distance under the Preferred Alternative, "Trail moved further from edge of street and barriers were eliminated").
[72] Exhibit R-10; 11/30/17 Tr., at 1032:20 – 1033:12 (testimony of B. Phillips).
[73] 11/30/17 Tr., at 1033:3-12 (testimony of B. Phillips).
[74] *Klickitat County*, 122 Wn.2d at 644.
[75] Ex. R-1.
[76] Ex. R-3.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

SDOT's witnesses who testified about this issue, the FEIS was based on standard and reasonable practices and national and local guidelines;[77] applied conservative assumptions;[78] gathered data using reasonable and standard methods;[79] and, in many instances, performed more analysis than is typical in an EIS.[80]

The FEIS also adequately compares the Project to existing conditions under the "no build" alternative, as required by SEPA.[81] The FEIS's transportation analysis begins with a summary of existing conditions, followed by an analysis of future conditions if the Project were not built.[82] As Respondents' witnesses testified, a substantial number of cyclists are using the street under existing conditions; the concerns that the Coalition raised are issues under existing conditions and are not attributable to the Project. In fact, the Project improves conditions as compared to the existing conditions in a number of significant ways.[83]

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[77] 11/29/17 Tr., at 822:2 – 840:23 (testimony of E. Ellig describing her methodology for assessing vehicular operations, freight, non-motorized transportation, public transportation, freight rail, and safety and confirming that the methodologies are typically used in her profession and was peer-reviewed by her team at Parametrix, the Environmental Science Associates team, and SDOT); 11/30/17 Tr., at 1026:14 – 1027:24 (testimony of B. Phillips regarding his use of the NACTO and AASHTO guidelines in designing the Project).

[78] 11/29/17 Tr., at 818:16-25 (testimony of E. Ellig regarding list of additional analyses done for this FEIS that are typical for EIS); 830:15-22 (testimony of E. Ellig regarding additional collection and analysis of driveway delay not typical of EIS); 906:12-14 (testimony of E. Ellig regarding use of the PM peak hour to "establish the worst-case condition"); 11/30/17 Tr., at 1042:2-4; 1097:10-17 (testimony of B. Phillips regarding SDOT's manual's specification that the standard design vehicle is a single unit truck (SU-30), and Mr. Phillips' use of a larger design vehicle (WB-50) at certain locations).

[79] 11/29/17 Tr., 821:23 – 822:1; 823:20-25; 917:20-24 (testimony of E. Ellig). 11/30/17 Tr., at 1075:10-14 (testimony of B. Phillips). 12/1/17 Tr., at 1302:17 – 1303:2 (testimony of B. Schultheiss); 1476:22 – 1477:6 (testimony of M. Mazzola). 12/5/17 Tr., at 1796:24 – 1797:3 (testimony of D. Chang); 12/5/17 Tr., at 1860:19-25 (testimony of C. Hirschey acknowledging that the tools used in SDOT's analysis are "commonly used").

[80] 11/19/17 Tr., at 824:15-17; 855:8-21 (testimony of E. Ellig, explaining that she examined and collected data 44 driveways, and that she has not typically done as extensive an analysis of driveways as SDOT did here); 11/30/17 Tr., at 1039:14 – 1040:10 (testimony of B. Phillips, explaining that AutoTURN analyses are typically used in final design, and that it is not typical to use AutoTURN on driveways).

[81] WAC 197-11-440(5)(b)(ii) (requiring comparison of the "no action" alternative to other alternatives).

[82] Exhibit R-3, Appendix B, at Chapter 4 ("Affected Environment"); Section 5.1 ("Potential Impacts - No Build Alternative")

[83] 11/29/17 Tr., at 834:14-25; 902:20-25 (testimony of E. Ellig); 11/30/17 Tr., at 1060:3-21 (testimony of B. Phillips); 11/30/17 Tr., at 1258:3 – 1259:22 (testimony of B. Schultheiss).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

2. To advance the Coalition's arguments, its witnesses expressed opinions that were not credible.

The Examiner must determine the facts of this case based, in part, on his judgment of witness credibility and must determine the value or weight to be given to the testimony of each witness.[84] With regard to expert witnesses, the Examiner is not required to accept an expert's opinion. To determine the credibility and weight to be given to an expert, the Examiner may consider the reasons given for an opinion and the sources of his or her information.[85] Here, Coalition witnesses were forced to support untenable theories that were inconsistent in many cases with their own past practices. As a result, their credibility suffered, and the strength of their opinions was undermined, and they failed to refute the testimony of SDOT's experts. For example:

- Mr. Kuznicki admitted that his expert opinion "depends on who my client is," suggesting that his conclusions would be different had he been retained by SDOT rather than the Coalition.[86] He criticized the effectiveness of pavement markings and signage in this proceeding, despite having approved drawings for those specific design elements in an earlier iteration of the trail. This demonstrates his willingness to change his positions depending on who pays the bill. His opinions are unreliable.

- Ms. Hirschey proclaimed that she was not aware of any involvement in an EIS that relied on concept level of design, that "most" EISs on which she had worked were designed

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[84] Among other factors, the Examiner may consider the opportunity of the witness to observe and know things related to the witness's testimony; any personal interest the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; and, the reasonableness of the witnesses' statements. *See, e.g.,* Washington Pattern Jury Instruction ("WPI") 1.02. Consistent with this principle, the Examiner should give the appropriate weight to lay opinion testimony offered by Coalition witnesses, none of which was sufficient to rebut the reasoned testimony of SDOT's expert witnesses that utilized standard methods of their profession to assess potential project impacts.

[85] *See, e.g.*, WPI 2.09.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

to a specific level beyond conceptual design, and that the Project's design failed to meet that level.[87] On cross-examination during rebuttal, however, when confronted with an example of an EIS for a transportation project on which she had worked, she was forced to admit that that EIS was based on a conceptual level of design and which anticipated subsequent design, similar to SDOT's approach in this FEIS.[88]

- Ms. Hirschey initially testified that riding on a contraflow side path is two to three times more dangerous than riding in the road.[89] On rebuttal she contradicted herself, confirming that the study that she had earlier referenced was much narrower and admitted that the Project's design in the locations where there are no driveway or intersection crossings provides a safer condition than existing conditions, where bicyclists ride in the road, because the Project provides separation from street traffic.[90]

- The Coalition experts repeatedly mischaracterized the FEIS, testifying that it "lacked" or "omitted" discussion or analysis, when, in fact, the purportedly missing analysis is included in the document. For example, Ms. Hirschey testified that the FEIS did not "develop the study methodology . . . to define the data collection and the analyses."[91] Her testimony ignores an entire chapter in the Transportation Discipline Report on "Methodology."[92] Similarly, her claim that the FEIS failed to analyze the "safety factors" identified in her report is belied by the FEIS itself. As Ms. Ellig testified, Table 1-1 of the FEIS summarizes the FEIS's discussion of the safety factors, which are discussed in detail throughout the FEIS for each of the alternatives

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[86] 11/28/17 Tr., at 556:14 – 557:9 (testimony of S. Kuznicki).
[87] 12/6/17 Tr., at 1904: 10-15 (testimony of C. Hirschey); 11/27/17 Tr., at 180:8- 181:4 (testimony of C. Hirschey).
[88] 12/5/17 Tr., at 1906:13 - 1908:4 (testimony of C. Hirschey).
[89] 11/29/17 Tr., at 946:3-7 (Coalition's counsel's questioning); 11/27/17 Tr., at 217:18-23 (testimony of C. Hirschey).
[90] 12/5/17 Tr., at 1899:15 – 1901:13 (testimony of C. Hirschey).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

as well as the "no build" alternative.[93] Ms. Ellig similarly testified as to the location of the relevant information referenced in Table 1 to Ms. Hirschey's report,[94] which Ms. Hirschey maintained was not included in the EIS.[95] Similarly, Mr. Bishop who has been retired for ten years and who last worked on an EIS around 15 years ago,[96] misstated the relevant standards and industry practices. For example, he claimed that streets should be designed for trucks (as opposed to accommodating trucks), that the Project's lane offset violates standards, or that truck aprons are a highly unusual and dangerous design feature. As explained below, SDOT's evidence established that none of these claims are correct.

