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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
RESPONSE TO SEATTLE
DEPARTMENT OF
TRANSPORTATION AND CASCADE
BICYCLE CLUB**

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I. INTRODUCTION

The last sentence of SDOT's closing argument explains everything that is wrong with this project and why the EIS is inadequate:¹ SDOT is not the only decision-maker who must rely on the EIS to make an informed decision regarding whether or not to locate and construct a multi-user, two-way sidepath that will invite vulnerable users into the heart of a chaotic, disorganized, and dangerous industrial and maritime area. The new Mayor must rely upon the EIS in making land use policy decisions² and in deciding whether to elevate this project over other needed infrastructure; the City Council must rely upon it in allocating funds in the budget; and even SDOT's new Director is entitled to the full and frank disclosure and discussion clearly

¹ SDOT Post-Hearing Brief, page 46, lines 15-17.

² See FN 76 in Coalition's Post-Trial Brief.

1 missing from the EIS. SDOT cannot claim its EIS is adequate when it knowingly withheld
2 studies and information about the increased dangers of contra-flow sidepaths from its
3 consultants,³ ignored Judge Roger’s direction to “more fully design” the trail,⁴ and instead un-
4 designed the project back to a 5–10% level to preclude analysis of impacts from its design
5 decisions, and directed its consultants to remove language from the EIS regarding traffic
6 hazards and economic and land use impacts.

7 On page six of its brief, SDOT twice asserts, in the space of a single paragraph, that its
8 EIS “discloses all probable impacts.” This patently untrue assertion invites the Hearing
9 Examiner to ignore the evidence from a six-day hearing, including all the evidence about traffic
10 hazards that is disclosed and analyzed in Mrs. Hirschey’s and Mr. Bishop’s reports. These
11 traffic hazards are not just probable, they are certain, given the data and analysis presented by
12 Mrs. Hirschey and Mr. Bishop, none of which is in the EIS and none of which was
13 meaningfully controverted. Even Mr. Schultheiss, whose firm was designing the Preferred
14 Alternative while this EIS appeal was pending, could not identify a single study that contradicts
15 the studies and data in Mrs. Hirschey’s report. SDOT’s brief, like its EIS, refuses to
16 acknowledge facts that are inconsistent with its determination to build the Preferred Alternative.

17 The FEIS is inadequate for all the reasons stated in the Coalition’s Post-Trial Brief and
18 discussed below in reply to SDOT’s Post-Hearing Brief.

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³ See FN 4 in Coalition’s Post-Trial Brief.

⁴ See FN 13 in Coalition’s Post-Trial Brief.

1 **II. ARGUMENT**

2 **A. The Coalition’s Response to SDOT’s Argument A**

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4 SDOT asserts that the Coalition “misstates both the purpose of an EIS and EIS adequacy
5 standards,” but SDOT does not identify these alleged misstatements, or explain where they were
6 made.

7 SDOT then goes on to assert that its EIS satisfies the rule of reason, a SEPA principle
8 that its environmental manager Mr. Mazzola was unaware of when preparing the EIS.⁵ The
9 Coalition agrees that it must demonstrate that the EIS fails to comply with the rule of reason, as
10 the Coalition discussed in Section II.A of its Post-Trial Brief. Professor Settle discusses the rule
11 of reason at length in section 14.01[1][a] of his treatise, *The Washington State Environmental*
12 *Policy Act, a Land Use and Policy Analysis*, and repeatedly makes it clear that the information
13 required by this rule depends upon the importance of the impact and the cost of obtaining the
14 needed information, e.g.:

15 Consistently, it is said that an EIS is not a compendium of every
16 conceivable effect or alternative to a proposed project, but is simply an aid
17 to the decision-making process. That is the EIS need include only
18 information sufficiently beneficial to the decision-making process to
19 justify the cost of its inclusion. Impacts or alternatives which have
20 insufficient causal relation, likelihood, or reliability to influence decision-
21 makers are “remote” or “speculative” and may be excluded from an EIS...

22 * * *

23 The SEPA Rules clearly call for a level of detail commensurate with the
24 importance of impacts and plausibility of alternatives...***If information or***
significant adverse impacts essential to a reasoned choice among
alternatives is not known and the costs of obtaining the information is
not exorbitant, it must be obtained and included in the EIS.

25 In this case, lives are at risk from the proposed creation of traffic hazards that are not
identified or analyzed in the EIS, and the future of the maritime-industrial community on
Shilshole (priority land uses under the City’s Comprehensive Plan and attendant zoning code) is

⁵ Transcript, page 1561, lines 3-4, a copy of which is attached to FN 1 of the Coalition’s Post-Trial Brief.

1 at risk from these traffic hazards, as well as from the loss of two-thirds of the parking on
2 Shilshole, and from increased delay and difficulty in making the truck movements on which the
3 maritime-industrial businesses depend. The level of detail provided by the Coalition's
4 witnesses was commensurate with the importance of these impacts, while the EIS simply
5 ignores these impacts altogether; or downplays them (as does the Economic Considerations
6 Report); or conceals them (as do both the Economic Considerations Report and the
7 Transportation Discipline Report). In addition, the Transportation Discipline Report: (1)
8 reduces the level of design from the level at which Hearing Examiner Watanabe concluded the
9 impacts would be significant, thereby making it impossible to identify impacts from the design
10 decisions that SDOT was making while this appeal was pending, contrary to Judge Robert's
11 Order; (2) fails to disclose the multiple studies demonstrating that contra-flow movement by
12 bicycles is two-to-three times more hazardous than movement in the same direction as motor
13 vehicles, even though Mr. Mazzola was aware of such studies from the prior hearing before
14 Hearing Examiner Watanabe; and (3) fails to analyze the impacts of creating such contra-flow
15 movement on Shilshole, with its many heavily-used industrial driveways.

16 A reader of the EIS will be unaware of the information and analysis provided by Mrs.
17 Hirschey's Report, Mr. Bishop's exhibits, and by the testimony of these and the other Coalition
18 witnesses. The information and analysis in the EIS is not commensurate with the severity of the
19 impacts of SDOT's proposal. The costs of obtaining the information needed to inform decision-
20 makers is not exorbitant; the Coalition provided much of the needed information at its expense,
21 and Mrs. Hirschey's report probably cost less than the cost to SDOT of having its EIS
22 consultants and Mr. Schultheiss attend six days of hearings.

