

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

THE BALLARD COALITION'S POST-TRIAL BRIEF

I. INTRODUCTION

The Final Environmental Impact Statement (Final EIS) that is the subject of this appeal is the fourth SEPA determination by the Seattle Department of Transportation (SDOT) that asserts that there will be no significant adverse environmental impacts from building a two-way side-path that crosses dozens of industrial driveways along the west side of Shilshole Avenue. SDOT previously issued three Determinations of Non-Significance (DNS) for this sidepath. The first two were upheld by the Hearing Examiner but reversed by the Superior Court, which remanded for new threshold determinations. The third DNS was reversed by Hearing Examiner Watanabe, who determined that a two-way sidepath on Shilshole would create significant traffic hazards, and remanded to SDOT to prepare an EIS to analyze these significant traffic hazards.

1 In response, SDOT reduced the level of design in its plans and prepared an FEIS that
2 again asserts that that there will be no significant traffic hazards, and no other probable
3 significant adverse environmental impacts. SDOT's EIS is tantamount to a fourth DNS.
4 SDOT's determination must be given "substantial weight," but just as this statutorily-required
5 deference was overcome by the facts in the three prior appeal of SDOT DNSs for the Missing
6 Link, the facts presented at the hearing demonstrate that SDOT's actions are again clearly
7 erroneous.

8 II. ARGUMENT

9 A. SDOT's Actions Demonstrate That its SEPA Determination is Unworthy of 10 Deference

11 SDOT's determination is given "substantial weight," but the adequacy of an EIS is a
12 question of law subject to *de novo* review, and assessed under the "rule of reason:"¹

13 The adequacy of an EIS is a question of law subject to *de novo* review. *Klickitat Cy.*
14 *Citizens Against Imported Waste v. Klickitat Cy.*, 122 Wash.2d 619, 632, 860 P.2d 390
15 (1993); *Citizens for Clean Air v. Spokane*, 114 Wash.2d 20, 34, 785 P.2d 447 (1990);
16 *Barrie v. Kitsap Cy.*, 93 Wash.2d 843, 854, 613 P.2d 1148 (1980); *Leschi Imp. Coun. v.*
17 *State Hwy. Comm'n*, 84 Wash.2d 271, 285, 525 P.2d 774, 804 P.2d 1 (1974). EIS
18 adequacy involves the legal sufficiency of the data in the EIS. *Klickitat Cy.*, 122
19 Wash.2d at 633, 860 P.2d 390 (citing Richard L. Settle, *The Washington State*
20 *Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i) (4th ed. 1993)).
21 Adequacy is assessed under the "rule of reason", *Klickitat Cy.*, at 633, 860 P.2d 390,
22 which requires a " 'reasonably thorough discussion of the significant aspects of the
23 probable environmental consequences' of the agency's decision." *Klickitat Cy.*, at 633,
24 860 P.2d 390 (quoting *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 344-45, 552
25 P.2d 184 (1976)). The court will give the agency determination substantial weight.
RCW 43.21C.090.

26 *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 37-38, 873 P.2d 498 (1994). The "substantial
27 weight" standard of deference, which also is stated in SMC 25.05.680.B.3, is overcome when
28 facts demonstrate that a SEPA determination is "clearly erroneous:"

29 In any action involving an attack on a determination by a governmental agency relative
30 to the requirement or the absence of the requirement, or the adequacy of a 'detailed
31 statement,' the decision of the governmental agency shall be accorded substantial

32
33
34
35

¹ Mr. Mazzola, SDOT's environmental manager, testified that he is not familiar with the rule of reason. Transcript
page 1561, line 3-4.

weight.” RCW 43.21C.090. . . . The “substantial weight” requirement directs us to review the agency’s decision under a “clearly erroneous” standard. *Norway Hill Pres. & Protection Ass’n v. King County Council*, 87 Wash.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wash.App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000).

Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 224-225, 151 P.3d 1079 (2007).

The evidence presented at the hearing demonstrates that the statutory deference is overcome.

1. SDOT Concealed Rather Than Disclosed the Inherent Dangers of Two-Way Side Paths Crossed by Multiple Industrial Driveways

As discussed below in section B.1, multiple studies demonstrate that two-way sidepaths are two-to-three times more dangerous than other bicycle facilities, because of the contra-flow movement they create, and such facilities should not be constructed in locations where they will be crossed by multiple driveways and intersections. SDOT reduced the level of its design from the 20-30% level before Hearing Examiner Watanabe, effectively precluding any review of SDOT’s design in this appeal. No witness identified a study that demonstrates that this hazardous condition can be eliminated or even mitigated by design; not even Mr. Schultheiss could identify a study demonstrating that a two-way sidepath can be made as safe as one-way facilities (including streets), even though he profits from designing such facilities.

Mr. Mazzola, SDOT’s Environmental Manager, acknowledged that he was aware of the studies that demonstrate the increased hazards of two-way sidepaths:²

Q. You were present at the prior hearings in front of at least hearings of Examiner Watanabe, correct?

A. That’s correct, as well as under Miss Tanner as well.

Q. Okay. And didn’t the Ballard business appellants in those prior hearings present the studies that were in effect at that time, available at that time, about the inherent safety issues created by Two Way [sic] Cycle?

² Transcript page 1551, lines 3-16.

1 A. I do recall the appellants presenting those studies about safety concerns
over two-way study (sic) paths and am familiar with the testimony related to those
studies.

2 Mr. Mazzola chose not to share his knowledge with the readers of the EIS:³

3 Q. So Mr. Mazzola, you were aware of the studies that talked about the
inherent risks of contraflow movements on cycle paths, correct?

4 A. I am aware that those studies are there, exist, yes.

5 Q. And at the time that SDOT and you as SDOT's person in charge, made the
decision not to even consider one-way cycle paths or one-way tracks, did you consider
alerting the reader to the safety implications of that decision?

6 A. So we did not include anything within the EIS that speaks to the safety
implications one way or the other of a multi-use trail versus one-way bicycle facilities.

7 Mr. Mazzola did not share his knowledge of these studies with the authors of the EIS:
8 neither Erinn Ellig, who wrote the Transportation Discipline Report, nor Mark Johnson, who
9 managed preparation of the EIS, were aware of these studies until they read Claudia Hirschey's
10 Report in preparation for the appeal hearing.⁴ Brad Phillips, the engineer who reviewed the
11 Transportation Discipline Report and is designing the sidepath, testified that he was aware of
12 the studies but had not read them.⁵

13 The studies summarized in Claudia Hirschey's Report demonstrate that a two-way
14 sidepath along a street crossed by dozens of industrial driveways increases the risk of injury
15 and death by 200 – 300%. Such studies were part of the evidence presented to Hearing
16 Examiner Watanabe when she concluded that a two-way sidepath along Shilshole would create
17 significant traffic hazards,⁶ but SDOT chose to conceal these studies from the people who
18 prepared its EIS and therefor from the readers of its EIS.

19
20
21
22
23 ³ Transcript page 1563, lines 8-21

24 ⁴ Transcript of Johnson testimony, page 1186, lines 4-10 and page 1187, line 11 – page 1190, line 16; Transcript
of Ellig testimony: page 945, line 14 – page 946, line 21.

25 ⁵ Transcript page 1080, lines 14 - 19.]

⁶ In re Ballard Business Appellants, W-12-002, Findings and Decision of the Hearing Examiner, page 9,
Conclusion 8, a copy of which is submitted with this brief.

1 **2. SDOT Directed Its Consultants to Remove or Change Language in the EIS**
2 **that Would Have Disclosed Impacts of Its Proposal**

3 SDOT repeatedly directed its consultants to downplay the environmental impacts of its
4 proposal. The first draft of the Economic Discipline Report acknowledges in multiple places
5 that the Missing Link would have significant impacts to the businesses on Shilshole, as Mr.
6 Mazzola acknowledged:⁷

7 Q. You would agree, would you not, that the first draft of Mr. Shook's report
8 used the word significant a lot?

9 A. Mr. Shook's initial draft of economics report did contain a lot of – excuse
10 me, did use the word significant in a number of different contexts throughout that
11 report.

12 The final report does not, however, disclose or discuss any significant impacts. In
13 addition, the final report deleted the quantification of economic impacts that was in the draft
14 report, as Mr. Mazzola acknowledged:⁸

15 Q. And you'll agree that the quantifying of the costs of delay was taken out of
16 the final version of the report?

17 A. That sort of monetization of the delay, that was taken out of the economics
18 report.

19 Mr. Johnson, in addition to Mr. Mazzola, acknowledged that tables and quantified
20 information were removed from the final Economics report:⁹

21 Q. For all our sakes, isn't it true that the first draft of the Economic Discipline
22 Report provided more information to readers and, therefore, to decision-makers?

23 A. There was more analysis that was done. Whether or not that was
24 information that was reliable was part of what we were dealing with when we were
25 looking at that draft and reviewing that draft.

 Q. So you agree that the first draft provided more information?

 A. It had -- yes, it had tables that were not present in the final draft.

 Q. Okay. And it has more analysis in the terms of quantification of impacts;
 correct?

 A. Yes.

 Mr. Johnson acknowledged that either Mr. Mazzola or Mr. Sharf, the former project
 manager, directed removal of this information.¹⁰

⁷ Transcript page 1548, lines 15-21.

⁸ Transcript page 1547, lines 21-25.

⁹ Transcript page 1193, lines 5-19.

¹⁰ Transcript page 1193, line 20 to page 1195, line 9.

1 In addition, Ms. Ellig acknowledged that SDOT directed her to remove references to
2 traffic hazards from the Transportation Discipline Report,¹¹ and SDOT’s “comments
3 spreadsheet” on the Economic Considerations Report, Exhibit A-18, repeatedly directs the
4 consultants to either use language that minimizes impacts or to remove altogether the
5 discussion of impacts (i.e., A-18, Item 92, page 002). For example, in comment 111 Mr.
6 Mazzola directs changing the word “damages” to the more neutral term “impacts,” and in
7 comment 143 Mr. Sharf complains that the draft Report acknowledges that some industrial
8 users may go out of business. This acknowledgment is removed from the final version of the
9 Economics Report.

10 By directing its consultants to conceal or gloss over impacts instead of objectively
11 disclosing them, SDOT affirmatively sought to prevent its EIS from informing decision-
12 makers of the impacts of its proposed two-way sidepath.

13 **3. SDOT Reduced the Level of Design and Thereby Reduced the Disclosure of
14 Impacts**

15 SDOT’s second DNS for its two-way sidepath along Shilshole was based upon a 10%
16 level of design, and on July 1, 2011, Hearing Examiner Watanabe affirmed that DNS. Judge
17 Rogers reversed in his Second Order of Remand, remanding to SDOT “for the limited purpose
18 of more fully designing the Shilshole Segment so that the impacts of the proposal on the
19 adjoining land uses, and any proposed mitigation of those impacts, may be identified.” In his
20 oral decision, he explained that “what hasn’t been decided can’t be reviewed.”

21 In response, SDOT increased the level of design to between 20 – 30% (as stated in
22 Finding 7 of Hearing Examiner Watanabe’s decision, dated August 27, 2012, in W-12-002)
23 and SDOT issued another DNS that, after an evidentiary hearing, Hearing Examiner Watanabe

24 ¹¹ Transcript page 921, lines 4-25 and page 922, lines 1-2:
25

1 concluded was clearly erroneous because there would be “significant adverse impacts in the
2 form of traffic hazards along the Shilshole Segment because of conflicts between truck
3 movements and other vehicle traffic and trail users along the Segment.” (Conclusion 8). Her
4 conclusion was based in large part on the testimony of Vic Bishop about the hazards that
5 would be created by SDOT’s design. See Findings 24 – 28 and Conclusions 6-7, W-12-002.