The Coalition's experts and their shifting opinions are not credible and their opinions do not support a finding that the FEIS is inadequate.

3. SEPA requires the consideration of impacts measured from a baseline of existing conditions.

Throughout the presentation of its case, the Coalition's witnesses demonstrated that they ignored or failed to consider existing conditions. This failure is most evident from Ms. Hirschey's report and testimony. As Ms. Hirschey admitted, her report does not discuss or consider the "no build" alternative anywhere except in Table 1.[97] Table 1 of Ms. Hirschey's report, however, is half-empty with respect to the no build alternative.[98] At the hearing, Ms. Hirschey confirmed that this is because she did not do any analysis or inventory for the no build

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[91] 11/27/17 Tr., at 182:10 – 183:5 (testimony of C. Hirschey).
[92] Exhibit R-3, Appendix B, at Chapter 3.
[93] Exhibit R-1 at 1-29
[94] Exhibit A-3 at p. 7.
[95] 11/27/17 Tr., at 247:8-13 (testimony of C. Hirschey).
[96] 11/27/17 Tr., at 134:12-17; 185:8-25 (testimony of V. Bishop).
[97] 12/5/17 Tr., at 1911:2012 (testimony of C. Hirschey).
[98] Exhibit A-3 at Table 1.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

alternative, such as an analysis of the lane widths, driveway sight distances, or truck tracking at driveways.[99]

The need to consider existing conditions is especially critical here, because many of the "impacts" the Coalition attributed to the Project are actually existing issues that are not attributable to or exacerbated by the Project. For example, the claim that hiring flaggers would be costly and logistically difficult[100] ignores the fact that flaggers may be needed under existing conditions.[101] The need to hire flaggers is not an impact of the Project. Another example of the importance of considering existing conditions is reflected in Ms. Hirschey's report. She noted that one of the factors for considering a bicycle contra-flow lane is if there are "a substantial number of bicyclists already using the street."[102] Ms. Hirschey nevertheless admitted that she simply did not consider this factor.[103] Finally, as discussed further below, by ignoring existing conditions, the Coalition obscures the fact that many of the safety concerns they raised—e.g., sight distance concerns, exposure to conflicts, contra-flow travel—are concerns that exist today, and are mitigated by the construction of a trail that lends definition to a currently chaotic transportation corridor. The very issues that the Coalition ascribes to the Project are, in fact, a product of poor existing conditions.

4. The Coalition's scattered criticism of the transportation analysis revealed no material flaws.

The Coalition's challenge to the FEIS transportation analysis is fundamentally flawed. Throughout the hearing, the Coalition and its witnesses attempted to obscure the underlying

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[99] 11/28/17 Tr., at 280:12 – 281:3 (testimony of C. Hirschey).
[100] 11/28/17 Tr., at 374:19 – 375:19 (testimony of T. Olstad).
[101] 12/5/17 Tr., at 1794:14 – 1795:6 (testimony of D. Chang).
[102] Exhibit R-3, at p. 10.
[103] 11/28/30 Tr., 296:20 – 297:24 (testimony of C. Hirschey)..

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

soundness of the FEIS by engaging in classic fly-specking[104]—raising a myriad of alleged flaws that are inaccurate, harmless, or simply distracting. The Coalition's dissatisfaction with the FEIS's methodology is not, however, a lawful basis for finding the FEIS inadequate. A methodology consistent with industry-accepted standards is legally adequate even if disputed by opposing experts.[105] In light of SDOT's expertise in analyzing transportation and safety, it must be given deference in its choice of methodology.

Even without the deference given to SDOT's witnesses, the scattered theories the Coalition presented do not establish adequate grounds for an inadequacy determination. Although the Coalition's points are addressed in detail below for completeness' sake, the Examiner need not fall into the Coalition's fly-specking exercise. The Coalition has failed to raise any probable significant impact not disclosed in the FEIS and has failed to show that the FEIS departed from reasonable or standard industry practices.

i. The FEIS reasonably discussed and analyzed truck activity.

The FEIS disclosed and discussed freight activity in the Project area. For example, the FEIS identified the street designations for the various alternatives, including which alternatives have streets that are designated as Major Truck Streets (the Leary Alternative and the Preferred Alternative) or Minor Truck Streets.[106] For every alternative, the FEIS team identified every driveway, and gathered and disclosed relevant information related to the driveway type.[107] The

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[104] *Mentor v. Kitsap Cty.*, 22 Wn. App. 285, 290, 588 P.2d 1226, 1230 (1978); *see also* SDOT's Pre-Hearing Brief, filed herein on November 20, 2017, at p. 5-6.

[105] *City of Des Moines*, 98 Wn.App at 37 (affirming hearing examiner's decision to uphold conclusions of SEPA agencies with expertise, despite contrary expert opinion); *see* discussion *supra* Section (B).

[106] Exhibit R-3, Appendix B (Final Transportation Discipline Report), at Figure 4-2.

[107] Exhibit R-3, Appendix B, Table A1. Special Considerations for Driveways 11/29/17 Tr., at 825:14 - 826:18 (testimony of E. Ellig).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

FEIS team also included the driveway widths in the design and assessed sight distance issues.[108] The FEIS team also collected and disclosed additional information and performed additional analyses of driveways with unique operations including: performing AutoTURN analyses;[109] collecting five days of video footage to measure truck volumes at driveways;[110] and interviewing businesses about their driveway operations.[111]

The Coalition's main criticism of the Project as it relates to truck activity is that the Project is not designed to allow trucks to turn at all locations within the truck's lane (which the Coalition described as "within lane" movement), but rather anticipates that trucks may need to encroach into the opposing lane or shoulder ("within available pavement"). The Coalition's criticism lacks for several reasons.

First, the Coalition's position is contrary to the City's policy of "accommodating" trucks. The Freight Master Plan discusses the difference between "designing for" and "accommodating" trucks. Designing for a truck is the same concept as the Coalition's "within lane" concept, meaning a truck can turn without encroaching onto other elements. Accommodating trucks is the same as the "within available pavement" concept, in which a truck may encroach into the opposing lane or shoulder.[112] The Freight Master Plan defines a Major Truck Street as "an arterial street that **accommodates** significant freight movement,"[113] meaning that encroachment

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[108] Exhibit R-3, Appendix B, Chapter 5, Section 5.3.2.4 (p. 5-17 – 5-18); Chapter 5, Section 5.3.2.7 (p. 5-19 – 5-20); Exhibit R-1, Chapter 1, Table 1-1. Potential Traffic Hazards by Alternative Segment, p. 1-29 – 1-32; Exhibit R-10; Exhibit R-11.