23 The EIS does not simply reflect a difference of opinion, as asserted by SDOT: It reflects
24 SDOT's on-going refusal to acknowledge and disclose impacts. The opinions of the Coalition's
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1 experts, moreover, are informed by the data, studies, and analysis of impacts that is missing
2 from the EIS, while the opinions of SDOT's consultants as expressed in the EIS were not.

3 The impacts identified by the Coalition's witnesses are not simply impacts to
4 individuals, as asserted by SDOT. Traffic hazards are an element of the environment in SEPA,
5 and the traffic hazards documented by the Coalition's witnesses will be hazards to all bicyclists
6 and pedestrians who use the proposed sidepath, particularly to the less-experienced cyclists who
7 will ride Shilshole for the first time because the trail will invite them to do so. Similarly, the
8 economic impacts to businesses are SEPA issues because Seattle's SEPA rules make them so
9 when an EIS is prepared, SMC 25.05.440.E.6.a, and because the loss of maritime-industrial
10 businesses from one of the few locations specifically zoned for such businesses will result in
11 significant adverse land use impacts that are inconsistent with the City's land use policies.

12 Finally, Section A.4 of SDOT's argument asserts that the "Coalition cannot rely on
13 evidence that was not reasonably available at the time SDOT prepared the FEIS." SDOT does
14 not identify what evidence, if any, that it believes was not reasonably available when SDOT
15 prepared its EIS, and the Coalition is unaware of any such evidence.

16 **B. The Coalition's Response to SDOT's Argument B**
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18 SDOT argues, as it did in its prehearing brief, that the Hearing Examiner must give
19 substantial weight to SDOT's determination of EIS adequacy. The Coalition agrees, but the
20 evidence presented at the hearing overcomes this required deference and demonstrates that
21 SDOT's determination of EIS adequacy is clearly erroneous. This is so not only for all the
22 reasons discussed in section A of the Coalition's Post-Trial Brief, but because the EIS fails to
23 comply with SEPA's requirement to disclose and analyze the traffic hazards and other impacts
24 that were the subject of the hearing.
25

1 The evidence at the hearing included the fact that SDOT engaged its consultants to
2 design the Preferred Alternative in March 2017, two months before publishing the FEIS and at
3 least nine months before taking action to choose among the EIS alternatives (Mr. Mazzola
4 testified such action still had not been taken at the time of the hearing in December). In
5 response to this evidence, SDOT now argues that its decision to design the Preferred Alternative
6 before choosing among the alternatives was authorized by SMC 25.05.070.D:

7 This section does not preclude developing plans or designs, issuing
8 requests for proposals (RFPs), securing options, or performing other work
9 necessary to develop an application for a proposal, so long as such
10 activities are consistent with subsection 25.05.070.A.

11 SDOT's is arguing that the exception swallows the prohibition. The development of plans must
12 be consistent with subsection A, which prohibits taking action that would "limit the choice of
13 reasonable alternatives." SDOT's position that expending hundreds of thousands of dollars, or
14 more,⁶ to design one alternative does not limit the choice among all alternatives directly
15 contradicts the reasoning and rationale articulated in *Public Utility Dist. No. 1 of Clark County*
16 *v. Pollution Control Hearings Board*, 137 Wn.App. 150, 151 P.3d 1067 (2007) wherein the
17 Court said "We agree that [the agency's] 'reasonable alternatives' could be limited if it was
18 forced to put all of its financial resources in one project" ***because the agency's "financial***
19 ***investment" in one alternative "could limit the choice of other alternatives..."***⁷ SDOT's
20 decision in March 2017, to proceed to final design of its Preferred Alternative and to commit
21 significant financial resources to do so not only precludes choosing another alternative, it is
22 "snowballing," which is inconsistent with "the fundamental idea of SEPA: to prevent
23 government agencies from approving projects and plans before the environmental impacts of

24 ⁶Mr. Mazzola acknowledged that SDOT spent \$4.8 million on design work for the Missing Link before SDOT's
25 prior SEPA determinations were reversed as clearly erroneous. Transcript, page 1516, line 17 – page 1517, line 12.

⁷ *Public Utility Dist. No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn.App. at 162 (emphasis added).

1 doing so are understood.”⁸ As Professor Settle reminds us: “SEPA must fight a constant battle
2 to keep decision-makers’ minds open while environmental information is gathered.”⁹

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4 **C. SDOT is Misconstruing and Misstating Testimony**

5 SDOT systematically and repeatedly misstates and misconstrues the Coalition’s
6 witnesses’ (experts’) testimony. Beginning with its very first reference to testimony in FN 9
7 (page 4), SDOT misconstrues Mrs. Hirschey’s testimony by claiming she somehow does not
8 understand the purpose of an EIS when in reality she testified:

9 A. The purpose of an EIS is to compare alternatives and provide information to
10 decision makers. (Inaudible) is to communicate safety.¹⁰

11 SDOT continues trying to warp the Coalition’s evidence to fit its arguments by cherry-picking
12 Mrs. Hirschey’s testimony in its next footnote, FN 10 (page 4), claiming she simply said the
13 EIS did not “pick the safest alignment,” when in fact she testified at length that the EIS should
14 have disclosed and discussed the number of conflict points along each alternative, which
15 informs a decision-maker of the relative safety of each alternative. SDOT does the same to Mr.
16 Bishop, claiming he said it was “unsafe” for trucks to cross the centerline when in fact he said
17 that that maneuver is “potentially a safety issue,” which must be disclosed and discussed for the
18 EIS to be adequate.¹¹

19 This pattern continues throughout SDOT’s brief. In FN 66 (page 17), SDOT claims
20 Mrs. Hirschey “ultimately admitted” she worked on an EIS based on a “conceptual design” like
21 the design at issue here when in fact she adamantly insisted that her work on Sound Transit’s
22 Lynwood Link Extension was based on a 30% design:

23 Q. Your testimony is that this is based on 30 percent design?

24 ⁸ *International Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 522, 309 P.3d

25 ⁹ Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*. Ch. 14, § 14.01, fn. 31 (Mathew Bender).