6 In response to Judge Rogers’ Order and Examiner Watanabe’s Decision, SDOT
7 *reduced* its level of design to between 5 – 10%¹² and issued an EIS that concludes there will be
8 no significant traffic hazards. By reducing the level of design, SDOT precluded meaningful
9 review of its design in this appeal and made it impossible for the Coalition to present the kind
10 of detailed testimony about traffic hazards that Mr. Bishop presented in 2012. As Judge
11 Rogers’ observed, “what hasn’t been decided can’t be reviewed.”

12 Judge Rogers’ order played no role in SDOT’s decisions about the level of design used
13 in the EIS, as Mr. Mazzola acknowledged:¹³

14 Q. Okay. But you've read and are familiar with the Second Order of Remand?

15 A. Yes. And that was the one that remanded the city to go back and provide
16 more detail on the Shilshole segment if I'm -- memory serves me right.

17 Q. Yes. It --

18 A. Okay.

19 Q. That's the one that said 10-percent level of design was not adequate and
20 remanded it for a more detailed design.

21 A. That's the same remand I'm thinking of then.

22 Q. Yeah. And when you sat down with your team to prepare for the -- to
23 prepare the EIS in this case, Judge Rogers decision played no role in your
24 determination about the level of design. Isn't that correct?

25 A. That's a fair statement that we felt we had enough level of design in order
to identify and disclose the impacts. So Judge Rogers's decision did not play in our --
into our determination that we had enough information to do the job that we needed in
this EIS.

26 An EIS cannot serve its purpose if a proposal is not developed to a level where both
27 adverse impacts and mitigation can be reasonably identified and analyzed. Claudia Hirschey
28 testified that in her experience working on NEPA/SEPA documents for transportation agencies

¹² Claudia Hirschey testified that the design was at 5-10% level, Transcript, page 180, lines 13-14, and no witness contradicted her testimony.

¹³ Transcript page 1483, lines 24-25 and 1484, lines 1-22.

1 such as Sound Transit and WSDOT, designs are typically taken to approximately a 30% level
2 so that impacts and mitigation for those impacts can be identified:¹⁴

3 Q. So what can you tell about the impacts of a project at 30-percent design that
4 you can't tell at 10-percent design?

5 A. It depends on how the project team defines their 10-percent design, but I'll
6 just give some more typical examples. For example, at 10 percent you may know you
7 can achieve 10 to 12 foot lanes, but at 30 percent you might be able to define that we
8 can achieve 10-and-a-half-foot lanes or 11-foot lanes. In that example, on a major
9 truck street or major transit street, the standard is 11-foot lanes, so you would know --
10 we typically know by 30-percent design confidently what design standard you can
11 achieve. And at 10 percent, you probably haven't quite achieved the level of
12 confidence. You're still talking about ranges of design.

13 Mr. Johnson, who also has done work for Sound Transit, confirmed Ms. Hirschey's
14 testimony about the level of design used in Sound Transit's SEPA review of transportation
15 projects:¹⁵

16 Q. Okay. You -- you described how, I think, in referring to EISs where the
17 agency preparing the EIS is also the project proponent such as Sound Transit, or in this
18 case, SDOT; that the agency typically strives to eliminate impacts by design?

19 A. Correct.

20 Q. And -- but don't they do that for -- Sound Transit, for example, don't they do
21 that in the EIS by advancing the design of the preferred alternative to a level where that
22 determination can be made?

23 A. Yes.

24 Q. Okay. And, so, that's why Sound Transit, as you know, takes its preferred
25 alternatives to approximately a 30 percent level of design; correct?

A. It -- it takes -- they sometimes refer to that as a 30 percent level of design.
Sometimes they prefer to -- they refer to it simply as a preliminary engineering
conceptual design.

The aptness of Ms. Hirschey's example about lane widths was confirmed by the
testimony of the City's Traffic Engineer, Mr. Chang:¹⁶

Q. So you'll agree that on this table or figure 1-3 from the EIS it includes a
typical section on Shilshole?

A. Yes, it does.

Q. And what does it say about the width of the travel lanes?

A. It has a range from 10-12 foot for the through lanes.

Q. It has a range from 10-12 feet. Ten feet would be below the standards in
both the Right-of-Way Improvement Manual and Streets Illustrated; correct?

A. It is below the posted standards.

Q. Okay. And has any safety analysis been done of what would happen if you
used ten-foot lane widths for the trucks on Shilshole?

¹⁴ Transcript page 179, line 16 to page 180, line 7.

¹⁵ Transcript, page 1184, lines 2-19.

¹⁶ Transcript page 1803, line 22 to page 1805, line 2.

1 A. So depending on where that location is, you'd have to determine if there is
an impact or not. So if it's at an intersection where the trucks are turning versus a small
(inaudible) versus a whole entire corridor.

2 Q. So whether there is a safety issue, you would have to determine that in a
subsequent²⁰ analysis that's not in the EIS?

3 A. So we have many locations that have varying lane widths, and we would
have to look at what's available. But we do not have a safety analysis.

4 Q. Okay. There is no safety analysis of dropping below the standards in the
EIS; correct?

5 A. Correct.

6 Another example of impacts that cannot be identified at a 5 – 10% level of design, but
7 that could be identified at a 20 – 30% level of design, are the impacts from barriers. At the
8 hearing before Hearing Examiner Watanabe, the Appellants presented expert testimony from
9 Mr. Bishop about the hazards that would be created by the barriers that SDOT proposed
10 between its trail and the street, as noted in Conclusion 6 of Hearing Examiner Watanabe's
11 decision W-12-002, but the lower-level design that SDOT used for the EIS defers decisions
12 about barriers to the future, so they cannot be reviewed in a SEPA appeal. Thus Mr. Bishop
13 testified:¹⁷

14 A. . . . There's a standard that says a barrier needs to be two-feet away from the
edge of the trail, and the standard that says it -- the barrier needs to be three feet from
15 the edge of the roadway. And if the barrier itself is two feet, that takes seven feet, not
16 five. So there aren't -- they haven't developed a design enough -- it's only 10 percent to
be able to tell where the barrier might be put, so I can't really comment on that. But I
don't see how they can put a barrier in when there's only five feet.

17 Q. What is shy distance?

18 A. Shy distance is the distance between the edge of the pavement and a
physical obstruction of whatever type including a barrier.

19 Q. So the two feet and the three feet you've been referring to are those shy
distances?

20 A. Yes.

21 Q. And can barriers themselves create safety hazards?

22 A. Yes. Yeah. At the ends -- particularly at the ends of the barriers where
you're stopping -- if you run into them -- you go onto the ends.

23 Q. When you testified at the prior hearing, did the -- were the plans sufficiently
developed for you to see where the barriers were, what they would be, and where the
ends of them were?

24 A. Yes.

25 The evidence presented by Appellants at this hearing demonstrates that SDOT's
reduced level of design is not only inconsistent with Judge Roger's Order, it is inconsistent

¹⁷ Transcript, page 96, line 8 to page 97, line 9.

1 with the purpose of an EIS, which is to inform decision-makers about environmental impacts
2 and mitigation before a decision is made, not conceal impacts or defer disclosure until after
3 decisions are made. “The purpose of threshold review, *the EIS process*, and SEPA’s other
4 mandatory procedures is *full disclosure* and consideration of environmental consequences and
5 values *prior to* government action.” Settle, at §6.01, p. 6-2 (emphasis added, citing *ASARCO*
6 *Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 707, 601 P.2d 501 (1979)). “An EIS does ‘not
7 rule on the wisdom of the proposed development’ but provides decision-makers with
8 ‘*sufficient information to make a reasoned decision.*’” Settle, at § 14.01, p. 14-3 (citing
9 *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 94 P.2d
10 1300 (1995))(emphasis added).

11 **4. SDOT Limited the Choice of Reasonable Alternatives in Violation of SMC
12 25.05.070.A.2**

13 SDOT chose the preferred alternative in late February or early March, 2017,¹⁸ and
14 asked its on-call design firm, Perteet, to begin work on the final design of the preferred
15 alternative in late March.¹⁹ Perteet was “officially on board”²⁰ and “engaged” to work on the
16 final design *before* SDOT published its Final EIS on May 25, 2017.²¹

17 As of the date of the appeal hearing, SDOT had advanced the preferred alternative to a
18 90% level of design,²² at a cost of unknown hundreds of thousands of dollars.²³

19 SMC 25.05.070 states in pertinent part:

20 A. Until the responsible official issues a final determination of nonsignificance or
21 final environmental impact statement, no action concerning the proposal shall
22 be taken by a governmental agency that would:

- 23 1. Have an adverse environmental impact; or

24 ¹⁸ Transcript page 1487, lines 15-18

25 ¹⁹ Transcript page 1494, lines 5-8

²⁰ Transcript page 1495, lines 8-12

²¹ Transcript page 1511, lines 19-25 (“A. The city engaged Perteet [sic] to begin work on the final sign prior to the final EIS being published this year. That's correct.”)

²² Transcript page 1515, lines 24-25

²³ Transcript page 1514, line 23 – page 1515, line 10

2. Limit the choice of reasonable alternatives.

1
2 Mr. Mazzola testified that since the FEIS was published in May, SDOT has taken no
3 action that would limit the choice of reasonable alternatives.²⁴

4 Q. So when and by whom is the future decision going to be made about
5 whether to proceed with an alternative, then?

6 A. So, right now, you know, as we've I think -- as the city has announced and
7 as we have stated in the final EIS, our -- the City's -- the Department's intent is to move
8 forward with the preferred alternative. As I mentioned before, the Department's made a
9 decision to proceed with the project, the project being defined as completing the Burke-
10 Gilman Trail Missing Link a long time ago, and always with the understanding that no
11 formal agency action as Section 070A1 and 2 refer to has yet been taken by the city.

12 Q. And my question is who is going to take that action?

13 A. So the Seattle Department of Transportation will take that action.

14 Q. Okay, but as a district, (inaudible) already blessed the preferred alternative
15 and approved the investment in the final design of the preferred alternative?

16 A. So as I mentioned, our intent is to move forward with the preferred
17 alternative, so and as I've mentioned before, you know, decisions are made about this
18 project as many of our projects every day and so the decision was made to move
19 forward with the design process and advance the project design, to gear the Department
20 up in order to get the project out eventually once the hearing here is settled.

21 Q. So is it -- is what you're saying then -- let's assume Mr. Kubly retains his
22 position as Department Director, that having made the decision and before May 25th to
23 invest in the final design of the preferred alternative, he's going to make another
24 decision whether to do that or not, whether to proceed with that project at some point in
25 the future?