[109] 11/30/17 Tr., at 1094:2 – 1095:4 (testimony of B. Phillips); Exhibit R-1, Appendix A AutoTURN Analysis, Page A-8 – A-9

[110] Ex. R-3, Appendix B, Chapter 4, Table 4-4. Study Area Daily Driveway Traffic Volumes (November 2016, December 2016, February 2017), p. 4-14 – 4-16; Exhibit R-3, Appendix B, Appendix C, Table C1. Daily Driveway Turning Movements by Vehicle Classification

[111] 11/29/17 Tr., at 846:3-17; 849:23 – 850:6 (testimony of E. Ellig); Exhibit R-3, Appendix B, Appendix B.

[112] Exhibit R-7 at p.79.

[113] *Id.* at p. 24.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

onto road elements is appropriate even on Major Truck Streets. The Coalition's witnesses cited no design standard or plan to support their claim that SDOT must "design for" trucks. As Mr. Phillips explained, designing for larger vehicles increases roadway turning radii and the width of driveway accesses, increasing vehicle speeds and conflicts and creating less safe areas for non-motorized users, and is thus inappropriate here.[114]

Second, the Coalition's position is contrary to City policies and plans. The Freight Master Plan states that when planning for trucks in urban environments, considerations include whether the area includes "priority areas or corridors designated in the Pedestrian Master Plan, Bicycle Master Plan, or Transit Master Plan" and whether "other plans/projects identify modal improvements (pedestrian/bicycle/transit/auto) for the same roadway."[115] As discussed above,[116] the Pedestrian Master Plan and the Bicycle Master Plan both identify the Project as a "priority" or "catalyst" project and call for placing the trail generally along the route of the Preferred Alternative.[117] SDOT appropriately considered these master plans in designing the Project.[118] The Coalition's belief that the streets should be "designed for" trucks is inconsistent with these plans, including the Freight Master Plan.

The Coalition's criticisms also illustrate its distorted view that the FEIS should have done more than what is reasonable, standard, or necessary in an EIS. The Coalition faulted SDOT for failing to perform an AutoTURN analysis of all driveways. But as Ms. Ellig and Mr. Phillips testified, it is not typical to include an AutoTURN analysis of driveways in an EIS, much less all

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[114] 11/30/17 Tr., at 1046:6-16 (testimony of B. Phillips).
[115] Exhibit R-7, Appendix C (Design Guidelines) at p. 8; *see also* Exhibit R-7 at p. 52-53 (directing SDOT staff to "consult all other master plans" and "reconcile different needs identified in the respective master plans).
[116] *Supra* at Section D(a).
[117] Exhibit R-36 at p. 56 (Pedestrian Master Plan identifying the Project as a priority project); Exhibit R-8 at p. 40 (identifying the Project as "catalyst project" that "reduce[s] critical barriers to bicycling by closing network gaps and increase[s] safety by building all ages and abilities friendly bicycle facilities to the maximum feasible extent").

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

driveways, because the purpose of AutoTURN analysis is to determine details in final design. Moreover, the analysis is a "significant amount of work" that does not add any additional value to show impacts.[119] Even Mr. Kuznicki, who performed all of the AutoTURN analyses for the Coalition, testified that he could not recall if he had ever used AutoTURN in an EIS or even in other stages of environmental review.[120]

Finally, while the FEIS analyzes in detail the risk issues presented by truck movements, it is undisputed that any truck movement-related impacts can be further reduced with further design. As Mr. Kuznicki admitted, if a designer discovers any movement issues through an AutoTURN analysis, the designer has a number of options to address the issues via design.[121] Moreover, the Coalition's AutoTURN analysis of all driveways showed that all driveways will remain accessible with the Preferred Alternative.[122] Thus the Coalition failed to raise any significant impact related to truck activity that was not disclosed in the FEIS.

ii. The FEIS reasonably discussed and analyzed conflicts.

The FEIS sufficiently disclosed the risk of traffic conflicts. The words "conflict" or "conflict point" is used approximately 70 times in the Transportation Discipline Report, particularly in discussions of potential conflicts between vehicles and non-motorized users at driveways and intersections. Ms. Ellig explained that the FEIS considered every driveway or intersection crossing as an area of potential conflict, thus the FEIS included an inventory of every driveway or intersection crossing for each of the alternatives at Table 1-1.[123] As described

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[118] 11/29/17 Tr., at 887:17 – 890:20 (testimony of E. Ellig); 12/1/17 Tr., at 1462:1-12 (testimony of M. Mazzola).
[119] 11/30/17 Tr., at 1039:18 – 1041:18 (testimony of B. Phillips); 11/29/17 Tr., at 818:12 – 819:2 (testimony of E. Ellig).
[120] 11/28/17 Tr., at 538:1-25 (testimony of S. Kuznicki).
[121] 11/28/17 Tr., at 532:11 – 536:5 (testimony of S. Kuznicki).
[122] 11/30/17 Tr., at 1051:4-9 (testimony of B. Phillips).
[123] 11/29/30 Tr., at 903:1-13 (testimony of E. Ellig).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

above, the FEIS also documented necessary information about each of these conflict points in its driveway inventories.

Ms. Hirschey's conflict point diagrams[124] are unavailing and unnecessary to understanding conflicts—in fact, her diagrams add complexity to an intuitive concept that the FEIS discussed in laymen's terms, as is encouraged by SEPA. Moreover, the SEPA rules expressly disavow any requirement for graphics, charts, or matrices.[125] The fact that the Coalition prefers Ms. Hirschey's diagram (or Mr. Kuznicki's blind spot diagram) does not render the FEIS's conflicts analysis and accompanying discussion inadequate.

Moreover, Ms. Hirschey's analysis of conflict points is flawed. Her definitive claim that there are no conflict points under existing conditions[126] is simply wrong and misrepresents existing conditions. As Mr. Schultheiss explained, under existing conditions, cyclists are "exposed to conflict continuously throughout their entire journey along the street as well as extra conflicts at some of the intersections[.]"[127] The conflicts are "infinite" because conflicts between a car and a cyclist could occur anywhere.[128]

Ms. Hirschey's "quantitative" analysis of conflict points conceals this fundamental fact by focusing only on the conflict points associated with the Project alternatives. As Mr. Schultheiss stated, however, the Project will result in a "substantial reduction of conflicts [compared] to the existing conditions" because the conflicts would be constrained to

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[124] Exhibit A-3 at p. 210-11.
[125] WAC 197-11-440.
[126] 11/28/17 Tr., at 278:15-23 (testimony of C. Hirschey).
[127] 12/1/17 Tr., at 1290:4-17 (testimony of B. Schultheiss).
[128] *Id.* at 1299:3-11.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

driveways.[129] Again, the Coalition failed to raise any significant impact associated with conflicts that was not disclosed in the FEIS.

iii. The FEIS reasonably discussed and analyzed the Project's contraflow side path design.