¹⁰ Transcript, page 1908-1909, line 21 to page 1908, line 10.

¹¹ Transcript, page 1878, line 22 to page 1880, line 16; also Transcript page 63, lines 22-24.

1 **A. I worked on 30 percent design on this project.**

2 Q. And despite the fact that the text itself says it's based on conceptual
3 design, you're saying that it's something different.

4 A. I'm not saying that this is different or what they present in here is
5 different or that the title is different. I worked with the design team as they
6 approached 30 percent design.

7 **Q. Is the EIS based on the conceptual design?**

8 **A. Not my work.**¹²

9 To support its summary mischaracterization of Mrs. Hirschey's extended and detailed
10 testimony, SDOT then cherry-picks from Mr. Phillips' testimony in FN 67 (page 17). Mr.
11 Phillips never testified one way or another as to the level of design for the SEPA review of the
12 Lynnwood Link project, ultimately asserting, "If I don't agree with the use of 30 percent, how
13 could I render an opinion?"¹³ Mr. Phillips' refusal to offer an opinion does not support SDOT's
14 assertions regarding Mrs. Hirschey and undercuts its arguments regarding the adequacy of an
15 EIS based on a 10% conceptual design.

16 SDOT goes to great lengths to misconstrue the Coalition's expert's testimony. For
17 example, on page 21 SDOT claims Mr. Kuznicki changes his testimony depending on who his
18 client is (FN 86) when in fact he was explaining he would *chose a different design vehicle*
19 depending on the needs of his client: As he said, if SDOT were his client he would select one
20 vehicle as compared to which vehicles he would select if he were working for the Coalition
21 "because the Ballard Coalition is going to consider the needs of the businesses along the
22 corridor explicitly and identifying the vehicles that they believe need to be served by the design
23 of the corridor."¹⁴ Likewise, on page 20, SDOT tries to claim Mr. Kuznicki was somehow
24 untruthful when he testified warning signs/pavements markings may be ineffectual in this
25 context because he "approved drawings" for an earlier design of the trail when in fact Mr.
 Kuznicki had not signed the design set SDOT put in front of him; instead, that design set only

¹² Transcript, page 1907, line 22 to page 1908 line 9 (emphasis added).

¹³ Transcript, page 1079 line 5 to page 1080 line 2.

¹⁴ Transcript, page 556 line 14 to page 557 line 9.

1 included his pre-printed engineer’s stamp, which the drafter puts on all draft documents—a set
2 of plans is not “approved” and certified by an engineer until they are actually signed, not just
3 stamped.¹⁵ On page 27 (FN120), SDOT again tries to impugn Mr. Kuznicki’s veracity by
4 claiming he never used AutoTURN analysis in an EIS when he actually responded he could not
5 “*recall if I have or have not specifically*, and I would—I would have to undertake a
6 considerable amount of research to describe to you the projects in which I’ve used it *and*
7 *whether or not it was specifically in support of an EIS.*”¹⁶ SDOT is grasping at nuances of
8 elocution to overstate and misconstrue actual testimony.

9 SDOT uses this same flawed approach on page 21 (FN 90) in an attempt to undermine
10 Mrs. Hirschey’s expertise and veracity by mixing two distinct issues. SDOT is trying to twist
11 her testimony to claim that its sidepath will be safer than riding in the road in those few and far
12 between spots where the trail is not crossing a driveway or intersection when in fact she
13 repeatedly and consistently testified that sidepaths are two- to three times more dangerous
14 because the contraflow movement creates dangerous conflict points,

15 Q. ...My question is -- I'm just trying to get some specificity here -- is
16 your testimony that that contraflow movement presents that same risk
17 outside the driveways?

18 A. *I never testified to that.* But if you're talking about between any -- in a
19 (inaudible) where there's absolutely zero turning movement conflicts
20 across the trail, separation provides a safer condition than non-separation.

21 Q. I guess I'm not sure that answered my question. The question --

22 A. *We're talking about a segment that is completely outside of any*
23 *driveway or intersection or anything. So just a segment. So it's not the*
24 *contraflow movement that's at issue, it's the fact that we've -- if we have*
25 *the buffer in a trail, we separated the peds and bikes from the motor*
*vehicle, so we separated speed and mass.*¹⁷

¹⁵ See WAC 196-23-070 defining what constitutes the “signature” of a registered professional engineer.

¹⁶ Transcript, page 538, lines 3-9 and 18-25.

¹⁷ Transcript, page 1900, line 20 to page 1901 line 13 (emphasis added).

1 On page 22, SDOT argues Mrs. Hirschey “ignored” an entire chapter in the Transportation
2 Discipline Report claiming she said the TDR and EIS entirely failed to “develop study
3 methodology” (FN 91 and 92) when her testimony actually said SDOT *failed to develop the*
4 *correct methodology* to “answer the questions that were raised during scoping and will answer
5 the questions that we anticipate decision makers will have about the project in choosing the
6 preferred alternative.”¹⁸ Mrs. Hirschey testified the EIS is inadequate because the methodology
7 in the TDR and Transportation section failed to disclose and focus on the conflicts created by
8 locating a contra-flow multi-user trail through an industrial area as she did in her Safety Report
9 in order to determine whether the Preferred Alternative is safer than the existing baseline
10 conditions:¹⁹

11 Q. Is the -- is the No Build safer than any of the (inaudible)?

12 A. It can't be determined. I mean the fact that where a track -- *the*
13 *(inaudible) alternative would attract a high number of vulnerable users,*
14 *including young users who don't even know the rules of the road,*
15 *cannot judge speed and distance. Really weighs a lot against the existing*
condition in my mind. But I don't have a -- myself, nor an FEIS does it
address that.

16 ***

17 Q ...Are you testifying that it cannot be -- the No Build alternative
18 cannot be compared to the other alternatives, or are you saying that has not

19 A. *We'd have to develop a methodology that could compare the level of*
20 *exposure to conflict level of risk of existing condition, where it's*
21 *primarily commuter bicyclists, with other bicyclists using Ballard Way,*
22 *which is a shared use facility, or wherever they are, versus attracting the*
23 *number of users, including vulnerable users, to pass through all those*
24 *conflict points at industrial driveways with large trucks.*

25 Q. And you didn't do that analysis?

¹⁸ Transcript, page 182, lines 21-25.