A. That's correct . . .

16 Mr. Mazzola made similar assertions repeatedly in his testimony,²⁵ even though the EIS
17 states that final design and permitting are expected to be completed by early 2018, with
18 construction beginning shortly thereafter, as Mr. Mazzola also acknowledged.²⁶

19 Thus SDOT's position is that it has not taken action, as defined in SEPA, to decide
20 among the alternatives in its EIS even though SDOT started work on the final design of the
21 Preferred Alternative approximately two months before the FEIS was published; had achieved
22 90% design of the Preferred Alternative by the time of the hearing, and stated in the FEIS its

24 Transcript page 1525, line 2 – page 1526, line 16.

25 Transcript page 1514, lines 1-6; page 1528, lines 15-17; and page 1529, lines 21-24.

26 Transcript page 1529, lines 6-12.

1 intent to complete final design and permitting by early 2018 and start construction shortly
2 thereafter.

3 One cannot fully design one alternative and not thereby limit the choice among
4 alternatives. SDOT's actions demonstrate that its EIS is an attempt to defend a decision
5 already-made. As discussed in Professor Settle's treatise:

6 Echoing frequent judicial admonitions, the SEPA Rules emphasize that the purpose of
7 the EIS is more than mere disclosure, rationalization or justification; ***it is to be used by
8 agency officials in making decisions on proposed actions.***

9 Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy
10 Analysis*, Ch. 14, § 14.01 (Mathew Bender)(emphasis added). Professor Settle's two-
11 paragraph footnote cited in support of this assertion reads:

12 WAC 197-11-400(4), 197-11-402(1), 197-11-406. *E.g.*, *King County v. Boundary
13 Review Board*, 122 Wn. 2d 648, 666, 860 P.2d 1024 (1993); *Barrie v. Kitsap County*,
14 93 Wn. 2d 843, 854, 613 P.2d 1148 (1980); *Mentor v. Kitsap County*, 22 Wn. App.
15 285, 291, 588 P.2d 1226 (1978) ("Although we find no serious inadequacies in the
16 statement submitted here, we feel compelled to emphasize that ***an environmental
17 impact statement should not merely be an ex post facto justification of official action
18 but should serve to inform lawmakers of the environmental consequences of the
19 proposal before them.*** *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973).").

20 ***SEPA must fight a constant battle to keep decisionmakers' minds open while
21 environmental information is gathered.*** Even the mayor of a large, progressive
22 Washington city recently was quoted as having "half-jokingly" said "We're going to
23 have a fair and detailed process—and then we're going to put [the new city hall] at
24 Union Station." D. Schaefer, *Union Station Proposal Picking Up Speed*, the Sunday
25 Seattle Times/Seattle Post Intelligencer, Feb. 16, 1986, at A1.

SDOT's decision to begin designing its Preferred Alternative months before it
published the FEIS, and to bring that design to the 90% level by the time of the hearing,
demonstrates that its EIS is a prohibited *ex post facto* justification of a decision already made.

And even if one assumes that SDOT has not already decided to build a two-way sidepath along
Shilshole, its decision to complete the design of one alternative before making a decision
among alternatives would be a direct violation of SMC 25.05.070.A, which is what the case
law refers to as "snowballing:"

One of SEPA's purposes is to provide consideration of environmental factors at the
earliest possible stage to allow decisions to be based on complete disclosure of
environmental consequences. *Stempel v. Department of Water Resources*, 82 Wash.2d
109, 118, 508 P.2d 166 (1973); *Loveless v. Yantis*, 82 Wash.2d 754, 765–66, 513 P.2d

1 1023 (1973). . . . Even a boundary change, like the one in this case, may begin a
2 process of government action which can “*snowball*” and acquire virtually unstoppable
3 administrative inertia. See Rodgers, *The Washington Environmental Policy Act*, 60
4 Wash.L.Rev. 33, 54 (1984) (the risk of postponing environmental review is “a
5 dangerous incrementalism where the obligation to decide is postponed successively
6 while project momentum builds”).⁹ Even if adverse environmental effects are
7 discovered later, the inertia generated by the initial government decisions (made
8 without environmental impact statements) may carry the project forward regardless.
9 When government decisions may have such *snowballing* effect, decisionmakers need to
10 be apprised of the environmental consequences *before* the project picks up momentum,
11 not after.

12 *King County v. Washington State Boundary Review Board for King County and City of Black*
13 *Diamond*, 122 Wn.2d 648, 663-664, 860 P.2d 1024 (1993) (emphasis added).

14 The *snowballing metaphor* is powerful because it *embodies the fundamental idea of*
15 *SEPA*: to prevent government agencies from approving projects and plans *before* the
16 environmental impacts of doing so are understood

17 *International Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512,
18 522, 309 P.3d 654 (2013) (emphasis added). This prohibition applies equally to popular as
19 well as unpopular projects. See *Marantha Min. Inc. v. Pierce County*, 59 Wn.App. 795, 801
20 P.2d 985 (1990).

21 SDOT is violating the fundamental idea of SEPA. Its actions are unworthy of
22 deference, and are clearly erroneous, for the reasons set forth in this subsection and in the three
23 subsections above.

24 **B. The EIS is Inadequate because it Failed to Disclose or Discuss Significant Adverse**
25 **Impacts Created by the Missing Link**

As Professor Settle explains, to be adequate an EIS must provide “...decision-makers
with ‘*sufficient information to make a reasoned decision.*’”²⁷ This is because “...SEPA’s
procedural and substantive mandates are intimately interrelated. The amount of
environmental information required to evaluate compliance with SEPA’s policies is:

Directly proportional to an action’s potential adverse environmental consequences.
Routine and inevitable agency actions, not commonly associated with noticeable
environmental effect, call for only the most superficial and impressionistic

²⁷ Settle, at § 14.01, p. 14-3 (citing *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356,
362, 94 P.2d 1300 (1995)(emphasis added).

1 environmental analysis. Conversely, *proposals which virtually shout out high*
2 *probability of environmental catastrophe may not proceed without nearly perfect*
3 *environmental information.* . . . Proposals that are environmentally significant are
4 subject to the intense environmental scrutiny and elaborate process requirements of the
5 environmental impact statement (EIS).²⁸

6 The “rule of reason” represents the recognition “that EIS adequacy is better determined on a
7 case-by-case basis guided by all of the policy and factual considerations reasonably related to
8 SEPA’s terse directives.”²⁹

9 **1. The EIS Failed To Disclose and Discuss Significant Adverse Safety Impacts**
10 **and Traffic Hazards**

11 In *Kiewit*, the Court upheld a decision by a Board of County Commissioners to require
12 an SEIS because the existing EIS failed to adequately disclose safety impacts and traffic
13 hazards related to a planned bicycle trail that would be located near *the sole driveway* of a
14 proposed asphalt plant. *Kiewit Const. Group Inc. v. Clark County*, 83 Wn.App. 133, 142, 920
15 P.2d 1207 (1996). The asphalt plant was proposed to be located *near* a planned bicycle trail
16 and its operation would generate approximately “43 two-way truck trips per day...or 86 ‘trip
17 ends...”, which trips would peak on “hot, sunny days during peak asphalt production...” to
18 approximately 100 to 125 trip ends per day and coincide with peak trail use. *Kiewit*, 83
19 Wash.App. at 137. Despite the fact that trucks entering and exiting the plant would not even
20 cross the planned trail and there were far fewer relative trips per day compared to the volume at
21 issue here, the Court upheld the determination that the EIS was inadequate because it failed “to
22 disclose the full effect of truck traffic on bicyclists and other trail users...” *Id.* at 142. The
23 Court noted that instead of disclosing these safety impacts, the EIS included conclusory
24 statements that “the trail would ‘greatly improve pedestrian and bicycle safety...’” when in fact
25 the EIS did “not address the specific impact of truck traffic on the bicycle trail.” *Id.* at 141.

²⁸ Settle, at § 14.01, p. 14-4 (citing *e.g. Sierra Club v. Sigler*, 18 Env’tl Rep. Cas. (BNA) 1649 (5th Cir. 1983) &
Oregon Env’tl. Council v. Kunzman, 22 Env’tl. Rep. Cas. (BNA) 1739 (D.C. Or. 1985))(emphasis added).

²⁹ Settle, at § 14.01[1][a], at p. 14-17.

1 Here, SDOT's EIS is similarly inadequate because rather than disclosing and analyzing the
2 trail's safety impacts it simply makes unsupported statements saying the trail will "improve
3 safety."

4 **a. The Coalition Presented Credible Evidence from Independent**
5 **Experts: SDOT's Witnesses All Had a Stake in the Preferred**
6 **Alternative**

7 The Coalition presented testimony regarding the inadequacy of the safety and traffic
8 hazard discussion and disclosure in the EIS from three independent experts, Mr. Bishop, Ms.
9 Hirschey, and Mr. Kuznicki. The Coalition's experts, together, have nearly 100 years of
10 combined experience and were qualified as unbiased experts.

11 SDOT's case that its EIS for its Project is adequate is based entirely on the testimony
12 of:

- 13 • Its staff, whose jobs were to prepare and issue the EIS or get the Missing Link built;
- 14 • Its consultants, who wrote the EIS and then sought to defend what they had written; and
- 15 • Mr. Schultheiss, who profits from his firm's, Toole Design Group's, design work on the
16 preferred alternative as a subconsultant to Pertect;³⁰ In addition, Mr. Schultheiss:
 - 17 ○ Has never worked on an EIS and only worked on one NEPA EA;³¹
 - 18 ○ Spent a total of approximately one hour driving around the Study Area as part of his
19 work on the Missing Link, during which drive he did not get out of the car to speak
20 with any business owners, bicyclists, or pedestrians before offering his opinion that
21 the trail will operate safely;³² and
 - 22 ○ His entire prior experience with bicycle issues in Seattle is based on his work as a
23 design consultant for SDOT.³³

24 ³⁰ Transcript, page 1304, line 22 to 1305, line 5.

25 ³¹ Transcript, page 1303, lines 17-19.

³² Transcript, page 1307, lines 7-21.

³³ Transcript, page 1310, lines 3-6 ("Q. So every time you've been here, you've been a professional consultant being paid by SDOT to work on an SDOT project. A. That is my job.")

1 **b. Ms. Hirschey Created a Methodology that is Consistent with the**
2 **Rule of Reason to Assess and Disclose the Relative Safety of the**
3 **Alternatives in the EIS**

4 The EIS does not include a meaningful safety methodology or analysis. Ms. Hirschey,
5 a licensed traffic engineer with over 30 years' experience who has worked on dozens of SEPA
6 and NEPA transportation projects including bicycle facilities,³⁴ prepared and submitted a
7 detailed, lengthy and independently peer-reviewed³⁵ safety report admitted into evidence as
8 Exhibit A-3. In preparing her report, she walked the entire route of each Alternative³⁶ included
9 in the Draft EIS and Final EIS to catalogue all of the driveways and intersections; contacted
10 numerous jurisdictions in the United States and Canada to determine best practices for locating
11 and designing bicycle facilities;³⁷ she conducted an extensive literature search, and she directly
12 communicated with experts in this field.³⁸

13 She did all of this to construct a proper methodology because “there needs to be a
14 legitimate comparison of the conditions across each alternative to provide decision makers
15 with information they need to compare alternatives.”³⁹ Ms. Hirschey confirmed that her
16 development of a site-specific/condition-specific methodology to evaluate safety is accepted
17 practice, saying there is no “cookbook” approach and that the safety analysis methodology has
18 to be based on local conditions.⁴⁰ She confirmed that it is very common—“it is what we do”—
19 to create a methodology to study safety or other critical elements of a complex project like the
20 Missing Link.⁴¹

21 ³⁴ See Exhibit A-30.

22 ³⁵ Transcript, page 316, line 18 to page 317, line 14.