The FEIS disclosed the contraflow nature of the trail and discusses the safety implications, such as the fact that drivers crossing the trail would need to look in both directions.[130] The FEIS also disclosed the nature of the risk under existing conditions, in its discussion of accident data, including the number of collisions associated with vehicles travelling in opposite directions to cyclists.[131] Despite Mr. Bishop's and Ms. Hirschey's definitive claims that "there's no contraflow movement" under existing conditions,[132] the accident data and Mr. Trask's video and photographs disprove this claim and show that contraflow movement exists today.

Throughout the hearing, the Coalition's counsel and Ms. Hirschey asserted that the studies Ms. Hirschey cited found that "riding on a contraflow side path is two to three times more dangerous than riding in the road."[133] But as Mr. Schultheiss testified, the studies do not support Ms. Hirschey's broad claim. Rather, determining whether a contraflow side path is more dangerous compared to other alternatives requires assessing numerous factors in context, such as street intersections and design, traffic volumes, traffic controls, and the relative ability to manage conflicts.

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[129] *Id.* at 1290:14-18.
[130] Exhibit R-3, Appendix B, at 5-20.
[131] Exhibit R-1, at p. 7-22.
[132] 11/28/17 Tr., at 278:15-23 (testimony of C. Hirschey); 11/27/19 Tr., at 149:9-19 (testimony of V. Bishop).
[133] 11/29/17 Tr., at 946:3-7 (Coalition's counsel's questioning); 11/27/17 Tr., at 217:18-23 (Ms. Hirschey's testimony).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Here, Mr. Schultheiss testified that a contraflow side path (i.e., the Project) is safer than riding in the street (i.e., existing conditions) because under existing conditions non-motorized users are constantly exposed to vehicles without any separation.[134] In rebuttal, Ms. Hirschey agreed with Mr. Schultheiss, stating that in the locations where there are no driveway or intersection crossings, the Project's design provides a safer condition than existing conditions because of the separation.[135] Although SEPA does not require selecting or designing the "safest" option, the fact that the project alternatives are safer than the no build alternative does inform the analysis and contradicts the Coalition's claims.

iv. The FEIS is based on industry-accepted local and national guidelines that address transportation and safety issues; under the rule of reason, the FEIS take into account the unreliable studies the Coalition presented.

The Coalition made much of the fact that the FEIS did not cite the specific studies Ms. Hirschey cited in her report, but that argument lacks merit for several reasons. First, as discussed above, the Coalition's counsel and Ms. Hirschey mischaracterized the studies' findings.

Further, the FEIS need not take into account unreliable studies. As Mr. Schultheiss testified, many of the materials Ms. Hirschey relied upon are unreliable, including the Chicagoland side path rating system, the Commute Orlando website, and the Finnish study.[136] In rebuttal, Ms. Hirschey all but admitted that these studies are flawed, acknowledging the validity of Mr. Schultheiss's criticisms and stating, "To me they are what they are."[137] That Ms. Hirschey nevertheless cited those studies and presented them as reliable calls her reliability and credibility into question.

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[134] 12/1/17 Tr., at 1347:22 – 1348:4 (testimony of B. Schultheiss).
[135] 12/5/17 Tr., at 1900:14 – 1901:13 (testimony of C. Hirschey).
[136] 11/30/17 Tr., at 1238:13 – 1245:11 (testimony of B. Schultheiss).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Finally, as Mr. Schultheiss testified, design standards and guidelines already incorporate studies on safety.[138] Therefore, it is unreasonable and unnecessary for an FEIS to account for individual studies.

v. The FEIS did not rest on the assumption that all users follow traffic laws at all times and reasonably used traffic laws as part of its analysis.

The FEIS did not rest on the assumption that all users will follow traffic laws and the "rules of the road" at all times. As Ms. Ellig testified, and as discussed in the FEIS, the FEIS's safety analysis used recent collision data and incident response data in the study area to establish baseline conditions, which is standard methodology used in EISs.[139] The FEIS's analysis of the types of collisions indicated how often and under what circumstances users commit errors and fail to follow the rules of the road.[140] Ms. Hirschey agreed with the FEIS's methodology—she agreed that most accidents are caused by failure to follow the rules of the road, and that accident data helps show trends in failures to follow the rules. The FEIS also disclosed and considered the possibility of distracted trail users, cyclists losing control of their bicycles, and drivers miscalculating turning movements or veering away from their path of travel.[141]

The fact that some users may not abide by traffic laws does not support the Coalition's conclusion that traffic laws are unreliable and cannot be considered in a safety analysis or in design. This conclusion would effectively render traffic laws meaningless and is unreasonable. SDOT is entitled to rely on the reasonable assumption that users generally abide by traffic laws,

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[137] 12/5/17 Tr., at 1865:18-23 (testimony of C. Hirschey).
[138] 12/1/17 Tr., at 1357:18-23 (testimony of B. Schultheiss).
[139] 11/29/30 Tr., at 839:19 – 940:20 (testimony of E. Ellig); Exhibit R-3, Appendix B, at 4-33 to 4-45.
[140] Exhibit R-3, Appendix B, at 4-38.
[141] Exhibit R-3, Appendix B, at 5-20.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

may design the project to be consistent with those traffic laws, and may account for the infrequent but inevitable failures to abide the laws, as SDOT did here.

vi. The FEIS reasonably incorporated signage and pavement markings.

The FEIS disclosed that the design will incorporate signage and pavement markings as safety features.[142] Mr. Kuznicki's admission that signage and pavement markings are "judiciously appl[ied] in the design process" and "show a demonstrated safety benefit"[143] belie his claim that people ignore these features,[144] and Ms. Hirschey's claim that these features "cannot mitigate" safety concerns.[145] Moreover, Mr. Kuznicki confirmed that the 100% design drawings for a prior iteration of the Missing Link showed signage and pavement markings, and he personally stamped those drawings certifying the design's safety.[146]

Mr. Kuznicki's claim that pavement markings are "extremely difficult to maintain" also has no merit.[147] First, his approval of pavement markings as an adequate safety measure in previous iterations of this project undermines any claim that markings pose a safety risk. Second, Mr. Phillips testified that the City does not use paint but instead uses more durable materials with "vastly reduced" maintenance.[148]

vii. The FEIS reasonably used the PM peak hour to identify transportation delay.

The FEIS disclosed that the PM peak hour was used to identify potential transportation delay because although truck volumes typically peak during midday, the PM peak hour represents the highest volumes for other transportation modes and thus "results in the worst-case

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[142] Exhibit R-1, at 1-18 to 1-19.
[143] 11/28/17 Tr., at 557:25 – 560:16 (testimony of S. Kuznicki).
[144] *Id.* at 515:1-10.
[145] Exhibit A-3 at p. 13.
[146] 11/28/17 Tr., at 558:4 – 559:21 (testimony of S. Kuznicki)..
[147] 11/28/17 Tr., at 463:15-18 (testimony of S. Kuznicki).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

impacts for all modes."[149] Ms. Ellig confirmed that this methodology is standard in her profession and resulted in the worst-case impacts to trucks as well as other modes.[150] Ms. Hirschey's criticism that the FEIS should have used the truck peak hour would not have accurately captured impacts, is not standard methodology, and is unsupported, given that Ms. Hirschey did not do an analysis using the truck peak hour.[151]

viii. The FEIS reasonably discussed potential impacts to railroad operations, based on reasonably gathered information.