¹⁹ Transcript, page 183, line 23 to page 184 line 9 (“..well, based on my professional opinion as well as the research conducted, it's really all about the level of conflict between bicycles, pedestrians, vehicles, and trucks with the level of conflict and potential risk and severity of a collision much, much greater for the trucks. *So I was actually asked to -- if I could come up with a methodology to evaluation safety, so it ultimately ended up very focused on the number of conflict points for a multi-use path and the type of traffic passing through each of the conflict points.*”)(Emphasis added).

1 A. I did not do that.

2 Q. And it's your testimony --

3 A. Direct comparison.

4 Q. ***And it's your testimony that the EIS did not do that either?***

5 A. ***No.***²⁰

6 SDOT claims on page 23 (FN 103), that Mrs. Hirschey “simply did not consider” whether a
7 “substantial number of bicyclists are currently using the street,” which is one of the three factors
8 listed in the NCHRP Standards, Exhibit A-3, pages 023-026. In reality, she testified she did not
9 define “substantial” nor apply that factor because SDOT failed to gather or present the
10 necessary data in the EIS regarding current bicycle volumes on each alternative route—SDOT
11 attacks Mrs. Hirschey for not completing an analysis when SDOT failed to gather and present
12 the data required to do so or to do that analysis itself.²¹ Possibly SDOT’s most egregious
13 overreach regarding Mrs. Hirschey is on page 28 (FN 126—citing transcript, page 278, lines 15-
14 23) where it claims she said “that there are no conflict points under existing conditions,” when
15 in fact she testified:

16 Q. Okay. And you went through that and said for the preferred alternative
17 there are 39 driveways. And then Mr. Schneider asked if you could
18 multiply that by four and came up with that number. And then you
19 compared it to the No Build alternative and said "zero." ***So just to be
20 clear, are you suggesting that there are no conflict points under existing
21 conditions right now?***

22 A. ***No. There's no contraflow movement.***²²

23 SDOT’s reference on that same page to Mr. Schultheiss’ testimony regarding “infinite”
24 conflicts between cars and bicyclists traveling on the road is of no moment because there are
25 “infinite” conflicts whenever bicyclists ride in the street, and there is no accident data showing
26 that the current conditions on Shilshole lead to a high number of accidents.

²⁰ Transcript, page 1911, line 13 to page 1912, line 23.

²¹ Transcript, page 296, line 17 to page 297, line 14.

²² Transcript, page 278, lines 15-23 (emphasis added).

1 Mr. Schultheiss has never worked on a SEPA EIS, spent about one hour driving around
2 the Study Area, read one chapter of the EIS and scanned a couple more, and his entire
3 experience in Seattle—including on this project--is as a paid consultant to SDOT,²³ while Mrs.
4 Hirschey has spent 30+ years working on dozens of SEPA and NEPA EIS projects, walked
5 every alignment, personally catalogued every driveway, created a detailed safety methodology
6 to address the issues that should have been disclosed and detailed in the EIS (“It is what we
7 do”), wrote an extensive and highly detailed report that was independently peer-reviewed and
8 spent “193.5 hours”²⁴ developing her opinions that the Missing Link will be unsafe. Mrs.
9 Hirschey’s testimony was unimpeached by any SDOT witnesses,

10 Q. You heard -- you were here present for the City's testimony about
11 traffic and safety.

12 A. Yes.

13 Q. Did you hear any testimony that there was anything inaccurate about
14 your safety analysis?

15 A. In everything I've heard throughout this entire hearing, I haven't heard
16 anyone criticize or find errors in the fundamentals of the conflict analysis I
17 prepared, as well as I comprehensively went through -- developed every
18 safety factor I could think of so that they would all be exposed, even if I
19 didn't have the time to fully develop every single one.

20 *But I haven't yet heard any testimony that claims a contraflow
21 movement is as safe or safer than traveling with the direction of
22 traffic.*²⁵

23 **D. The Coalition’s Response to SDOT’s Argument C**

24 SDOT asserts that its “work with its consultants is entirely consistent with its role as
25 lead agency under SEPA.” This is another counter-factual assertion: The evidence presented at

²³ SDOT’s reliance on Mr. Schultheiss’ testimony and “expert” opinions are misplaced because he is not a neutral expert and has a conflict since he is personally profiting from his firm’s, Toole Design’s, work on the Missing Link, because he simply expressed his personal opinions about the numerous studies Mrs. Hirschey reviewed and relied upon without pointing to any studies to rebut these published studies, and admitted he has never authored a peer-reviewed article published in journal. See Transcript, page 1315 line 13 to page 1316 line 10.

²⁴ Transcript, page 317, lines 5-14.

²⁵ Transcript, page 1864, line 14 to page 1865 line 1 and page 1865 line 24 to page 1866 line 1 (emphasis added).

1 hearing demonstrates SDOT repeatedly took action to ensure the EIS conceals rather than
2 discloses impacts. Mr. Mazzola did not inform his consultants about the studies demonstrating
3 the hazards of two-way cycle tracks; Mr. Mazzola directed the author of the Economic
4 Considerations Report to remove all references to significant impacts and all quantified data;
5 and Mr. Scharf, while Project Manager, complained that the initial draft of the Economic
6 Considerations Report acknowledged that industrial users may go out of business and requested
7 ECONorthwest remove this acknowledgment.²⁶ As lead agency, SDOT’s pervasively violated
8 its fundamental duty to provide “complete disclosure of environmental consequences.”²⁷

9
10 **E. The Coalition’s Response to SDOT’s Argument D**

11 In section D of its argument, SDOT again asserts that its EIS satisfies the rule of reason,
12 again asserts that its determination of EIS adequacy is entitled to great weight, and argues that it
13 acted consistently with the rule of reason by not evaluating alternative designs. The Coalition
14 agrees that an EIS need only include a reasonable number and range of alternatives, but it is not
15 reasonable to do what SDOT did: Refuse to consider safer design alternatives (one-way
16 facilities); then conceal from readers of the EIS the fact that safer design alternatives are
17 available; and also conceal from readers the recognized, documented hazards of SDOT’s chosen
18 design--a two-way facility with contra-flow movements; and to claim, without support, that an
19 elevated structure was economically unfeasible when in fact the Coalition’s expert established it
20 could be built for a reasonable amount of money. SDOT may not be required to consider less
21 hazardous designs, but it is required to acknowledge what it is doing and identify the hazards of
22 the design it has chosen, which it failed to do.