23 ³⁶ Mr. Schultheiss, by comparison, admitted he never walked any of the alternatives and did not talk to anyone
24 along any of the routes. See Transcript, page 1311, lines 10-25 and page 1312, lines 1-9.

25 ³⁷ Transcript, pages 203 to 207.

³⁸ *Id.*; see also Exhibit A-3, pages 2-5.

³⁹ Transcript page 183, lines 15-18.

⁴⁰ Transcript page 269, lines 4-14.

⁴¹ Transcript, page 314, line 19 to page 315, line 6.

1 By comparison, the safety analysis and disclosure of traffic hazards in the
2 Transportation Discipline Report and section of the EIS (which were copied throughout the rest
3 of the document) where written by a junior planner who is not an engineer or designer, has
4 worked on approximately five EISs in her less than 6 years of professional experience, and
5 who confirmed she did not personally walk or catalogue the driveways and intersections
6 included in the Draft EIS and Final EIS before writing these reports and sections of the EIS.⁴²

7 The Transportation section of the Final EIS in particular and the Final EIS in general, makes
8 assertions about safety that are unsupported by data and analysis, as summarized by the
9 following exchange between the Hearing Examiner and Ms. Hirschey:

10 Q. Ms. Hirschey, you directed our attention to page 5-19 and 5-20 of the
11 Transportation Discipline Report. The -- and specifically to the safety analysis of the
12 preferred alternative. There are many assertions in those paragraphs about what would
13 happen. Is, in your opinion, *is there any data or analysis to -- in the EIS to support*
14 *those assertions?*

15 A. *Not that I have found. No.*⁴³

16 **c. The EIS Does Not Disclose the Increased Safety Risks Created By**
17 **Contraflow Movements on Two-Way Sidepaths**

18 The EIS does not disclose or discuss the increased risks created by contraflow
19 movements on the two-way bicycle sidepaths proposed by SDOT for each alternative. As Ms.
20 Hirschey discussed in her report, Exhibit A-3, and testified about at length, there are “clear risk
21 factors of contraflow bicycle movements documented in existing research” because contraflow
22 movements “create a much more complex decision-making process for drivers leaving the
23 driveway.”⁴⁴ This is because drivers exiting a driveway across a contraflow sidepath have to
24 look both ways instead of just one direction to find a gap in two-way cycle/pedestrian traffic as
25 well as a gap on the roadway, while drivers turning left into a driveway across a contraflow
sidepath have to look 90 degrees behind them to so they can both cross oncoming vehicle

⁴² Transcript, page 923, lines 2-13, page 924, lines 8-23.

⁴³ Transcript, page 313, line 20 to page 314, line 3 (emphasis added).

⁴⁴ Transcript, page 194, lines 4-6 and 8-10.

1 traffic and navigate through two-way traffic on the sidepath.⁴⁵ Ms. Hirschey testified that the
2 increased risk created by contraflow movements is well document in accepted literature and
3 reports over many years, including:

- 4 • *The Risks of Cycling*, by Dr. Pasanen, concluded there were “approximately **twice the**
5 **number** of accidents on a two-way cycle track [contraflow] than a single direction” and
6 that it is safer to bicycle on a street compared to on a contraflow sidepath;⁴⁶ and
- 7 • *The Safe Streets Boulder Report*, 2016, which concluded based on a very high level of
8 bicycle usage on many bicycle paths that accidents “where bicycles are traveling in the
9 contraflow direction were **three times** that of bicycles that are traveling in a single
10 direction.”⁴⁷

11 Ms. Hirschey confirmed that she could not find a single study—anywhere—that concluded
12 contraflow sidepaths are not more dangerous than one-way facilities.⁴⁸

13 Based on all of her work personally gathering data, inventorying the existing conditions
14 and creating a methodology to study and assess the safety of the Missing Link, Ms. Hirschey
15 concluded that the traffic hazards from the proposed two-way sidepath would be significant:

16 A. In my opinion, it would have **more than a moderate impact to traffic safety**,
17 because over time as volumes increase, we have this greater level of exposure to --
18 through the conflict points. We have the greater risk factor of the contraflow lanes, and
19 you layer upon that the 94 percent of all accidents are human error. So over time with
20 this level of conflict, this level of risk, and the number of users, ultimately there will be
21 an accident. And, like, you know, it will be with a truck and it will be severe.⁴⁹

22 Scott Kuznicki, another of the Coalition’s safety experts, also opined the Missing Link
23 will create unmitigated safety impacts and traffic hazards:

24 Q. Mr. Kuznicki, did you also form an opinion as to whether the Missing Link will
25 create more than a moderate risk of a traffic hazard or a safety hazard?

⁴⁵ Transcript, page 194, line 10 to page 195, line 8.

⁴⁶ Transcript, page 199, lines 10-19; *see also* Exhibit A-3, page 076.

⁴⁷ Transcript, page 200, lines 5-15 (emphasis added); *see also* Exhibit A-3, page 079.

⁴⁸ Transcript, page 211, lines 18-22.

⁴⁹ Transcript, page 246, lines 11-21 (emphasis added).

1 A. I think the Missing Link itself creates a traffic hazard and some of the proposed
2 solutions to the Missing Link do not appear to take the alternate safety of people
3 walking and people bicycling into consideration.⁵⁰

4 To counter Ms. Hirschey's testimony, SDOT offered Mr. Schultheiss, who is personally
5 profiting from the Missing Link because his firm is helping design the Preferred Alternative.
6 He acknowledged he had read very little of the EIS — "I read one chapter" "...and scanned the
7 remaining chapters"⁵¹ — and had spent little time (about an hour driving around) personally
8 observing the Study Area. While he claimed the EIS disclosed the heightened risk associated
9 with a contraflow design, he could not remember where it did so or point to a specific page.⁵²
10 He asserted that he believes that he can design a two-wide sidepath to operate safely, but he
11 could not identify any literature that supports this assertion, and he has never designed or
12 worked on a bike trail that crossed 44 industrial driveways in less than 1.4 miles.⁵³ In fact, Mr.
13 Schultheiss admitted that the Missing Link will create the hazardous conditions Ms. Hirschey
14 discussed and which are detailed in one of the studies he relied upon, *Road Factors and
bicycle-motor vehicle crashes at unsignalized priority intersections*.⁵⁴

15 Q. There's a sentence that reads: "The risk of bicycle crashes is found to be
16 elevated at priority intersections. The two-way cycle paths along the arterial road, as
17 drivers entering from the roadside -- excuse me-- the side road, have difficulties in
18 detecting cyclists from the right." Do you see that?

19 A. I see that.

20 Q. So isn't that exactly the situation we have here, where the bicyclist is the priority
21 vehicle and a driver is coming out of a driveway and crossing the path and is going to
22 have difficulty seeing that cyclist?

23 A. It's exactly the same situation.⁵⁵

24 ⁵⁰ Transcript, page 522, lines 16-24.

25 ⁵¹ Transcript, page 1337, lines 3-6.

⁵² *Id.* lines 7-24.

⁵³ Transcript, page 1328, lines 17-24.

⁵⁴ Admitted Exhibit R-32.

⁵⁵ Transcript, page 1335, line 22 to page 1336, line 10 (emphasis added); *see also* R-32, page 588.

1 The problem, as Ms. Hirschey explained, is the EIS fails to disclose the problems with
2 contraflow bike movements on sidepaths and instead includes unfounded and unsupported
3 assertions that the Missing Link will be safer than existing conditions:

4 Q. The FEIS asserts in multiple places that the two-way trail will be safer than the
5 existing conditions. *Is there any data or analysis in the EIS to substantiate that*
6 *assertion?*

7 A. No. I should say *no for the preferred alternative*. For example, there could be
8 another alternative, such as a protected bike lane with a buffer on each side of the
9 street, that may improve safety compared to the no build.⁵⁶

10 **d. The EIS Inadequately Disclosed or Discussed the Numerous Conflict**
11 **Points Created By the Missing Link**

12 Ms. Hirschey testified that to properly evaluate, analyze and disclose potential safety
13 and traffic hazards from the Missing Link, the EIS should have focused on the level of conflict
14 between bicyclists, pedestrians, vehicles and trucks. As she explained, a “conflict point is a
15 potential interaction between vehicles be it non-motorized or motorized vehicles” that occurs
16 as a crossing conflict, a merging conflict or a divergent conflict.⁵⁷ Ms. Hirschey used Figure 1
17 in her Report⁵⁸ to illustrate these conflict points at a typical driveway along a contraflow
18 sidepath like the Missing Link. That diagram shows the Missing Link will create four new
19 conflict points—two for pedestrians and two for bicycles—at each driveway because of the
20 contraflow movement/design.⁵⁹ Ms. Hirschey then created an inventory of driveways based on
21 the type of use/activity that occurs at each one, which she presented in Table 1 in her Report.⁶⁰
22 She inventoried them based on use because every driveway is not created equal since the type
23 and intensity of vehicle traffic at a specific driveway presents different safety risks to sidepath
24 users:

25 A. Yes. Well, the industrial driveways on Shilshole are very active and most of the
– what you would call industrial on Leary are very low use or abandoned or maybe

⁵⁶ Transcript, page 247, line 20 to page 248, line 3.

⁵⁷ Transcript, page 190, line 23 to page 191, line 5.

⁵⁸ Exhibit A-3, page 211.

⁵⁹ Transcript, page 193, lines 2-22; *see also*, Exhibit A-3, page 211.

⁶⁰ Exhibit A-3, page 007.

1 used -- it appears like it could -- it's a really old facility, so maybe there's a delivery
2 once a week. But they were --when I drove by they were closed and not in use, so they
3 weren't active like they are on Shilshole.⁶¹

4 Ms. Hirshey, unlike SDOT, inventoried and evaluated the type and frequency of
5 vehicles at each driveway because the literature shows that bicycle accidents involving big
6 trucks and semi-trailers are far more likely to be severe or fatal:

7 A. Okay. So they summarized a report of bicycle with motor vehicle crashes from
8 2002 to 2008 in Ohio and found that the pickups, vans, minivans, and semi-trucks
9 accounted for approximately 23 percent of the crashes and the *likelihood of a severe
10 injury increased by 141 percent at intersections if the vehicle involved is a van. And
11 at non-intersections the severity was 100 percent if the vehicle involved was a semi-
12 truck.* So basically saying, the severity is much higher for larger vehicles.

13 Q. And are larger vehicles, in fact, involved in a higher percentage of fatal crashes
14 according to this report?

15 A. Yes.⁶²

16 She also testified that a New Jersey study she reviewed showed that “death or serious
17 injury was almost twice as likely on a truck route than a non-truck route.”⁶³ This is important,
18 as Ms. Hirshey explained, because the type of traffic passing through a conflict point is as
19 important as the number of conflict points in conducting a safety analysis and disclosing and
20 discussing these safety impacts.

21 **e. The EIS Fails To Disclose and Discuss the Risks Created By the
22 Combination of a Contraflow Sidepath and Numerous New Conflict
23 Points**

24 As Ms. Hirshey testified, one of the critical pieces missing from the EIS is that it
25 failed to include any analysis, disclosure or discussion regarding the dangerous combination of
26 contraflow bicycle movements and the increased number of new conflict points. Because of
27 the “findings about the increased risk of the contraflow movement,” she “tallied the number of
28 driveway crossings for each alternative that would be in the contraflow direction.”⁶⁴ She then

29 ⁶¹ Transcript, page 216, lines 8-15.