The FEIS disclosed the potential relocation of railroad track or removal of siding and states that the impact would be mitigated by coordinating the relocation with the rail provider and agencies to reduce disruption.[152] The Project does not call for, and the FEIS did not discuss removing any main line tracks. Only sidings that are currently largely paved over may be relocated or removed.[153] The information contained in the FEIS about the railroad was based on Ms. Ellig's interview with one of the owners of Ballard Terminal Railroad, who described Salmon Bay Sand & Gravel's intermittent use of the railroad as disclosed in the FEIS.[154] Additionally, Ms. Ellig's testimony was based on review of five days of video footage showing railroad operations.[155]

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[148] 11/30/17 Tr., at 1058:14-25 (testimony of B. Phillips).
[149] Exhibit R-1, at 3-3.
[150] 11/29/17 Tr., at 905:12 – 907:5; 907:22 – 909:1 (testimony of E. Ellig).
[151] 11/28/17 Tr., at 313:8-14 (testimony of C. Hirschey).
[152] Exhibit R-1, at 7-36 (stating that impacts could include "removing pieces of siding or passing rail . . . that are no longer used, or relocating track"); Exhibit R-3, Technical Appendix B, at ES-1 ("the Preferred Alternative and the Shilshole South Alternative would require track relocation, which would be coordinated with the rail provider to reduce disruption to track use"), 5-11 ("New track could be laid prior to removing the old track to reduce the period of time when the tracks are unusable. As necessary, any construction activities near the BTR rail line would be coordinated with the appropriate agencies.").
[153] Exhibit R-1 at 7-36; 12/1/17 Tr., at 1473:18 – 1474:5 (testimony of M. Mazzola).
[154] 11/29/17 Tr., at 838:11 – 839:14, 850:4-6, 942:24 – 943:16 (testimony of E. Ellig); Exhibit R-3, Appendix B, at 4-33.
[155] 11/29/17 Tr., at 838:11 – 839:14, 850:4-6, 942:24 – 943:16 (testimony of E. Ellig).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

The Coalition's letter from CalPortland alleging its use of the railroad is information that was not reasonably available at the time SDOT issued the FEIS, given that Mr. Cole did not discuss this use during his interview with Ms. Ellig, no comment was submitted alerting SDOT to this use, and even Mr. Nerdrum, one of the owners of the railroad, was apparently unaware of CalPortland's use. Mr. Nerdrum testified that the Ballard Terminal Railroad's only customers in the last five years were Salmon Bay Sand & Gravel and a flour trans load that occurred three or four years ago.[156] Mr. Nerdrum made no mention of CalPortland or its use of the railroad, either in the past or in more recent years. The letter, submitted in rebuttal, is self-serving testimony that lacks credibility. The discussion of the impacts to the railroad was reasonable, and it would be "preposterous" to expect the FEIS to disclose facts that the Coalition did not develop until hearing.[157]

ix. The location of pavement joints is not a safety issue.

As the City traffic engineer Dongho Chang testified, there are no City or state standards or design guidelines that forbid placing pavement joints in the travel lane. The City has pavement joints in travel lanes throughout the City, and the City has not observed problems with drivers failing to follow the travel lanes even in rainy conditions.[158] The Coalition's witnesses provided no support for their opinions that pavement joints in travel lanes pose a "serious safety concern."[159]

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[156] 11/29/17 Tr., at 785:9-25 (testimony of E. Ellig).
[157] Settle, *supra*, at 14-27 ("Under the rule of reason, it would be preposterous to expect an EIS to disclose and analyze facts that were not known and not reasonably knowable at the time the EIS was issued.").
[158] 12/5/17 Tr., at 1792:7 – 1793:11 (testimony of D. Chang).
[159] Exhibit A-3 at p. 13.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

x. Curb or truck aprons are not a safety issue.

The FEIS disclosed the use of aprons in the design.[160] As Mr. Phillips testified, aprons are a design feature used in the City and elsewhere and are included in the Freight Master Plan and the NACTO guidelines. Aprons improve safety for non-motorized users by slowing turning vehicles.[161] Mr. Schultheiss confirmed the safety benefits of aprons and testified about a report by the Federal Highway Administration advocating the use of aprons at intersections.[162] This evidence outweighs Mr. Bishop's statement that aprons are only used at roundabouts and that their use at intersections is a "very, very significant, unique system."[163]

xi. Barriers are not a safety issue.

Mr. Bishop's testimony that the design "put[s] a barrier in the buffer," and the Coalition's exhibit depicting a barrier in the buffer, are incorrect.[164] Mr. Phillips testified that the design drawings do not show barriers, and the FEIS confirmed that the Preferred Alternative's design does not show a need for barriers.[165] As Mr. Phillips explained, the FEIS disclosed the potential use of barriers (consistent with AASHTO guidelines) to account for potential changes in final design, but does not state that barriers will be used.[166] Moreover, even if a barrier was used, that potential impact was disclosed in compliance with SEPA.[167]

xii. The lane offset at the intersection of Shilshole and Market is not a safety issue.

Mr. Bishop's testimony that the design's lane offset at one specific location (the intersection of Shilshole Avenue and Market Street) is dangerous and violate SDOT's and

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[160] Exhibit R-1 at 1-15.
[161] 11/30/17 Tr., at 1067:2-25 (testimony of B. Phillips); Exhibit R-7, Appendix C, at p. 12, 18.
[162] 11/30/17 Tr., at 1262:1 – 1267:19 (testimony of B. Phillips); Exhibit R-28.
[163] 11/27/17 Tr., at 74:1 – 76:25 (testimony of V. Bishop)..
[164] 11/27/17 Tr., at 96:3-5 (testimony of V. Bishop); Exhibit A-1, at Figure 1.
[165] 11/30/17 Tr., at 1034:11-13 (testimony of B. Phillips); Exhibit R-1 at 1-5.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

WSDOT's standards is incorrect.[168] As Mr. Chang testified, SDOT's standards do not prohibit or limit the use of lane offsets, and the City has used offsets elsewhere because they help accommodate movement through constrained intersections. WSDOT's lane offset standards do not apply in the City, because WSDOT's standards apply to interstates and state highways and a different context—higher speeds, more space availability for expansion, and lack of pedestrians, parking, or buildings.[169] And as Mr. Phillips testified, there are design treatments for lane offsets, such as guide markers or shifting the road.[170]

xiii. The design of the intersection of Market and 24th Ave NW is not a safety issue.

As Mr. Bishop admitted, under existing conditions, "There is no definition [in the intersection's design]. It's totally wide open."[171] Despite Mr. Bishop's criticisms of the intersection's proposed design, as Mr. Phillips testified, the design adds defining elements such as curbs and crossings, which increase safety by slowing down vehicles and notifying users of potential conflict areas.[172]

In sum, despite the Coalition's attempt to fly-speck the FEIS, SDOT established that the transportation analysis in the FEIS was reasonable and should be affirmed.