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25 ²⁶ See Exhibit A-22, page 003, Item No. 78 and Item No. 143 (“Can we delete” statement that businesses will fail).

²⁷ *King County v. Washington State Boundary Review Board for King County and City of Black Diamond*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993).

1 **F. The Coalition’s Response to SDOT’s Argument E**

2 SDOT again asserts that the project was sufficiently designed to evaluate impacts. This
3 is wrong not only as a matter of law (Judge Rogers decided that a 10% level of design is not
4 sufficient for the Shilshole segment of the Missing Link), it also is wrong as a matter of fact, as
5 demonstrated by the evidence at the hearing.

6 At a 20–30% level of design, Hearing Examiner Watanabe concluded the traffic hazards
7 would be significant, based in large part on the evidence of Mr. Bishop, who testified about the
8 hazards that would be created by SDOT’s own design choices. SDOT’s Preferred Alternative is
9 a two-way recreational facility on one side of a heavily-used Major Truck Street with many
10 crossings and limited right-of-way to accommodate trucks, cars, bicycles, and parking, thereby
11 requiring the decision-makers to make many hard design and locational decisions. At the
12 5–10% level of design used in the EIS, Mr. Bishop could not evaluate the new hazards that
13 inevitably will be created by the design choices that SDOT has been making during the
14 pendency of this appeal,²⁸ just as Ms. Hirschey could not evaluate how SDOT will address the
15 hazards that already are apparent from its 5–10% level of design.²⁹ For example, there is not
16 enough room in the proposed five-foot buffer for a barrier that complies with required “shy”
17 distances;³⁰ Mr. Chang acknowledged that SDOT does not know whether the traffic lanes on
18 Shilshole will comply with the minimum 11-foot lane width for truck streets;³¹ and no design
19 solution is proposed for the 11-foot lane offset at the intersection with Market Street, which is
20 almost twice the offset allowed by WSDOT’s regulations.³²

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24 ²⁸ Transcript, page 97, lines 2-9.

25 ²⁹ Transcript, page 211, lines 2-17.

³⁰ Transcript, page 96, line 8 to page 97, line 9.

³¹ Transcript, page 1803, line 22 to page 1804, line 9.

³² Transcript, page 80 line 12 to page 81 line 2.

1 SDOT's assertion that its Preferred Alternative is sufficiently designed to allow
2 evaluation of impacts is yet another counter-factual assertion that is repudiated by the evidence
3 presented at the hearing.

4 **G. The Coalition's Response to SDOT's Argument F³³**

5
6 SDOT's transportation and safety analyses do not meet the rule of reason. SDOT's
7 argument is based, in large part, on *City of Des Moines v. Puget Sound Regional Council*, 98
8 Wn.App. 23, 988 P.2d 27 (1999), which is inapposite to SDOT's position. In that case, the
9 Court upheld the Hearing Examiner's decision finding one expert's testimony more credible
10 than another's because the Port's expert had over 30-years of experience on directly relevant
11 projects, his specialty was analyzing aviation-type transportation projects, and, as he explained
12 at hearing, had developed and applied a methodology specific to the project to ensure his
13 analysis was accurate and sufficient, while the City's expert lacked similar credentials or
14 experience and had not created a similar methodology.³⁴ The Court also agreed with the
15 Examiner because he had "noted that the difference of opinion between the Cities' expert
16 witness and the Port's witnesses *was discussed in the EIS, which 'allowed the decision-makers*
17 *to be informed on this issue prior to making their decisions.*"³⁵ Here, Mrs. Hirschey, like the
18 Port's expert, has 30+ years of directly relevant experience, her specialty is working on multi-
19 modal transportation projects, and she is an expert at developing and applying transportation
20 and safety methodologies as she did here. By comparison, the Transportation Discipline Report
21 and Transportation section of the EIS was written by a planner with less than 5-years of relevant
22 experience (at the time she authored those documents)³⁶ who has worked on about 5 EISs
23

24 ³³ Since the Coalition responded in other sections of this brief, it will not respond here to all of the arguments
SDOT raises in section F of its brief.

25 ³⁴ *City of Des Moines v. Puget Sound Regional Council*, 98 Wn.App. at 23.

³⁵ *Id.* (emphasis added).

³⁶ Transcript page 920, lines 3-23.

1 during her career, who admitted she removed language regarding traffic hazards from her report
2 pursuant to SDOT's instructions,³⁷ admitted her work was not peer-reviewed by anyone other
3 than her supervisor and her client,³⁸ and confirmed she did not walk the routes or the Study
4 Area before drafting her reports. When pushed about her methodology, Mrs. Ellig admitted:

5 Q. But you don't have any specific training in safety or safety
6 methodology, do you?

7 A. Beyond what I've received as an employee at Parametrix, no.

8 Q. And, again, you're not an engineer or a designer?

9 A. Again, I am not an engineer or a designer.

10 Q. So in the Alaskan Way Promenade, what type of safety analysis was
11 conducted?

12 A. It was similar to the analysis that was completed for this project. We
13 reviewed existing crash data to provide a base lien [sic] and then evaluated
14 the design for any changes to safety as part of the build conditions.

15 Q. Were any safety sight-distance analysis conducted for the Alaskan Way
16 Viaduct Promenade Project?

17 A. No.

18 Q. And none were actually conducted here, were they?

19 A. A detailed sight-distance analysis was not conducted here.

20 Q. And, in fact, if you go back to that page 5-19 in R-3, the last paragraph,
21 the bullet point says, "Although the preferred alternative would improve
22 overall safety compared to the no build alternative, there is potential for
23 some new impacts depending on the final design. And it goes on to list
24 those potential impacts of the sight-distance concern. So whether there's
25 sight distance concerns or not is going to depend on final design?"