30 ⁶² Transcript, page 197, line 23 to page 198, line 12 (emphasis added)(citing to the University of Washington
31 study, *Why Can't We Be Friends* (2012), Exhibit A-3, pages 027-075).

32 ⁶³ Transcript, page 198, line 24 to page 199, line 3.

33 ⁶⁴ Transcript, page 216, lines 18-22

1 correlated the number of conflict points with the types of driveways, as depicted and explained
2 in Table 1 in her Report, concluding,

3 Q. So going back for a moment then to your conflict diagrams, how many
4 additional conflicts with this proposed project create at each of those 39 driveways?

5 A. It's an additional four conflict points in the contraflow direction.

6 Q. So if we multiply 4 by 39 and get **156, that would be the number of additional
7 conflict points?**

8 A. Yes.

9 Q. And is it fair to say, based on your review of the literature -- well, what does the
10 literature say about the danger of each of those conflict points for the contraflow?

11 A. Well, **each of those are two to three times as dangerous.**⁶⁵

12 To be thorough and have an “apples-to-apples” comparison, Ms. Hirschey also
13 completed this same analysis for the No Build (i.e., existing conditions) alternative compared
14 to the alternatives considered in the EIS,⁶⁶ all of which she presented in Table 1 in her
15 Report.⁶⁷ Based on this, she testified that the Preferred Alternative is still more dangerous than
16 the existing conditions (No Build) because of the increased conflict points created by the
17 contraflow movement at industrial driveways frequented by large trucks.⁶⁸

18 Ms. Hirschey did all of this work because SDOT failed to include any of it in the EIS.

19 Q. So you testified quite a bit about the additional conflict points and the increased
20 hazard from the contraflow movement. **Is any of that disclosed in the EIS?**

21 A. **None of that is. And not – definitively not in a quantified way.**

22 Q. **Is there any acknowledgement in a qualitative way that contraflow bicycle
23 trails are more -- two to three times more dangerous than single flow?**

24 A. **No. There just general statements about conflict.**⁶⁹

25 Lacking disclosure and analysis, the EIS is inadequate. *Kiewit, supra*, at 142 (EIS is
inadequate because of its “failure to disclose full effect of truck traffic on bicyclists and other
trail users” and its failure to “discuss meaningfully the alternative” routes).

⁶⁵ Transcript, page 217, lines 8-23 (emphasis added).

⁶⁶ Transcript, page 219, lines 6-15.

⁶⁷ Exhibit A-3, page 007.

⁶⁸ Transcript, page 219, line 18 to page 220, line 20.

⁶⁹ Transcript, page 247, lines 8-19 (emphasis added).

f. Mr. Bishop Confirmed the Missing Link Will Have More Than a Moderate Impact on Traffic Safety Not Disclosed In the EIS

1
2 Vic Bishop, a traffic engineer with nearly five decades of experience working on
3 bicycle facilities for clients including SDOT and the Washington Department of
4 Transportation, also testified that the Missing Link will create traffic hazards not disclosed in
5 the EIS. To support his testimony, Mr. Bishop created autoTurn diagrams for *all* of the
6 driveways along the Preferred Alternative, not just the 4 driveways SDOT depicted in the
7 Final EIS. As Mr. Bishop explained, he personally identified/verified each driveway and
8 spoke with business/property owners to confirm the largest type of truck that used each
9 driveway.⁷⁰ Mr. Bishop testified that SDOT failed to even properly inventory the existing
10 driveways along the Preferred Alternative: In Mr. Bishop's autoTURN diagrams, the 29
11 driveways SDOT did not address are indicated by a letter after the driveway number—for
12 example, "17a," "17b," etc.⁷¹ Additionally, Mr. Bishop contacted the business and property
13 owners along the Preferred Alternative to confirm the largest truck that frequented each
14 driveway so he could use that vehicle in his autoTURN analysis. Instead of doing that
15 legwork, SDOT used a smaller vehicle in its autoTURN analysis even when, for example at
16 CSR Marine, it knew a larger truck (the low-boy) frequented a driveway.

17 Based on all of this, Mr. Bishop testified that his autoTURN analysis depicted in
18 Figures 1A and 1B⁷² that the Project will create more than a "moderate adverse impact on
19 traffic safety, which was not disclosed nor discussed in the EIS, stating:

20 Q. So, Mr. Bishop, the issues that you've identified using Figures 1A and 1B, you
21 think those issues together constitute a reasonable likelihood of more than a moderate
adverse impact on traffic safety?

22 A. I do.

23 Q. Are the issues that you've been talking about other than the inability to make a
right-hand turn from Shilshole or 24th onto Market, *are they identified in the EI -- in
the text of the EIS so that a reader would be aware of them?*

24 ⁷⁰ Transcript, page 32, lines 5-12.

25 ⁷¹ Transcript, page 35, lines 14-25.

⁷² Exhibit A-1.

1 A. *No.*⁷³

2 Mr. Bishop also testified that the Preferred Alternative will create a dangerous and
3 unsafe condition because approximately one-half of its length will be comprised of driveways,
4 street crossings or incursion zones (areas where some portion of a turning truck will be in the
5 proposed buffer area between the trail and the curb of the street),⁷⁴ none of which, again, is
6 either disclosed or discussed in the EIS. Explaining the basis for his opinion, Mr. Bishop
7 testified:

8 A. We've got a mile and a -- almost a mile-and-a-half, 1.4 miles of trail and a third
9 of it is in an area that a -- the -- all types of bicyclists are invited to come and use this
10 trail. And whether we're talking about the strong and fearless type bicycle who's
11 commuting and got his head down and going as fast as he possibly can all the way
12 down to the families with kids that come in on the weekend and they're all week long.
13 *You're -- then you're inviting a wide range of bicycle users into something that is
14 called "safe" by the City. And designing a system that's got more than a third of the
15 total length that's in an area where everybody has to be really on their toes: the truck
16 driver, the vehicle driver, the pedestrian, and the bicyclist in order for them to
17 negotiate their multiple users. That is universally, in our mind, just the -- an amazing
18 level of danger to this path-- type path -- two-way side path.*⁷⁵

19 Again, none of this is disclosed or discussed in the EIS.

20 **g. The EIS Is Inadequate Because It Fails To Disclose or Discuss How
21 the Preferred Alternative Is Incompatible With Recognized
22 Locational Criteria**

23 The EIS fails to disclose or discuss how the Preferred Alternative is incompatible with
24 accepted and applicable locational criteria. To be adequate, the EIS must be “substantiated by
25 [credible and admissible] opinion and data,” which is lacking here. *Kiewit, supra* at 140.

The EIS, at heart, is intended to inform a policy decision⁷⁶ about where to locate and
how to design the Missing Link. The EIS, however, fails to include any discussion of how the

⁷³ Transcript, page 84, lines 5-16 (emphasis added).

⁷⁴ See Transcript, page 58.

⁷⁵ Transcript, page 110, lines 1-21 (emphasis added).

⁷⁶ Transcript, page 1196, lines 8-13 (As Mr. Johnson confirmed: “Q. Is it fair to say that *the decision-maker, after being informed by an EIS, after actually reading it and being informed, then makes a policy decision where other factors can be taken into account? A. Yes.*”)(emphasis added).

1 Missing Link is incompatible with accepted and applicable locational criteria. Not only does
2 the EIS contain numerous unsupported statements that the “trail will be designed to operate
3 safely,” but it also actively misleads the reader by implying that locating the Preferred
4 Alternative on Shilshole “would be consistent with applicable Seattle design standards,
5 including the NACTO and AASHTO guidelines.”⁷⁷

6 Multiple witnesses at the hearing testified that locating the Preferred Alternative on
7 Shilshole does not comply with those guidelines and other applicable siting criteria. On
8 cross,⁷⁸ even Mr. Schultheiss admitted that locating the Preferred Alternative in a heavy
9 industrial area with numerous driveways is inconsistent with siting criteria that he helped draft
10 in the *AASHTO Guide to Bicycle Facilities, 4th Ed.*⁷⁹ because you cannot guarantee safety.⁸⁰

11 Despite Mr. Schultheiss’s confirmation that the AASHTO siting criteria apply to this
12 Project,⁸¹ the EIS fails to include any disclosure or discussion of how the Missing Link is
13 incompatible with AASHTO’s criteria. Instead, it says the sidepath will be “compatible” with
14 them, without any support, documentation, or analysis.

15 Mr. Bishop also testified that the Missing Link should not be located on Shilshole based
16 on an analysis of the Missing Link’s relative safety using the Chicagoland Bicycle Federation
17 rating criteria.⁸² Using this rating system, Mr. Bishop calculated that the Preferred Alternative
18 scores “66,” which is “four times the maximum threshold [of 16] that the Chicagoland people
19 thought was appropriate.”⁸³

20 The only evidence SDOT offered to rebut Mr. Bishop’s use of and conclusions based
21 on the Chicagoland rating system was Mr. Schultheiss, who stated that it is not “scientific”—a

22 ⁷⁷ R-1, FEIS, Section 7.3.2, page 7-32.

23 ⁷⁸ See Transcript, pages 1343 to 1346.

24 ⁷⁹ Exhibit R-13.

25 ⁸⁰ Transcript, page 1346, lines 21-22.

⁸¹ Transcript, page 1345, lines 4-24.

⁸² Transcript, pages 111-118.

⁸³ Transcript, page 116, lines 22-24.

1 fact readily acknowledged by Mr. Bishop, who described it as a quantitative tool to compare
2 the safety of alternative routes, not a qualitative tool to evaluate relative safety of alternative
3 trail configurations or designs.⁸⁴ Mr. Schultheiss admitted he knows of no studies or tools
4 based on science that can be used to evaluate side path safety risks—he just thinks the
5 Chicagoland Federation authors are biased because they were advocating for a specific point of
6 view.⁸⁵

7 Summarizing his application of the Chicagoland rating system to the Missing Link, Mr.
8 Bishop testified,

9 A. And we're four times as big on all the alternatives: the preferred alternative as
10 well as the four that were in the draft EIS. That just tells me that the whole concept is
11 really risky. Really, it's inappropriate in my mind because of this and the incursion zone
12 stuff that we're even talking about a two-way side path through this highly industrial
13 area with driveways and heavy trucks and all the activity that's going on on this major
14 truck street.⁸⁶

15 Asked whether the danger of two-way side paths was disclosed or discussed anywhere in the
16 EIS, Mr. Bishop said “No. Not that I’m aware of.”⁸⁷

17 **h. The EIS Is Inadequate Because It Failed To Include Sufficient
18 Discussion and Disclosure of the Amount and Severity of Conflict
19 Points amongst Alternative Routes**

20 Going back to *Keiwit*, one of the main reasons the Court agreed that the EIS was
21 inadequate was because it failed to include sufficient disclosure and discussion on the relative
22 safety of alternatives to the proposal (“...the company’s failure to discuss meaningfully the
23 alternative of direct access ramps onto State Route 14.”). *Kiewit, supra* at 142. Here the EIS is
24 similarly inadequate because it failed to disclose the increased hazards that will be created by
25 the proposed sidepath, with its contraflow movement and additional conflict points on a

⁸⁴ Mr. Bishop acknowledged Chicagoland is not “scientific” but is the “best they could come up with” and that
“nobody’s come up with a better system.” Transcript page 112, lines 1-5.