G. The parking analysis meets the rule of reason.

The parking impact analysis is documented in two locations: chapter 8 of the FEIS[173]; and the Parking Discipline Report appended to the FEIS.[174] The author of the FEIS's Parking

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[166] 11/30/17 Tr., at 1093:1-24; Exhibit R-1 at 1-8 (noting use of "barriers **or** buffers" (emphasis added)).
[167] Exhibit R-1, at p. 1-8.
[168] 11/27/17 Tr., at 79:12 – 81:12 (testimony of V. Bishop).
[169] 12/5/17 Tr., at 1789:10 – 1791:8 (testimony of D. Chang).
[170] 11/30/17 Tr., at 1068:22 – 1069:22 (testimony of B. Phillips).
[171] 11/27/17 Tr., at 70:22-25 (testimony of V. Bishop).
[172] 11/30/17 Tr., at 1070:1 – 1071:4 (testimony of B. Phillips).
[173] Ex. R-1.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Discipline Report, Ryan LeProwse, testified that his methodology for the parking analysis is common in his profession and was similar to the methodology used in other EISs and other studies that he has performed.[175] He used existing studies regarding parking supply and utilization, collected data to supplement existing data and to address comments to the DEIS, and reviewed recent data to confirm the studies' accuracy.[176] Even Mr. Bishop, the Coalition's witness on this topic, admitted that the study was "extensive."[177] Mr. LeProwse included unregulated (i.e., unpermitted) parking spaces in the count of parking supply and removed those spaces from the supply under the build alternatives (even though some of those spaces may continue to exist), resulting in a conservative analysis.[178] And he defined the study area based on all of the build alternatives, as is typically done in parking studies for EISs. As Mr. LeProwse explained, a study area that includes all alternatives allows for an equal comparison to the no build alternative.[179]

The Coalition's sole criticism of the parking analysis was based on their claim that the study area was too large, and that the FEIS should have defined a separate study area for each build alternative.[180] The claim has no merit, because the Coalition's methodology is not typically used or suitable for an EIS because it would not facilitate a comparison of overall parking loss among various alternatives.[181] Mr. Bishop stated that his experience with parking issues arose in his work "as a consultant doing mostly private development work,"[182] and he admitted he has

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[174] Ex. R-3.
[175] 11/30/17 Tr., at 1107:1-9; 1130:6-9 (testimony of R. LeProwse).
[176] *Id.* at 1113:2 - 1115:16.
[177] 11/27/17 Tr., at 126:4-9 (testimony of V. Bishop)
[178] 11/30/17., at 1116:20 - 1118:14 (testimony of R. LeProwse).
[179] *Id.* at 1110:3-9.
[180] Exhibit A-1 at p. 053.
[181] 11/30/17 Tr., at 1110:10 – 1112:25; R-16.
[182] 11/27/17 Tr., at 123:4-6 (testimony of V. Bishop).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

never done a parking analysis for an EIS that required looking at alternatives.[183] A parking analysis for a private development project, in which there are no alternatives, is different from a parking analysis of several build alternatives and a no build alternative. Mr. LeProwse's choice of methodology is entitled to more weight, given his pertinent experience and Mr. Bishop's total lack of EIS experience on parking impacts.

Moreover, Mr. Bishop's claim that his methodology shows "significant impacts" to parking has no merit. As Mr. LeProwse testified, the loss of parking is not significant because there is adjacent excess parking supply that is within walking distance and is not being fully utilized currently.[184] The opponents' witnesses argue that the loss of parking from the preferred alternative is concentrated, but overstate that impact by asking the Examiner to ignore parking that is available on immediately adjacent streets. As Mr. LeProwse explained, Figure 5-1 of the Parking Discipline Report illustrates the availability of parking in the blocks surrounding the Preferred Alternative, the remaining supply on the Preferred Alternative, and the type of parking available. Mr. Bishop's calculation of parking availability ignored all of Figure 5-1 except for the narrow sliver of red showing the Preferred Alternative.[185]

Finally, setting aside the Coalition's disagreement with the characterization of the parking loss, the FEIS disclosed the loss of parking under each alternative, and thus disclosed the impact.[186]

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[183] *Id.* at 152:2-4.
[184] 11/30/17 Tr., at 1120:13 – 1123:11 (testimony of R. LeProwse).
[185] 11/30/17 Tr., at 1142:2 – 1144:12; Exhibit R-3, Appendix C, at Figure 5-1.
[186] *Id.* at 1121:17-25; Exhibit R-1 and Figure 5-1.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

H. The FEIS appropriately analyzed the potential land use impacts and economic factors related to the Project.

At hearing, City witnesses confirmed what was stated in the EIS: that the EIS took into account the maritime and industrial land uses in the project area;[187] considered the "Major Truck Street" designation of a portion of the Preferred Alternative and other alternatives;[188] and carefully analyzed the Project's relationship with the policies and goals that prioritize water-dependent uses in the area, as well as other relevant goals and policies.[189] The Coalition presented no evidence to support their challenge to SDOT's consideration of the Project's relationship with the City's 2035 Comprehensive Plan.[190] Instead, the Coalition focused primarily on what it describes as the "actual" or economic impacts to businesses adjacent to the Project, but presented no credible evidence that SDOT's analysis was inadequate. SDOT's land use and economic analysis should be affirmed.

1. *The primary purpose of a SEPA land use analysis is to identify the Project's relationship to existing land use plans, which includes balancing a variety of conflicting comprehensive plan policies.*

The Project's relationship to the Comprehensive Plan is discussed in numerous places throughout Ch. 4 of both the Draft and Final EISs, as well as the Land Use Discipline Report (Technical Appendix A to the Draft EIS[191]) and the Updates and Errata to the Land Use

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[187] E.g., Exhibit R-1, FEIS Section 4.1 and 4.2 and 11/30/17 Tr., at 1169:9 – 1170:18 (testimony of M. Johnson). The nature of the project area as an important maritime industrial area is incorporated into the relevant Comprehensive Plan goals and policies, which clearly prioritize those types of uses.

[188] 11/30/17 Tr., at 1171:19-21. The priority use of streets in the project area for freight are reflected in the goals and policies considered in the land use analysis and the land use analysis also relies on the transportation analysis, which clearly identifies the Major Truck Street at p. 7-4 and 7-11 of Exhibit R-1. The objective of the project itself makes clear that prioritizing freight movement was a primary consideration. *See* p. 1-3 of Exhibit R-1.

[189] The EIS actually defined a significant impact as an impact that would "likely cause the permanent loss of land uses that are a priority," such as water-dependent, water-related, and industrial uses and considered those priority uses throughout the analysis. *See, e.g.*, Exhibit R-1, p. 4-1 and 4-17.

[190] Notice of Appeal [Corrected], p. 9, Section E.

[191] Exhibit R-34.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Discipline Report (Technical Appendix A to the Final EIS[192]). A reader-friendly "Summary of Alternative Consistency with Comprehensive Plan Goals and Policies" was included as Appendix E to the original Land Use Discipline and as Appendix F to the Updates and Errata to the Land Use Discipline Report. The updated Appendix F incorporated modifications to the Seattle Comprehensive Plan that were adopted between the time the Draft and Final EIS were issued. Both summaries considered the no build alternative, as well as the five build alternatives, and clearly identified where each was consistent, inconsistent, or neutral, as related to relevant goals and policies. The summaries also include a brief qualitative description of the relationship of the alternatives, including the No Build Alternative, to the relevant goals and policies. These summaries alone appear to satisfy the requirements of SEPA.[193]

The summaries also illustrate that some Comprehensive Plan goals and policies appear to conflict. As described in the Comprehensive Plan, "Because Plan policies do not exist in isolation and must be viewed in the context of all potentially relevant policies, it is largely in applying these policies that the interests are reconciled and balanced by the legislative and executive branches of City government."[194] The summaries, in addition to the commentary in the Land Use chapters, provides all the information decision-makers will need to balance the various goals and policies.