A. Sight distance can be altered in final design from my understanding of
what occurs in a design process. But what I am discussing here is the
potential for there to be a sight-distance issue, which I don't need to
complete a detailed sight-distance analysis to document.

Q. Just to say that there could be some?

A. Yes. There could be some as a potential impact.³⁹

26 She also confirmed that she had never read any of the literature regarding the inherent dangers
27 of contra-flow sidepaths⁴⁰ and that the design treatments she relied upon in her methodology to
28 conclude the contra-flow sidepath would be safe (i.e., reduce the likelihood of collisions
29 between vehicles and cyclists) were not finalized at the 10% level of design used in the EIS.⁴¹

37 Transcript, page 921, lines 18-20.

38 Transcript, page 922, lines 3-24.

39 Transcript, page 947 line 18 to page 949 line 8.

40 Transcript, page 953, lines 1-9.

41 Transcript, page 953 line 10 to page 954 line 22.

1 At a minimum, to be consistent with the tests articulated in *City of Des Moines*, and to be
2 adequate, SDOT’s EIS should have disclosed the studies that demonstrate the hazards of
3 sidepaths, which were known to Mr. Mazzola but never conveyed to Mrs. Ellig or the rest of the
4 EIS team, and then analyzed the safety of its design (after advancing the design to an
5 appropriate level) in light of these documented hazards. Because SDOT did not do so, the
6 City’s decision-makers were not “allowed...to be informed on [these] issue[s] prior to making
7 their decisions.”

8 **1. The EIS Did Not Reasonably Disclose or Discuss Truck Activity**

9 The EIS failed to include, identify or discuss all of the driveways along the Preferred
10 Alternative. Mrs. Ellig admitted in response to a question from the Examiner that EIS Figure
11 1.3 “doesn’t comprehensively cover all driveways” and had to prepare a list identifying the
12 driveways omitted from or not properly identified in the EIS.⁴² Mr. Bishop easily completed
13 this task, identifying the approximately 29 driveways not included in the EIS in his figures
14 “Driveway and Incursion Zone Areas” admitted as Exhibit A-1, pages 037 and 038. Second,
15 ample testimony was presented at the hearing confirming SDOT did not contact business and
16 property owners to confirm the actual vehicles that frequent these driveways nor include this
17 information in the EIS. Even Mr. Phillips, the consultant who prepared SDOT’s AutoTURN
18 diagrams included in the FEIS, admitted he did not use a WB-67 (i.e., similar to a lowboy) and
19 instead used a WB-50 for the AutoTURN at CSR Marine despite knowing WB-67 lowboys
20 come and go from CSR’s driveway.⁴³ And third, the freight truck and turning traffic volumes in
21 the EIS are misleading because they include “small, medium and large” vehicles (*see* Exhibit R-
22 3, Appendix B, Table C-1). By FHWA Vehicle Classifications (*see* Exhibit R-3, Appendix B,
23 page 3-2, Figure 1-1) the small category includes motorcycles, passenger cars and pick-up
24

25 ⁴² Transcript, page 984, lines 8-16; *see also* Exhibit R 55 (copy not provided).

⁴³ Transcript, page 1097, lines 2-11; *see also* FEIS Appendix A, AutoTURN Analysis, page A-7 (copy not provided).

1 trucks while the medium category includes school buses, RVs and larger pick-up trucks. As
2 such, the FEIS overinflates volumes on Leary and dilutes freight volumes on Shilshole.

3 Since the EIS did not include accurate information regarding the actual driveways and
4 driveway usage, and mixes passenger vehicles, school busses and RVs into freight traffic
5 volumes, it is incomplete and inadequate on its face.

6 **2. The FEIS Did Not Reasonably and Adequately Disclose, Discuss or**
7 **Analyze Conflicts**

8 Simply because a report in an appendix to the FEIS use a word (“conflict”) over and
9 over again does not mean the EIS reasonably and adequately discloses or discusses the
10 inherently dangerous condition of locating a contra-flow sidepath next to a Major Truck Street
11 where it will create approximately 156 new conflict points, none of which is included in the
12 EIS. Instead of disclosing these conflicts and acknowledging their hazardous nature, the
13 Transportation Discipline Report says “The project would create a safely designed, direct, and
14 defined multi-user trail for persons of all abilities, and improve predictability for all motorized
15 and non-motorized users along the project alignment,” which is advocacy rather than disclosure.
16 (See Exhibit R-3, Appendix B, page ES-1). Similarly, Table 1-1 in the EIS lacks detail
17 sufficient to inform a reader or a decision-maker of the dangers inherent in SDOT’s design and
18 instead includes pithy statements unsupported by analysis or information claiming the sidepath
19 will improve safety instead of creating the new traffic hazards testified to by the Coalition’s
20 experts.

21 **3. The EIS is based on an Assumption Drivers Will Obey the Rules of**
22 **the Road**

23 “This trail is designed so that if everybody follows the rules of the road it's perfectly
24 safe,” said Dong Ho Chang, the City’s Traffic Engineer.⁴⁴

25 ⁴⁴ Transcript, page 1808 line 24 to page 1809 line 11 (“Q. So am I to understand then that this trail is safe, in your opinion, because you assume all truck drivers and bicyclists are going to follow the rules of the road? A. Yes.”)

1 The problem is 94% of accidents are caused by human error,⁴⁵ and what Mr. Chang
2 refers to as the “rules of the road” *unequivocally prohibit the very movements SDOT is forcing*
3 *people to make as testified to by Messrs. Bishop and Kuznicki and Mrs. Hirschey—namely,*
4 *having to cross the centerline in order to enter or exit driveways along the Preferred*
5 *Alternative or having to drive over curbs and the proposed buffers.* SMC 11.53.020 and RCW
6 46.61.100 require trucks and vehicles to drive on the right side of the centerline except in
7 enumerated circumstances that do not including swerving left in order to make a right-hand
8 turn. And *SMC 11.58.250 prohibits trucks and other vehicles from driving over curbs:*

9 *No person shall drive any vehicle upon a constructed sidewalk and/or*
10 *curb except upon a permanent driveway or a temporary driveway*
11 *established in accordance with a permit issued under Section 11.24.100.*

12 This prohibited movement is exactly what the Coalition’s experts testified at length will occur,
13 even based on 10% level of design, because vehicles will have to cross curbs and encroach into
14 the incursion zones to enter and exit driveways along the Preferred Alternative. SMC 11.53.290
15 is of even greater import because it prohibits a driver from crossing the “*centerline when a*
16 *bicycle or pedestrian is within view of the driver and is approaching from the opposite*
17 *direction...*”*as will be the case with this contra-flow sidepath.* Even Mr. Schultheiss
18 confirmed drivers will not always obey the rules of the road, which undermines the entire basis
19 for Mr. Chang’s statement:

20 Q. Do you believe human beings can operate a car safely?

21 A. I think the historical record shows it's a problem.

22 Q. But wouldn't the safety of this facility where there's 44 driveways in 1.5
23 miles depend in part on the human beings operating their vehicles safely?