⁸⁵ Transcript, page 1312, lines 20-25 and page 1313, lines 1-17.

⁸⁶ Transcript, page 117, lines 15-24.

⁸⁷ Transcript, page 118, line 8.

1 heavily-trafficked industrial street crossed by many industrial driveways. The EIS similarly
2 fails to meaningfully inform decision-makers about the comparative safety of alternative
3 alignments and designs, such as one-way facilities on Ballard Avenue and Leary Way.

4 Under the rule of reason, an EIS is adequate when it includes the information and
5 analysis that *reasonably* could have been included. “An EIS does ‘not rule on the wisdom of
6 the proposed development’ but provides decision-makers with ‘*sufficient information to make*
7 *a reasoned decision.*” Settle, at § 14.01, p. 14-3 (citing *Citizens Alliance to Protect Our*
8 *Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 94 P.2d 1300 (1995))(emphasis added). The
9 evidence presented at the hearing demonstrates this was not done here. SDOT already knew
10 about, but chose to conceal, the additional hazards created by two-way sidepaths, and SDOT
11 could easily have commissioned the kind of analysis of alternatives that Ms. Hirschey
12 prepared, or used accurately-sized trucks to prepare the AutoTurns that Vic Bishop prepared.
13 Lives are at stake, as well as the survival of many businesses, and under the rule of reason
14 much more was required of SDOT.

15 **2. The FEIS Does Not Identify the Significant Parking Impacts That SDOT’s**
16 **Preferred Alternative Will Have on the Businesses on Shilshole**

17 The FEIS concludes that there will be no significant adverse impacts from the loss of
18 parking because the FEIS calculates the loss of parking as a small percentage of the parking in
19 a large study area that encompasses all the alternatives studied in the EIS. As stated in section
20 5.3.2 of the Parking Discipline Report (Exhibit R3, Technical Appendices to the FEIS):

21 Overall, the loss of approximately 344 on-street parking spaces represents
22 approximately 11% of the on-street parking supply in the study area The loss of
23 parking would not be considered a significant adverse impact because the parking loss
24 is spread throughout the Preferred Alternative . . .
25

1 This is not accurate: the loss of parking for the preferred alternative will be highly
2 concentrated, as demonstrated by Mr. Bishop's Parking Evaluation, Ex. A1, page 053, and by
3 Mr. Bishop's testimony.⁸⁸

4 The FEIS does not acknowledge the highly concentrated nature of the parking loss that
5 is set forth in Mr. Bishop's exhibit. In order to know how concentrated the loss is, one has to
6 count the losses block-by-block, and then do the math that Mr. Bishop did in his Parking
7 Evaluation. Only then does one learn that on Shilshole Avenue, 299 stalls will be lost out of a
8 total supply of 454 spaces. In other words, 66% of the spaces will be lost and only 155 spaces
9 will remain.

10 Based on the weekday parking utilization of 300 spaces set forth in Appendix B of the
11 Parking Discipline Report, the remaining 155 spaces will be 145 spaces fewer than are needed
12 to meet the current weekday need on Shilshole. As Mr. Bishop testified, "that's a significant
13 reduction in parking and it's something that ought to be talked about and discussed and
14 identified in an environmental impact statement that is intended to identify impacts."⁸⁹

15 Scott Kuznicki, who authored a parking study of the same area in 2011 that is referred
16 to in the Parking Discipline Report, agreed: "I think that the parking displacement caused by
17 the proposed trail construction will have significant adverse, high localized impacts to
18 parking."⁹⁰

19 Tim Olstad, who lives on a boat moored in a marina near the south end of Shilshole,
20 and who walks along Shilshole to work at Salmon Bay Sand & Gravel, provided first-hand
21 knowledge of the need for the parking that will be removed:

22 Q. Is it hard to park where you live?

23 A. Where I live, I park in a marina.

24 Q. What about outside of the marina?

25 A. Outside of the marina it's extremely difficult to park.

Q. And so, since you live there you see those parking places being used?

⁸⁸ Transcript page 123, line 9 to page 128, line 2.

⁸⁹ Transcript page 126, line 23 to page 127, line 1.

⁹⁰ Transcript, page 517, lines 4-7.

1 A. Oh, yes.

2 Q. Seven days a week?

3 A. Yes.

4 Q. And are they used all the time?

5 A. All the time.

6 Q. Would you say they're used 24/7?

7 A. Yes. Especially on the weekends with the farmer's market and such. It's
8 really busy.⁹¹

9 The EIS does not attempt to determine the effect that this loss of parking will have on
10 the businesses along Shilshole. The author of the Parking Discipline Report did not interview
11 any business owners before preparing the Parking Discipline Report, and only talked to a few
12 business owners who attended an open house "after the EIS."⁹²

13 Scott Anderson of CSR Marine described how his employees depend on the parking
14 that will be removed,⁹³ and Mr. Nerdrum described how both the employees and customers of
15 Salmon Bay Sand & Gravel use this parking,⁹⁴ concluding:

16 Q. Will the loss of that parking then significantly impact your business?

17 A. Absolutely.

18 Mr. Nerdrum also testified about the effect of the change in the parking that will remain,
19 from back-in angled parking to parallel parking.⁹⁵

20 Q. And are you worried about the City changing from back-in angle to parallel
21 parking?

22 A. I'm very worried about it, because it precludes the ability for some of our
23 customers to be able to get to us to back in to those loading docks and get their material
24 orders.

25 As Mr. Bishop testified, if you make the study area big enough you do not have a
parking problem:⁹⁶

Q. And what -- give us in general terms your response to what is said in the
parking study in the EIS.

A. Well, the fundamental thing about parking is location. It's location, location,
location. It's all about where the spaces are in relationship to where they want to go.
And the standard thing in any parking study is if you just make the study area big
enough you can solve any parking problem because you just ask the people to walk
further. And eventually, you can find enough empty spaces so they'll -- they can walk

⁹¹ Transcript, page 389, lines 7-19.

⁹² Transcript page 1137, lines 1-14.

⁹³ Transcript page 324, line 5 to page 325, line 7.

⁹⁴ Transcript page 777, line 15 to page 778, line 5.

⁹⁵ Transcript page 749, lines 1- 23.

⁹⁶ Transcript page 123, lines 15 - 25.

1 to them and if you carefully design your study area to be big enough, you don't have a
2 parking problem.

3 The parking impacts from SDOT's preferred alternative are localized and significant in
4 their impact on the existing industrial-maritime businesses on Shilshole, but none of this is
5 acknowledged or analyzed in the FEIS, in either the Parking Discipline Report or the
6 Economic Discipline Report.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

3. The Missing Link Will Cause Significant Adverse Economic and Land Use Impacts Not Disclosed or Discussed in the EIS Rendering it Inadequate

The City's SEPA Rules state at SMC 25.05.440.E.6.a:

Analysis of the following social, cultural, and economic issues shall be included in every EIS unless eliminated by the scoping process (Section 25.05.408):

- a. Economic factors, including but not limited to employment, public investment, and taxation where appropriate . . .

Even without such a requirement, economic factors must be adequately discussed in an EIS when they lead to land use impacts, as was the case in in *Barrie v. Kitsap Cty.*, 93 Wash. 2d 843, 859, 613 P.2d 1148, 1157 (1980), where the Washington Supreme Court stated:

Respondents argue that socio-economic effects are remote or speculative consequences which need not be covered. However, the possible impact on the physical plant of the CBD is not remote or speculative, as evidenced by the indication that Sears will move to Ross center. The projected reduction in the CBD's share of department store type sales (52 to 35 percent) suggests possible additional vacancies. By focusing exclusively on sales impact the EIS overlooks the real possibility of lost jobs and tax base in the CBD and its possible resultant decline as Bremerton's social center. ***The EIS should point out the possibility the project could lead to the demise of the CBD, as evidenced by experience in other areas.*** An EIS "should disclose the history of success and failure of similar projects." ***Because experts disagree on the possible effects, the statement should set forth the responsible opposing views rather than ignoring the potential debilitating impact.***

Barrie, 93 Wash.2d at 859 (internal citations omitted; emphasis added).

Here, not only does the Missing Link EIS "ignore" the potential debilitating economic and land use impacts of the Project, but, as mentioned above, SDOT instructed its consultant, ECONorthwest to ***delete information and statements from the first draft Economic Discipline Report ("EDR") describing the significant adverse economic impacts from the Missing Link***

1 *on local businesses.* By deleting and hiding information regarding significant impacts to
2 businesses, the EIS fails on its face.

3 Not only does the EDR hide instead of disclose and discuss impacts, it asserts, without
4 support, that the proposed two-way sidepath will be safe, and assumes that there will be no
5 significant impact from the loss of 299 parking stalls on Shilshole. The EDR therefore does
6 not address economic impacts to the existing industrial maritime businesses from a bicyclist
7 being killed or seriously injured, or from businesses becoming uneconomical because their
8 customers and employees cannot find convenient parking, or because these businesses have to
9 hire flaggers to address the introduction of vulnerable users into this “chaotic” “dangerous” and
10 “disorganized” industrial environment. To the extent that the safety and parking analyses in
11 the EIS are inadequate, the EDR also is inadequate.

12 As discussed below, even the impacts that the EDR does address - the impacts from
13 delay – are addressed in a manner that conceals rather than discloses impacts.

14 **a. The Missing Link Will Cause Significant Economic and Land Use
15 Impacts—Causing Water-Dependent and Water-Related Industrial
16 and Maritime Businesses to Fail**

17 The Coalition’s economic expert, Mr. Spencer Cohen, concluded that the Missing Link
18 will cause adverse economic and land use impacts:

19 Q. And what is your opinion? Will it cause more than a moderate risk of an
20 adverse economic impact to these maritime and industrial businesses?

21 A. My opinion, based on the research that I've done and the reports that I've
22 reviewed has led me to believe that there will be more than a moderate adverse
23 impact.⁹⁷

24 Mr. Cohen explained that the delay caused by locating a recreational, two-way sidepath in
25 front of industrial businesses will cause economic harm because, for these businesses, time is
money. Mr. Cohen’s opinion and testimony was confirmed by numerous other witnesses.

⁹⁷ Transcript, page 604, lines 9-15.

1 Mr. Olstad, Salmon Bay's batch-plant manager and a resident of the Ballard Mill
2 Marina, testified that locating the Missing Link on Shilshole will cause significant impacts
3 because of the delay it will create in getting trucks in and out of Salmon Bay (ready-mix trucks
4 as well as trucks delivering bulk materials) as time is important in the concrete business since it
5 is a perishable product.⁹⁸ He confirmed that if Salmon Bay had to use flaggers, they would be
6 there for 12 to 14 hours per day.⁹⁹ He testified that during the annual Locks closure, it takes an
7 additional 500-plus trips to bring in bulk material.¹⁰⁰ Mr. Olstad confirmed that just the ready-
8 mix concrete trucks coming and going from Salmon Bay would cross the trail *116 to 130 times*
9 *per day*—which number does not include the bulk delivery trucks or customers, which adds a
10 couple hundred additional trips per day.¹⁰¹

11 Mr. Nerdum, who is the fourth-generation owner of Salmon Bay Sand & Gravel Co.,
12 which has been on Shilshole for over 110 years, testified,

13 Q. So would delay impact your ability to get that many trucks in and out a
14 day?

15 A. Yes.

16 Q. And how would it impact that?

17 A. If they had to slow, and crawl, and wait for the ability to get back out
18 onto Shilshole to start heading to the jobsite, it would delay getting to the customer.
19 We're carrying a perishable product which is set sensitive, so that delay could cost us
20 serviceability to our customers and lost truck-utilization time.