2. Economics is not an element of the environment under SEPA.

Seattle is unique in that its SEPA rules require an EIS to include an analysis of certain social, cultural, and economic issues, unless eliminated by the scoping process.[195] That required

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[192] Exhibit R-1.
[193] Exhibit R-1, Appendix A, Appendix F.
[194] R-18, excerpt of Seattle 2035 Comprehensive Plan, p. 18.
[195] SMC 25.05.440(E)(6).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

economic analysis is described as an analysis of "[e]conomic factors, including but not limited to employment, public investment, and taxation where appropriate…" Like its State counterpart, Seattle's SEPA rules do not include economics as an element of the environment.[196] Both the State and Seattle's SEPA rules explicitly provide that certain types of information are not required to be discussed in an EIS, including: "Methods of financing proposals, *economic competition*, *profits and personal income and wages*, and social policy analysis such as fiscal and welfare policies and non-construction aspects of education and communications."[197] Both the State and Seattle's SEPA rules also explicitly provide that a cost-benefit analysis is not required.[198] Specifically, "the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis *and should not be when there are important qualitative considerations*."[199]

The Coalition misrepresents what is required related to the analysis of economic factors related to the Project. Nearly every question asked of the author of the Economics Considerations Report, Morgan Shook, was framed in a way that assumed the purpose of the report was to disclose the potential impacts of the Project—based on impacts to profitability—related to specific, individual businesses along the Project route.[200] When framed that way, it is

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[196] See SMC 25.05.444, which lists the elements of the environment required to be considered.

[197] SMC 25.05.448.C and 197-11-448, emphasis added. 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).

[198] SMC 25.05.450.

[199] *Id* (emphasis added).

[200] *E.g.*, 12/1/17 Tr., at 1405:7-12 ("Direct me to the portions of the final report that *inform the owner of an industrial maritime business* on Shilshole of *the effect of this project on that business*" emphasis added), 1406:20-23 ("And now, again, I'm asking you to tell me as the hypothetical owner of an industrial business what I'm supposed to learn from your report about the potential impacts of this trail."), 1410:15-17 ("So what does that tell me as a business along shilshole about the economic impact on my business?"), 1415:25 – 1416:3, 1422:8-10, 1426:5-6 ("informs me, as a business owner, of the impact on my business."), 1431:19-25 ("And so, this – is this the take

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

clear that the Coalition is concerned not about potential environmental impacts, but to the potential impacts to their bottom line, which is not the purpose of SEPA review.

Similarly, none of the testimony the Coalition elicited related to changes to the Economic Considerations Report between early drafts of the report and the final version published as part of the Draft EIS supports the Coalition's claim that the analysis was inadequate. As Mr. Shook testified, some information was removed from the original draft because they determined that they did not have enough support for the conclusions in the initial draft or because of concerns that some of the information would be misinterpreted.[201] The final report, not the preliminary draft, is at issue in this appeal and the iterative nature of drafting that final report does not impact the adequacy of the FEIS.

3. SDOT disclosed all of the potential impacts from the Project, none of which were probable significant adverse environmental impacts.

As described in the EIS, and by Mark Johnson at hearing, the EIS defined a significant land use impact as an impact that 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."[202] This definition of "significance" in the context of land use impacts is consistent with SEPA and slightly more conservative than how courts have considered the question, which essentially defines a significant land use impact as physical blight.[203] Changes in

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away that I as an industrial business in terms of the impacts of this trail on my business? Is this where I turn to learn them?").

[201] 21/1/17 Tr., at 1383:25 – 1384:1; 1411:14-20 (testimony of M. Shook). Even the Coalition's expert witness, Spencer Cohen, agreed that there was not enough analysis to support conclusions in that initial draft. *See* 11/28/17 Tr., at 694:8-9 (testimony of S. Cohen).

[202] Exhibit R-1, p. 4-1.

[203] 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

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

land use are only relevant for purposes of SEPA if they will cause *physical* changes to the environment.[204] The development and use standards of the Land Use Code are generally expected to provide the necessary mitigation of potential adverse impacts,[205] so it is not surprising that no significant land use impacts from the Project were identified.

Regardless, the FEIS did consider the potential land use impacts to adjacent businesses, including the consideration and discussion of whether any businesses are likely to go out of business or relocate as a result of the project.[206] In addition to discussing whether there would be any probable significant adverse land use impacts, the land use analysis identified other potential impacts such as impacts to the railroad,[207] access to businesses,[208] and even identified potential trade-offs between impacts to businesses and other potential impacts like traffic hazards.[209]

4. SDOT's Economic Considerations Report appropriately analyzed the economic factors related to the Project.

At hearing, SDOT presented testimony by Mr. Shook, who has worked on approximately 15 EISs and is generally familiar with SEPA,[210] that he and his colleagues used the data available

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center would be an environmental impact, though plaintiffs failed to establish that such impacts were sufficiently probable to require EIS coverage).

[204] *See W. 514, Inc. v. County of Spokane*, 53 Wn. 838, at 847, 770 P.2d 1065.

[205] *See*, "Overview Policy" at SMC 25.05.665.

[206] Exhibit R-1, at p. 4-16 to 4-34.

[207] *E.g.*, Exhibit R-1, at p. 1-25 ("Rail relocation could occur in some of the alternatives."), p. 7-22 ("Impacts on freight rail would occur if freight rail movement in the study area was removed or relocated."), and p. 7-36 ("This could include removing pieces of siding, or passing rail (rail line that allows trains to pass each other) that are no longer used, or relocating track to allow additional right-of-way space for the trail. All track relocation would be coordinated with BTR so that impacts on rail operations would be minimized and so that rail operations could continue as before once construction is complete."), and p. 10-10 ("The removal or relocation of rails, or irreversible treatments that cover the rails or other physical features of the railroad such as switches or sleepers, would result in an impact to the railroad.")

[208] *E.g.*, Exhibit R-1, at p. 4-16 ("Elimination of loading zones could negatively impact business activities, particularly for auto-oriented commercial businesses. Additional people in the study area could also delay freight transport by crossing the roads and driveways used by freight vehicles. Because of the minor disruptions to access and loading for some of these uses within the BINMIC, a minor adverse impact could occur.")

[209] *E.g.*, Exhibit R-1, FEIS p. 7-43 ("The placement of the trail could also be moved to locations farther from the property lines, but this would require additional relocation of the BTR tracks.")