24 A. Yeah.⁴⁶

25 ⁴⁵ Transcript, page 246, lines 16 to 17.

⁴⁶ Transcript, page 1317, lines 1-9

1 4. **The EIS Failed to Disclose Impacts to The Ballard Terminal**
2 **Railroad**

3 Mr. Forgette’s testimony established SDOT intends to remove active track (the Western
4 Pioneer siding), which was not disclosed nor discussed in the EIS.⁴⁷ The fact that SDOT does
5 not understand the railroad’s operational needs and that Mrs. Ellig watched five days of video
6 looking at the wrong section of track (focusing on Salmon Bay Sand & Gravel, not the Western
7 Pioneer siding)⁴⁸ does not excuse the lack of disclosure and discussion in the EIS.

8
9 5. **The EIS Improperly Relies Upon the PM Peak Hour Traffic Delay**

10 Mrs. Hirschey succinctly explained the problem of relying on the PM peak hour traffic
11 volume in disclosing and discussing impacts to freight operations and maritime and industrial
12 land uses:

13 So the p.m. peak hour was described as the worst-case scenario. Figure 3-
14 4, the Transportation Discipline Report, shows both -- shows which -- if
15 you recall, showed a red line that was all traffic and a percent of all traffic
16 that's truck traffic along the bottom. And so the p.m. peak hour is chosen
17 as worst case scenario, which, if you look here, *the peak of the peak is a
peak, but it has very little truck volume. But during midday the overall
traffic volume is nearly the same as the peak, but the truck volumes are
much higher.*⁴⁹

18 What Mrs. Hirschey is describing above can easily be discerned by looking at Figure 3-4 in the
19 Transportation Discipline Report (Exhibit R-3, Appendix B, page 027). By drawing a horizontal
20 line across the intercept of the red line depicting “PM peak general purpose traffic” where that
21 red line crosses the vertical line depicting “6:00 PM,” it is easy to see that for much of the day
22 there are far higher volumes of both general purpose and freight traffic volumes, which debunks
23 SDOT’s claim its analysis is based on the “worst case” scenario.

24
25 ⁴⁷ Transcript, page 1820 line 24 to page 1821 line 5.

⁴⁸ Transcript, page 853, lines 4-11.

⁴⁹ Transcript, page 1883, lines 9-19 (emphasis added).

1
2
3 **H. The Coalition’s Response to SDOT’s Argument G**

4 SDOT asserts that its parking analysis complies with the rule of reason. The EIS does
5 not inform the reader, however, that 66% of the parking spaces on Shilshole will be lost if the
6 Preferred Alternative is built, or that the spaces that remain will be 145 spaces fewer than are
7 needed to meet current weekday demand.

8 SDOT argues that the loss of such parking is not significant because there will be other
9 parking available within walking distance. Even if one assumes that there are 145 available
10 spaces within walking distance of the businesses on Shilshole (and the EIS does not
11 demonstrate that there are), many of these spaces are metered spaces, particularly those near the
12 northern half of Shilshole,⁵⁰ many of the users of the parking spaces that will be lost are
13 employees of the maritime-industrial businesses who need day-long parking, not hourly
14 parking, and many of them lug heavy tools and equipment with them every day, to and from
15 their jobs. SDOT’s consultant did not communicate with the maritime-industrial businesses on
16 Shilshole or otherwise obtain information that would allow the EIS to evaluate the impact on
17 this maritime-industrial cluster of the loss of two-thirds of its current parking.

18 SDOT argues, at page 37 of its Post-Hearing Brief, that it is acceptable practice to have
19 one large study area because that “allows for an equal comparison to the no build alternative.”
20 Whatever this assertion may mean, it does not justify the EIS’s failure to reasonably inform
21 decision-makers about the impacts of the alternatives being evaluated. SDOT’s obligation is to
22 identify the impacts of each alternative, and a large study area that includes all alternatives
23 conceals rather than discloses the impacts of each alternative on the businesses that will be
24 affected by each alternative. This is particularly true with regard to the impacts of the Preferred
25

⁵⁰ Exhibit R-3, Technical Appendices to the FEIS, Parking Discipline Report, Figure 4-2.

1 Alternative on maritime-industrial businesses on Shilshole, adjacent to the Ship Canal, because
2 this body of water precludes any replacement parking to the west.

3
4 **I. The Coalition’s Response to SDOT’s Argument H**

5 SDOT, by asserting the Coalition only established impacts to individual businesses, is
6 misconstruing the evidence to claim the Coalition did not prove the sidepath is incompatible
7 with the City’s Comprehensive Plan and the goals and policies that prioritize existing water-
8 dependent and water-related maritime and industrial uses. In Seattle, an EIS must include an
9 economics section because, for certain land uses, economic impacts *are* land use impacts.
10 There are only two areas in Seattle zoned industrial: SODO and the BINMIC. Industrial and
11 maritime businesses within the Study Area can only be located and operate on land within the
12 BINIC zoned industrial.