21 Q. *Would that be a significant impact to your business?*

22 A. *Yes. It would.*

23 Q. Ms. Ferguson asked Mr. Cohen whether Mr. Cohen believed the trail
24 would cause any businesses to fail. *Do you think this trail could cause your business*
25 *to fail?*

A. *I do.*¹⁰²

⁹⁸ Transcript, page 381, lines 1-24.

⁹⁹ Transcript, page 375, lines 1-10.

¹⁰⁰ Transcript, page 380, lines 15-25.

¹⁰¹ Transcript, page 378, lines 16-25 (emphasis added); also page 380, lines 4-14.

¹⁰² Transcript, page 775, lines 8-25 and page 776, line 1 (emphasis added).

1 Mr. Nerdrum also explained that having to hire flaggers, which is a proposed mitigation
2 strategy discussed in the EIS, could force his company to spend approximately \$250,000 per
3 year, which is a “very significant cost” he could not cover under competitive margins or pass
4 through to his customers.¹⁰³

5 Mr. Anderson, the owner of CSR Marine, likewise testified the Missing Link will have
6 an adverse impact on his business¹⁰⁴ because the trail will remove parking spaces used by his
7 customers and workers, will impede his ability to get large boats (often delivered on low-boys)
8 into and out of his facility) and will introduce an incompatible land use activity into an area of
9 heavy industrial and maritime traffic/activity.

10 Mr. Forgette confirmed the Ballard Terminal Railroad is functioning business with
11 clients including Cal Portland,¹⁰⁵ and that that the Missing Link will cause significant adverse
12 impacts to the Ballard Terminal Railroad.

13 Q. Just going back to one last question, Mr. Forgette. So the removal by the
14 City of any track that you use, would that be an impact to the railroad?

15 A. Yes, it would.¹⁰⁶

16 **b. SDOT Instructed Econorthwest to Delete Information Disclosing**
17 **Significant Economic and Land Use Impacts From the EDR in the**
18 **DEIS Thereby Precluding Anyone from Learning the Missing Link**
19 **Will Adversely Impact Local Businesses**

20 Exhibits A-15, A-16 and A-17, along with Mr. Johnson’s testimony,¹⁰⁷ confirm that
21 SDOT instructed ECONorthwest to delete all references to “significant impacts,” “damages,”
22 “winners” and “losers” and all quantitative data and analysis from the first draft of the EDR,
23 and replace it with essentially meaningless information about total delay at a single

24 ¹⁰³ Transcript, pages 761-763.

25 ¹⁰⁴ Transcript, page 356, lines 1-4.

¹⁰⁵ Transcript, page 1840, lines 1-14 and Exhibit A-24.

¹⁰⁶ Transcript, page 1825, lines 9-13.

¹⁰⁷ The second draft of the Economic Consideration Report, showing SDOT’s redline/track changes, is Exhibit A-16.

1 intersection. SDOT did this despite the fact that the EDR was supposedly prepared so a reader
 2 could, as Mr. Shook, its lead author confirmed, “understand how businesses within the area
 3 might be impacted by the differential alignments....”¹⁰⁸

4 As Professor Settle explains, an EIS is supposed to be readable and understandable,
 5 written in plain English that clearly describes potential impacts. Settle, § 14[5] (page 559-560).
 6 The first draft of the EDR plainly and simply described significant impacts from the Missing
 7 Link while later drafts deleted such descriptions and discussions, as shown in the following
 8 table:

<u>Section</u>	<u>First Draft of the EDR</u>	<u>Final Version of the EDR</u>
4.2	The construction of the Burke-Gilman Trail Missing Link will result in changes to accessibility, transportation patterns and infrastructure in the Ballard region of Seattle. The resultant changes in operation of the BGT are likely to induce alterations to the economic landscape of businesses and residents of Ballard. Some economic impacts will manifest in short run disruptions in business and commuting activity due to trail construction. Over the long run, once the trail becomes operational, the local economy will adapt to accommodate the presence of the trail. <i>The operational impacts may entail some “winners”, those whose business and residents benefit from increased accessibility and pedestrian/bike traffic, as well as “losers”, those who are detrimentally impacted by the trail from congestion of existing activity with increased pedestrian/bike traffic.</i> ¹⁰⁹	The construction of the BGT Missing Link could result in changes to accessibility, transportation patterns, and infrastructure in the Ballard area. The resultant changes in operation of the BGT Missing Link are likely to induce alterations to the economic landscape of businesses and residents of Ballard. Some economic impacts could manifest in short-term disruptions in business and commuting activity due to trail construction. Once the trail becomes operational, the local economy would likely adapt to accommodate the presence of the trail over time. <i>The impacts may result in benefits to some parties whose business and residents benefit from increased accessibility to pedestrian/bicycle traffic, as well as negative consequences to some who do not benefit from increased pedestrian and bicycle traffic.</i> ¹¹⁰
4.2.	<i>The operation of the BGT Missing Link may significantly impede some</i>	The operation of the BGT Missing Link may impede some industrial

24 ¹⁰⁸ Transcript, page 1362, line 22 to page 1363, line 1; also page 1403, lines 10-17 (emphasis added).

25 ¹⁰⁹ Exhibit A-15, page 4-3 (emphasis added).

¹¹⁰ Exhibit A-17, page 4-2 (emphasis added).

1		<i>industrial users located adjacent to the trail due to the congestion of industrial traffic and pedestrian use. Significant impacts mean that these industrial users are likely to experience disruptions to business activity that are unlikely to be overcome or mitigated without large cost.</i> ¹¹¹	users located adjacent to the trail due to the congestion of industrial traffic with pedestrian and bicycle use. ¹¹²
2	4.2.	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. ¹¹³	[entirely deleted from final version]
3			
4			
5			
6			
7			
8			
9	<u>Section</u>	<u>First Draft of the EDR</u>	<u>Final Version of the EDR</u>
10	4.2	At these points, the congestion of pedestrian and bike travelers with industrial traffic may cause significant economic harm. <i>Significant impacts result from the interference of the business operations of industrial properties due to pedestrian and bicycle traffic. This interference may result in decreased profitability and in extreme cases, result in some industrial users going out of business.</i> ¹¹⁴	[entirely deleted from final report]
11			
12			
13			
14			
15			
16	4.3	Table 4-3-1—Economic Impact of South Shilshole Alternative by Land Use Type ¹¹⁵	[entirely deleted from final report]
17			
18			
19	4.3	Industrial properties may experience some disruption to business due to congestion of pedestrian and industrial freight traffic. While the industrial users are likely to undertake some actions to mitigate the increased costs, the cost of operating in the study area may increase.	All other major land uses in the study area would likely experience statistically insignificant impacts from proximity to the multi-use trail. While other property types are unlikely to face significant impacts on average, some properties located directly adjacent to the Shilshole
20			
21			
22			

¹¹¹ Exhibit A-15, page 4-9, lines 4-7 (emphasis added).

¹¹² Exhibit A-17, page 4-7.

¹¹³ See A-15, page 4-9, lines 20-21.

¹¹⁴ *Id.*, lines 24-27 (emphasis added).

¹¹⁵ *Id.*, lines 7-8

1		<p style="text-align: center;">***</p> <p>Table 4-3-2 shows the expected economic impact to those properties identified with significant operations adjacent to the Shilshole South Alternative. Economic impact is ranked on a 1 to 5 scale, with 5 being most affected. This subjective scale captured the degree to which current operations and accessibility are likely to be impinged by the operation of the Shilshole South Alternative for the BGT Missing Link.</p> <p style="text-align: center;">***</p> <p>Of the properties identified, it is expected that the <i>Ballard Marina and Salmon Bay Sand and Gravel</i> may be significantly impacted by the operation of the Shilshole South Alternative.¹¹⁶</p>	<p>South Alternative may face acute impacts from trail operation if their business activities are significantly disturbed by increased pedestrian and bicycle traffic.¹¹⁷</p>
12	<u>Section</u>	<u>First Draft of the EDR</u>	<u>Final Version of the EDR</u>
13	4.3	Table 4-3-2: Economic Impacts to Adjacent Industrial or Warehouse Properties ¹¹⁸	[entirely deleted from final report]
14	4.3	The estimated annual cost of traffic delays in 2040 for the Ballard study region were derived using data from the Transportation Discipline Report. Expected delay time per intersection for the Shilshole South build alternative was converted into an annual expected cost using an average estimate of the time value of money of \$20 per hour. In Table 4-3-2, the expected costs of traffic delay under the No Build Alternative and Shilshole South Alternative are displayed by intersection. ¹¹⁹	The estimated traffic delays for intersections and driveways under the Shilshole South Alternative in 2040 were compiled from the Transportation Discipline Report (Parametrix, 2016a). Intersections were considered to have potentially significant economic impacts where expected delays for the 2040 Shilshole South Alternative would be at least 20% larger than those predicted for the 2040 No Build Alternative (Table 4-1). In addition, Table 4-1 provides the average weekday traffic volume, per car delay, and increase

¹¹⁶ Exhibit A-15, page 4-12, lines 13-15, 17-21 and 24-26 (emphasis added).

¹¹⁷ Exhibit A-17, page 4-8.

¹¹⁸ Exhibit A-15, page 4-13.

¹¹⁹ Exhibit A-15, page 4-14

1		in delay for all study intersections. Only one intersection (NW 46th St/Shilshole Ave NW) has an expected delay that increases by more than 20% compared to the 2040 No Build Alternative. For this intersection, the average expected delay would increase from 9 to 28 seconds. However, reported traffic volumes are relatively modest at this intersection with 380 cars per day expected in 2040. Most of the remaining intersections would experience net decreases in traffic under the Shilshole South Alternative compared to the No Build Alternative.	
2			
3			
4			
5			
6			
7			
8			
9			
10	4.3	Table 4-3-3: Expected Cost of Traffic Delay for the years 2040 (Shilshole South Alternative) ¹²⁰	[entirely deleted from final report]
11	4.3	If capitalized into 2015 dollars using a discount rate of 3.5% and a capitalization rate of 6.0%, the capital cost of driveway delays are equivalent to a total value of approximately -\$1.4 million. Some of these costs may be offset by altering delivery schedules and changing driving behavior but are unlikely to ameliorate all of the economic damages. <i>Based upon these results, it is estimated that the Shilshole South Alternative will result in significant negative economic impacts to property owners with studied driveways in the Ballard study region. These impacts are defined as significant because the capitalization costs exceed more than 1% of the current appraised parcel value.</i> ¹²¹	<i>It is anticipated that the trail would improve safety overall for pedestrian and bicycle modes.</i> But if the higher volume of pedestrian and bicycle traffic near industrial businesses and in loading and unloading zones increases the localized probability of industrial vehicle involved bicycle and pedestrian conflicts, then business operating expenditures could increase due to higher costs of insurance. <i>However, the full extent of any potential increases in business costs under the 2040 Shilshole South Alternative and how these costs compare to the 2040 No Build Alternative are unknown.</i> ¹²²
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23	4.4	Table 4-4-2: Economic Impacts to Adjacent Industrial and Warehouse	[entirely deleted from final report]

¹²⁰ *Id.*

¹²¹ Exhibit A-15, page 4-15, lines 7-13 (emphasis added).