[210] 12/1/17 Tr., at 1361:25 (testimony of M. Shook).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

and methodologies that are accepted in his industry[211] to analyze the potential economic impacts related to the Project. He also testified that the findings of that analysis are reflected in the Economics Considerations Report[212] and that any greater level of certainty or precision would require a huge expenditure of time and resources and may not even be feasible.[213] Any potential displacement of an industrial business along the Preferred Alternative would be speculative.[214]

Specifically related to the industrial businesses that were the primary focus of testimony at hearing, the Economic Considerations Report included the following:

> *How Multi-use Trails Negatively Affect Property Value*
>
> The operation of the BGT Missing Link may impede some industrial users located adjacent to the trail due to the congestion of industrial traffic with pedestrian and bicycle use. Industrial users may be required to adjust delivery patterns where the trail crosses loading docks or driveways. In addition, the operation of heavy machinery and trucks in an environment with more pedestrian and bicycle travelers may increase risk of accident. Increases in risk of automotive accidents could result in higher insurance costs or require additional labor expenditures to employ traffic flaggers to avoid collisions. Industrial businesses may adapt somewhat by adjusting delivery schedules to times of day with relatively few pedestrians and bicyclists using the BGT. This may result in more scheduled hours of operation and higher labor costs for these users. These additional operating challenges are likely to increase costs of production for these users, and these costs are unlikely to be passed on to consumers due to competition from producers elsewhere in the region.[215]

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[211] *Id.* at 1375:20 – 1376:1.
[212] *Id.* at 1394:3-6.
[213] *Id.* at 1384:25 – 1387:9.
[214] *Id.* at 1384:13-20. Nonetheless, the Economic Considerations Report does disclose that displacement is a possibility. *See* Exhibit R-34 at p. 5-1 ("However, while the economic impacts from operation of the BGT Missing Link are likely to be modest on average, these results do not imply that a negative effect could not occur to some properties.")
[215] Exhibit A-34, at p. 4-7.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

The Economic Considerations Report itself, supported by the testimony of Mr. Shook, appropriately discloses the potential impacts to properties and businesses in the project area[216] and analyzes the potential economic factors related to the Project.

Moreover, the Coalition failed to present any credible contrary evidence. Although the Coalition's expert, Mr. Spencer Cohen, indicated that SDOT did not do an adequate analysis of the potential economic impacts related to the Project, he testified that "I don't feel that I'm qualified to comment on the adequacy of a SEPA review."[217] Mr. Cohen has never worked on an EIS, has no familiarity with SEPA, and could not testify whether his proposed approach was required by SEPA.[218] In fact, he testified that the analysis he was proposing was a cost-benefit analysis,[219] which is explicitly NOT required by SEPA. In addition, Mr. Cohen improperly framed the question to be addressed in a SEPA analysis of economic factors as "what would those impacts be to those businesses?"[220] –in other words, he erroneously framed the question as being related to the profitability of a business, which is something SEPA explicitly does not require.

But most importantly, although Mr. Cohen testified at one point that he did believe the Project would cause "more than a moderate risk of an adverse economic impact to maritime and

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[216] *E.g.,* Exhibit R-34, Economic Considerations Report, at p. ES-1 ("The higher traffic congestion levels associated with this alternative may impose economic costs to businesses operating in the study area, due to higher labor and delivery delay costs, as well as to residents and commuters who may experience longer traffic delays."), ES-2 ("The extent to which these driveway delays may impact the profitability or viability of study area businesses is presently unknown but should be considered as potential economic issues.").

[217] 11/29/17 Tr., at 696:16-22 (testimony of S. Cohen).

[218] *Id.* at 714:2-23 ("Q: And so your opinion that Economic Considerations Report is inadequate, is that based on any prior experience, training, or real familiarity with SEPA? A: Not based on familiarity with SEPA" 714:8-12, and "…my understanding which is not as an expert on SEPA…" 714:16-17).

[219] *Id.* at 685:6 ("Think of it as sort of a cost-benefit analysis"), 696-697 (testifying that SDOT should be able to gather information to do a cost-benefit analysis and that he does not know if that is required by SEPA).

[220] *Id.* at 649:1.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

industrial businesses,"[221] in several instances he stated that he did not have enough information to make that determination[222] and did not have any real basis for the threshold of what would be "more than moderate."[223] Mr. Cohen could not say that the failure of a business would be "likely" as a result of the Project.[224] Absent definitive contrary expert testimony, the reviewing body must defer to SDOT's expertise and affirm its analysis.[225] SDOT's land use and economics analysis should be affirmed.

I. The Coalition presented no evidence on several of their appeal issues.

The Coalition presented no evidence on several of their appeal issues: adequacy of notice of the "New Segment"; cumulative impacts in conjunction with Seattle Public Utilities' Combined Sewer Outflow; and the adequacy of the FEIS's analysis of impacts on the shoreline environment. Accordingly, these issues are waived and should be dismissed as a matter of law.[226]

III. 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.

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[221] 11/29/17 Tr., at 604:9-15 (testimony of S. Cohen).
[222] *Id.*, at 605:12-13 (in response to a question whether his opinion was that the project would have more than a moderate risk of an adverse economic impact to these maritime and industrial businesses, Mr. Cohen testified "There's thus far been insufficient analysis in my opinion to draw that conclusion about the impacts.")
[223] *Id.*, at 706.
[224] *Id.*, at 704:23-24 ("likely feels like a strong statement").
[225] *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").
[226] *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279, 1282 (1988).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

DATED this 22nd day of December, 2017.

PETER S. HOLMES
Seattle City Attorney

s/Erin E. Ferguson, WSBA #39535
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98124-4769
Email: erin.ferguson@seattle.gov

VAN NESS FELDMAN LLP

s/Tadas A. Kisielius, WSBA #28734
Dale Johnson, WSBA #26629
Clara Park, WSBA #52255
719 Second Avenue, Suite 1150
Seattle, WA 98104
E-mail: tak@vnf.com; dnj@vnf.com;
cpark@vnf.com

Attorneys for Respondent
Department of Transportation

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 December 22, 2017 filed a copy of Seattle Department of Transportation's Post-Hearing Brief, a full copy of the hearing transcript (the transcript was not provided to the Coalition as it already has it), and this Certificate of Service with the Seattle Hearing Examiner using its e-filing system and that on December 22, 2017 I addressed said documents and deposited them for delivery as follows:

Office of the Hearing Examiner
Ryan Vancil, Deputy Hearing Examiner
City of Seattle
700 Fifth Avenue, Suite 4000
Seattle, WA 98104

☐ By U.S. Mail
☒ By Messenger
☒ By E-file

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

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

The Ballard Coalition Pat Schneider Foster Pepper PLLC 1111 Third Avenue, Suite 3000 Seattle, WA 98101	☐ By U.S. Mail ☐ By Legal Messenger ☒ By Email: (per agreement) pat.schneider@foster.com brenda.bole@foster.com Alicia.pierce@foster.com
The Ballard Coalition Josh Brower Leah Silverthorn Danielle Granatt Veris Law Group PLLC 1809 7th Ave, Suite 1400 Seattle, WA 98101	☐ By U.S. Mail ☐ By Legal Messenger ☒ By Email: (per agreement) josh@verislawgroup.com leah@verislawgroup.com danielle@verislawgroup.com megan@verislawgroup.com
Cascade Bicycle Club Matthew Cohen Rachel Cox Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101	☐ By U.S. Mail ☐ By Legal Messenger ☒ By Email: (per agreement) matthew.cohen@stoel.com rachel.cox@stoel.com sharman.loomis@stoel.com judy.shore@stoel.com

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 22nd day of December, 2017.

s/Amanda Kleiss
Declarant

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200