13 Seattle’s Comprehensive Plan includes specific goals and policies for many of the City’s
14 neighborhoods, including goals and policies for the BINMIC. While those goals and policies
15 are generally described in the EIS, the EIS fails to adequately disclose and describe how
16 SDOT’s sidepath is incompatible with the BINMIC’s goals and policies while simultaneously
17 overstating how the project may be compatible with inapplicable goals and policies. Near the
18 bottom of page 4-17 of the EIS (Exhibit R-1), SDOT discloses that the BINMIC policies state
19 that “trails should be located away from industrial areas.” Earlier on that same page, however,
20 SDOT also says “...the Missing Link is specifically included in some plans as a priority
21 improvement.” What SDOT fails to disclose and discuss is that those “plans” saying the
22 Missing Link is a “priority improvement” include the Crown Hill Neighborhood Plan and that
23 no portion of the Missing Link is located within the Crown Hill neighborhood. Since the
24 Preferred Alternative is located almost entirely within the BINMIC, its goals and policies—
25 which specifically state not to locate the trail near industrial areas—should control. Again, this

1 important distinction is not directly addressed, leaving decision-makers either woefully
2 uninformed, or, worse, misled.

3 Not only does the EIS gloss over or misstate information that should be provided to
4 decision-makers, as described above and in the Coalition’s prior brief, its witnesses and experts
5 testified the sidepath will have significant and adverse impacts to businesses: Both Messrs.
6 Nerdrum and Anderson testified their businesses will fail and close because of the trail and
7 Mr. Cohen confirmed that the trail will add stressors to this already fragile industrial cluster and
8 economic ecosystem. Salmon Bay Sand & Gravel cannot simply pick and up and move a
9 couple blocks away both because it must be located on industrially zoned land and because it
10 relies on its water adjacency and rail adjacency to bring in bulk materials. Similarly, CSR must
11 be located on industrially zoned land directly adjacent to water access, which only exists in very
12 few locations in Seattle. Impacts to these individual businesses prove direct land use conflicts
13 and are indicative of the larger land use problem of locating a recreational trail—*which can be*
14 *located anywhere*—in one of Seattle’s two industrially zoned areas.

15 But none of these impacts were disclosed or discussed in the EIS because SDOT
16 instructed ECONorthwest to delete them from its draft report and rewrite it (i.e., Exhibit A-22,
17 Item No. 143 wherein Mr. Scharf instructed ECONorthwest to “delete” the statement that the
18 trail will “result in some industrial businesses going out of business”). By instructing its
19 consultants like Mrs. Ellig to remove language regarding “traffic hazards” and ECONorthwest
20 to remove language that “some industrial businesses” will “go out of business,” SDOT robbed
21 decision-makers of critical information necessary to make, as Mr. Johnson confirmed, a land
22 use policy decision. Using the definition in the EIS, and as confirmed by Mr. Johnson,
23 ECONorthwest’s draft report and the testimony adduced at hearing prove SDOT’s sidepath will
24 cause significant land use impacts because it “will likely cause the permanent loss of land uses
25

1 that are preferred (such as water-dependent, water-related industrial uses) under adopted City of
2 Seattle policies.”

3
4 **J. The Coalition’s Responses to SDOT’s Argument I**

5 Mr. Bishop testified at length regarding the safety impacts of the new section of trail not
6 disclosed nor noticed in the DEIS and only included in the FEIS.⁵¹ His testimony established
7 that this previously undisclosed portion of the trail will actually create significant adverse traffic
8 hazards for multiple reasons including the inability of trucks to safely turn in and out of NW
9 24th onto or off of Market Street; that SDOT is proposing to use a unique design (double curb)
10 which will itself create undisclosed safety hazards; SDOT created a “Mixing Zone” in the FEIS
11 not disclosed nor discussed in the DEIS and which again creates new safety issues; and that
12 SDOT’s re-design of Market Street includes impermissibly large lane-offsets that do not comply
13 with WSDOT guidelines, none of which were disclosed in the Draft EIS.⁵² Mr. Bishop’s
14 testimony that SDOT’s plan to use an untested and unique design—a portion of a roundabout
15 constructed at Market and 24th as an extended curb to create a “Mixing Zone”—will itself create
16 an unsafe condition is supported by one of SDOT’s studies admitted into evidence, Exhibit R-
17 30, which states, in part:

18 Despite the reduced risk for motor vehicles at roundabouts, studies of
19 cyclists have found increased risk....The increased risk to cyclists
20 associated with traffic circles and roundabouts could relate to the large
21 number of associated ‘conflict points.’... *We included a variable
indicating whether the cyclist was travelling in the opposite direction to
motor vehicles and found it to increase risk at intersections
significantly.*⁵³

22 Again, none of this was included in the DEIS and thus readers and decision-makers were not
23 given the opportunity to comment on SDOT’s proposed design changes that will create

24 ⁵¹ See Transcript, page 69 line 15 to page 70 line 9 (“A. Well, this is introducing another concept. This section of
25 Shilshole was not a part of one of the alternatives that was in the draft EIS.”)

⁵² Transcript, pages 71 to 76, pages 78 to 81 and page 84, lines 5-15.

⁵³ See Exhibit R-30, page 601 (emphasis added).

1 significant traffic hazards and adverse impacts to the maritime-industrial businesses on
2 Shilshole, and to other users of the street and intersection.

3 **K. Coalition’s Response to Cascade’s Argument**
4

5 For the most part, no additional response is necessary since Cascade largely echoed
6 SDOT’s arguments. The Coalition does, however, note that Cascade’s argument on page 8 of
7 its brief that Mr. Bishop failed to use the Chicagoland rating system to “calculate the risk score
8 for the existing condition” misses the point of that tool: the Chicagoland rating system rates the
9 *baseline, existing condition* in order to help decision-makers decide whether or not to locate a
10 multi-user sidepath in a specific location or not. As such, Mr. Bishop’s conclusion that
11 Shilshole is four times more dangerous than recommended by the Chicagoland system reflects
12 both the dangerous nature of existing conditions and the additional hazards that would be
13 created by a two-way sidepath. The Coalition agrees with Cascade’s assertions that Shilshole is
14 a dangerous, chaotic area that is, as Cascade quoted Mr. Kuznicki, “not conducive to
15 organization...” but the evidence presented at the hearing demonstrates that the Preferred
16 Alternative will increase the number of conflict points and make them more dangerous than the
17 existing points of conflict.

18 **III. Conclusion**
19

20 The EIS is woefully inadequate.

21 ///
22
23
24
25

1 DATED this 5th day of January, 2018.

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DECLARATION OF SERVICE

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

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