¹²² Exhibit A-17, page 4-9 (emphasis added).

	Properties Shilshole North Alternative ¹²³	
4.4	Table 4-4-3: Exepected Cost of Delay for the Year 2040 (Shilshole North Alternative) ¹²⁴	[entirely deleted from final report]
4.6	<p>The Leary Alternative may result in some acute shortages of available parking supply in high demand locations with large amounts of retail and residential properties and during high demand times of day. Overall, 128 out of 261 properties along the Leary Alternative are commercial, mixed-use or multi family properties. <i>In these areas, reduced parking supply may detrimentally impact automobile travelers who must spend additional time either searching for parking or walking from more remote parking locations. These increased commute costs may inconvenience or deter some automobile travelers to the region.</i> These costs could be reduced by increasing the supply of off street parking in the area.¹²⁵</p>	<p>The Leary Alternative may result in some acute shortages of available parking supply in high demand locations with large amounts of retail and residential properties during high demand times of day....<i>The degree to which these supply shortages could impact commercial and retail businesses located near the Leary Alternative is unknown.</i> The loss in parking supply would raise commute costs for automobile based customer traffic, thereby lowering aggregate demand from these users; however, <i>these losses could be offset, in part, from increases in aggregate demand stemming from increases in traffic from pedestrians and bicyclists on the trail facility.</i> In addition, due to reductions in on-street parking, managers of off-street parking locations would have incentives to increase prices and expand supply, which may help compensate for the loss of on-street parking spaces.¹²⁶</p>
5.1	<p>However, some businesses and residents may experience some acute economic impacts. These impacts may be at least partially mitigated through the following options: / Industrial and warehouse users will likely experience the largest economic losses. Choosing an alternative and setting a route with minimal crossing of drive-in-docks and driveways will</p>	[entirely deleted from final report]

¹²³ Exhibit A-15, page 4-17.

¹²⁴ Exhibit A-15, page 4-18.

¹²⁵ Exhibit A-15, page 4-27 (emphasis added).

¹²⁶ Exhibit A-17, page 4-16 (emphasis added).

	help minimize disruption to these users. ¹²⁷	
6	<p>The Ballard study region is a rapidly changing and growing community. <i>The analysis conducted in this report determined the likelihood of economic damages from the BGT Missing Link by comparing economic outcomes under each build alternative to the baseline conditions in 2015 for the No Build Alternative....</i> As shown in Table 4-4-2, from 2000 to 2014, <i>the services industry in Ballard has increased employment share by approximately 18.3% and the manufacturing industry has reduced employment by -7.5%.</i> In addition, recent trends suggest strong growth in rents for multi-family housing, implying strong demand for housing and population growth in the region. Between 2015 and 2040, these economic trends are likely to continue, if not accelerate. <i>Hence, industrial and other low-rent land users are likely to face increasing competitive pressure for service based and residential land users.</i></p> <p><i>The operation of the mixed-use trail may add to the competitive pressures facing industrial users and appropriate steps should be taken to avoid or mitigate these damages.</i>¹²⁸</p>	[entirely deleted from final report]

Even the deletions detailed above were not even sufficient for SDOT as it instructed, and Mr. Mazzola himself actually made, changes to the *second* draft of the EDR, Exhibit A-16,

¹²⁷ Exhibit A-15, page 5-1.

¹²⁸ Exhibit A-15, page 6-1 (emphasis added).

1 including changing “would” to “could,”¹²⁹ and adding the affirmative sentence: “It is
2 anticipated that the trail would improve safety overall for pedestrian and bicycle modes.”¹³⁰

3 Mr. Shook admitted there was no factual or analytical basis to make the changes in the final
4 EDR detailed above,

5 Q. My question, “So the draft EIS identifies significant negative economic
6 impacts and the final EIS does not. Correct?” Answer --

7 A. Yes. That’s correct.”

8 Q. Is your testimony different today then?

9 A. No.

10 Q. And after the draft EIS concluded there were significant negative
11 economic impacts, you didn’t do any additional analysis? Correct?

12 A. No. We did not.

13 Q. And you didn’t gather any additional information?

14 A. We did not.¹³¹

15 Even though the final EDR did not include any disclosure or discussion of adverse economic
16 and land use impacts, Mr. Shook claimed it was more “precise”¹³² because economics is
17 “sophisticated” and not easy to understand,

18 Q. Mr. Shook, you’ve repeatedly explained that to us. Why didn’t you just
19 put the explanation in the report and leave the data and the information, the quantitative
20 information in the report for people to interpret according to the explanation that you’ve
21 been providing to us?

22 A. Because I think it requires a high degree of sophistication, as I said, to
23 interpret correctly, and we did not want people to misunderstand what we thought is the
24 core impact, which is the value of delay that is experienced with -- along the
25 alternatives that is documented in the Transportation Discipline Report.¹³³

¹²⁹ *Id.*(Sentence originally read: “To the extent that the businesses and properties that operate these study driveways are dependent upon driveway traffic to maintain a profitable enterprise, these delays **would** result in higher costs of production.”)

¹³⁰ Transcript, page 668, lines 13-17 (Mr. Cohen testified: “Q.So the new version says the trail will improve safety, but it doesn’t talk about economic impacts to these businesses, does it? A. That’s correct.”)

¹³¹ Transcript, page 1435, lines 2-14.

¹³² Transcript, page 1379, lines 2-6.

¹³³ Transcript, page 1411, line 21 to page 1412, line 8.

1 Mr. Shook also confirmed the final EDR did not discuss or disclose any impacts to the actual
2 businesses along Shilshole.¹³⁴

3 Q....what does that tell me about, as an owner of a industrial business on
4 Shilshole, of the potential impacts of the project on my business?

5 A. We didn't do an analysis of impacts to individual businesses and their
6 profitability.

7
8 **c. The EIS Is Inadequate Because It Failed To Include Readily
9 Available Information and Analysis That Would Have Disclosed
10 Economic Impacts**

11 Unlike Mr. Shook, Mr. Spencer Cohen has extensive experience evaluating the
12 economic benefits of and risk/stressor factors impacting Seattle's maritime and industrial
13 industries as he helped author two seminal studies on these issues and an Industrial Lands
14 Analysis for the Puget Sound Regional Counsel. See Exhibits A-12, A-13 and A-14,
15 respectively. As he explained, industrial and maritime activities and businesses are unique
16 land uses that benefit from synergistic co-locational proximities, a phenomenon called
17 "agglomeration."¹³⁵ These unique land uses are fragile and can be negatively impacted by
18 external "stressors" such as incompatible uses,

19 Q. And can you remind us why -- what is the impact of those stressors on
20 those clusters?

21 A. The impact is that growing encroachment or perceived encroachment --
22 there are a couple things. One, there's a perception that long-run of those businesses
23 won't be viable or there's not support for those businesses as there's non-industrial use
24 that gets in close proximity to industrial operations. But more acutely, businesses were
25 concerned that as there are more non-industrial uses actually happening in close
proximity to those industrial operations that particularly residential operations and
essential uses, that that will help -- that will adversely affect and curtail operations at
those businesses. For instance, having to change their operation schedule to
accommodate concerns about noise among residents that live in close proximity to that
industrial operation.

Q. And does that kind of go hand in glove with the agglomeration concept
that if you start peeling apart this group you undermine the entire cluster?

A. It has a -- definitely, I think an adverse impact on the agglomeration
benefits and the agglomeration effects. Because what we learned in our studies in the

¹³⁴ Transcript, page 1427, lines 20-24

¹³⁵ Transcript, pages 610-611.

1 maritime industry, for instance, as well as in other clusters across the state, but
2 particularly with the case in maritime is that there's a high degree of fragility within the
3 cluster. And this was communicated to us through direct conversations with
4 businesses.¹³⁶

5 Based on his interviews with businesses and research, Mr. Cohen confirmed that many
6 industrial businesses, especially in Ballard, are under stress and pressure to move or curtail
7 their operations because of land use and zoning decisions being made by the City, even though
8 these businesses are within an area zoned for industrial and water-dependent and water-related
9 uses.¹³⁷ Unlike Mr. Shook, who claimed it was hard or impossible to gather data about
10 industrial business operations to include in the EDR, Mr. Cohen confirmed he and his staff
11 often interview maritime and industrial businesses who are more than willing to speak with
12 him and his team.¹³⁸ Mr. Cohen also opined that ECONorthwest's hedonic model was
13 insufficient and not well tailored to the task of disclosing impacts to water-dependent industrial
14 businesses because it is better suited to studying impacts to single-family homes,¹³⁹ and he
15 confirmed ECONorthwest did not even review, rely upon or disclose in its reports the readily
16 available information in the 2013 and 2017 Maritime Cluster studies or the PSRC Industrial
17 Lands Study. Page 647, lines 2-25.

18 The EIS is inadequate.

19 DATED this 22nd day of December, 2017.

20 VERIS LAW GROUP PLLC

21 By /s/ Joshua C. Brower

22
23 ¹³⁶ Transcript, page 645, lines 3-25 and page 646, lines 1-9.

24 ¹³⁷ Transcript, page 620, lines 9-23 and page 623, lines 9-18; *see also* Exhibit R-1, FEIS, Sections 4.2.2 Land
25 Uses, 4.2.4 Zoning, and 4.2.6 Shorelines.

¹³⁸ Transcript, page 624, lines 1-3.

¹³⁹ Transcript, page 649, lines 3-17.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Joshua C. Allen Brower, WSBA #25092
Leah B. Silverthorn, WSBA #51730
Danielle Granatt, WSBA #44182
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
Telephone: (206) 829-9590
Facsimile: (206) 829-9245
josh@verislawgroup.com
leah@verislawgroup.com
danielle@verislawsgroup.com

Attorneys for Appellant the Ballard Coalition

FOSTER PEPPER PLLC

By /s/ Patrick J. Schneider

Patrick J. Schneider, WSBA #11957
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Tel: (206) 447-4400
Fax: (206) 447-9700
pat.schneider@foster.com

Attorneys for Appellant the Ballard Coalition

1 **DECLARATION OF SERVICE**

2 I declare under penalty of perjury under the laws of the State of Washington that on this
3 date I caused the foregoing document to be served on the following persons via the methods
4 indicated:

5 Peter S. Holmes
6 Erin Ferguson
7 Seattle City Attorneys
8 701 5th Avenue, Suite 2050
9 Seattle, WA 98104
10 Tel: (206) 684-8615
11 erin.ferguson@seattle.gov

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail / HE ECF

12 *Attorney for Respondent*
13 *Seattle Department of Transportation*

14 Matthew Cohen
15 Rachel H. Cox
16 Stoel Rives LLP
17 600 University Street, Suite 3600
18 Seattle, WA 98101-4109
19 Tel: (206) 386-7569
20 Fax: (206) 386-7500
21 matthew.cohen@stoel.com
22 rachel.cox@stoel.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail / HE ECF

23 *Attorneys for Intervenor Cascade Bicycle Club*

24 Tadas A. Kisielius
25 Dale Johnson
Clara Park
Van Ness Feldman
719 2nd Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
tak@vnf.com
dnj@vnf.com
cpark@vnf.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail / HE ECF

26 *Attorneys for Respondent City of Seattle*

27 Dated at Seattle, Washington, this 22nd day of December, 2017.

28 /s/ Megan Manion
29 Megan Manion, Veris Law Group PLLC