

The Honorable Judge Roger Rogoff

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

BALLARD COALITION,

Petitioner,

v.

CITY OF SEATTLE, and
CASCADE BICYCLE CLUB,

Defendant.

No. 18-2-04988-1 SEA

ORDER ON MOTION TO
ENFORCE

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court on Petitioner’s Motion to Enforce Judge Chung’s Order, and the Court having reviewed Petitioner’s motion and memorandum, Defendant’s response, Petitioner’s reply, the additional briefing requested by the Court, exhibits provided at oral argument, and the exhibits and declarations attached to the pleadings, the Court makes the following ruling:

BACKGROUND

The City of Seattle (City), through its Department of Transportation (SDOT), proposes to complete an unfinished portion of the Burke-Gilman Trail in Ballard. The City

1 achieved financing for the project. Prior to initiating construction, the City conducted an
2 environmental review under the State Environmental Policy Act (SEPA). After years of
3 litigation, the City issued an Environmental Impact Study (EIS) before beginning
4 construction on the Missing Link Trail. The purpose of an EIS is to provide decision-makers
5 and the public information about any potential adverse impacts of the proposed construction.

6 Glasser v. City of Seattle, 139 Wash. App. 728, 736, 162 P.3d 1134 (Div. I, 2007).

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8 In May, 2017, after three separate attempts to avoid it, the City completed a Final
9 Environmental Impact Statement (FEIS) for the project, and was prepared to begin
10 construction. The City's Hearing Examiner approved the FEIS in January, 2018. Petitioner
11 appealed the Hearing Examiner's finding, and argued that the document failed to sufficiently
12 set forth potential adverse environmental impacts.

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14 On December 21, 2018, Judge Samuel Chung ruled on the sufficiency of the FEIS.
15 *See*, Order of Judge Samuel S. Chung, December 21, 2018 (Sub #83) [Hereinafter "*Order*
16 *P*"]. Judge Chung found that SDOT's FEIS adequately addressed every category of potential
17 environmental impacts, except that SDOT "[did] NOT adequately disclose adverse economic
18 impacts associated with," motor vehicle versus bicycle collisions. *Id.* (Emphasis in original).
19 The judge went on to clarify that, while the FEIS did disclose economic impacts related to
20 real property values and impacts to businesses from delivery delays, it failed to address the
21 economic impacts from traffic conflicts. *Id.* In relation to those potential impacts, the Court
22 said the FEIS, "[did] not provide sufficient information or analysis for proper consideration
23 by the decision makers." *Id.* This failure directly violates one of SEPA's stated purposes.

1 SDOT sought reconsideration of Judge Chung's ruling. The City argued that Judge
2 Chung lacked subject matter jurisdiction because the State's SEPA regulations, as opposed to
3 the City's, did not require the type of analysis he had found wanting. Second, the City
4 argued that that the analysis of traffic conflicts was an issue beyond the reach of an EIS, and
5 instead was a, "business-specific issue."
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7 After considering the motion and response, Judge Chung issued a written ruling on
8 January 18, 2019. *See* Judge Samuel S. Chung, Order Denying Defendant's/Respondent's
9 Motion for Reconsideration (Sub #93) [Hereinafter "*Order IP*"]. In that order, the Court
10 disagreed with the City about the two legal issues raised. The Court also held, "Respondents
11 assert that the first segment of the proposed trail does not negatively impact the businesses
12 and should be allowed to proceed . . . [but] this Court hereby denies Respondent's Motion for
13 Reconsideration."
14

15 After these rulings, the City began construction on portions of the project it deemed
16 ancillary to the Missing Link Trail construction. Petitioner filed a Motion for Contempt,
17 which the undersigned denied, finding that the construction had independent utility from the
18 Missing Link Trail.

19 The City conducted additional environmental analysis and issued an addendum to its
20 FEIS. The City again intends to begin construction on the project. In response, Petitioner
21 has filed a Motion to Enforce, asking this Court to determine that an addendum is
22 insufficient to fix the FEIS.
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1 **SUMMARY OF DECISION**

2 Petitioner's motion is more properly a Motion to Clarify Judge Chung's ruling.

3 While the original orders in this case addressed the adequacy of environmental
4 determinations, they did not address what should happen with the underlying governmental
5 action, as is required.
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7 As such, this Court remands the matter to the agency level so the City can issue an
8 adequate FEIS, consistent with Judge Chung's orders. At the agency level, the City can use
9 whatever documents they wish. However, that review process begins again at the agency
10 level where decisionmakers actually consider the information so they can make
11 determinations about the efficacy of the project. Simply having this Court approve an
12 addendum or reject an addendum frustrates SEPA's purpose, which is to inform those who
13 decide whether a project is good policy. Such policy decisions are legislative and executive,
14 and not the job of this Court.
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16 **ANALYSIS**

17 The legislature requires that agencies engaged in, "major actions significantly
18 affecting the quality of the environment," issue reports or statements that include:

- 19 (i) the environmental impact of the proposed action;
20 (ii) any adverse environmental effects which cannot be avoided
21 should the proposal be implemented;
22 (iii) alternatives to the proposed action;
23 (iv) the relationship between local short-term uses of the
24 environment and the maintenance and enhancement of long term
25 productivity; and
26 (v) any irreversible and irretrievable commitments of resources
which would be involved in the proposed action should it be
implemented;

1 RCW 43.21C.030. The City agrees (after two adverse rulings by Judge Rogers) that the
2 Missing Link Trial project is a major action which might impact the environment, and that it
3 must issue an EIS.

4 SDOT commissioned an environmental impact study which it then reduced to an
5 environmental impact statement (EIS). It then made copies of such statements and the
6 comments and views of the appropriate agencies available to the governor, Department of
7 Ecology, the ecological commission, and the public. SMC 25.05.460. The resulting FEIS
8 was challenged administratively and, after being found sufficient at two administrative
9 levels, was challenged and found insufficient by Judge Chung in King County Superior
10 Court.
11

12 **1. Procedural Posture**

13 SDOT and the Cascade Bicycle Club rightfully point out the dearth of a procedural
14 basis for Petitioner's Motion to Enforce. There is no specific cause of action for such a
15 motion, nor any caselaw or court rule specifically allowing such a motion. However, nothing
16 in our court rules limits the types of motions that a party can make, only that a motion must
17 be made if the party seeks an order for relief. CR 7. But the Court agrees that Petitioner's
18 post-ruling motion does not neatly fit within the cause of action Petitioner originally brought.
19 No party has asked this Court to act as a continuing moderator of the City's actions. No
20 party has moved this Court to retain jurisdiction. No statute or rule under SEPA recognizes a
21 superior court's jurisdiction to monitor a city agency's environmental actions after a finding
22 that the City's EIS is insufficient.
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1 Petitioner's lawsuit in this case is an appeal of a hearing examiner's decision
2 approving the Missing Link Trail construction in Ballard. Specifically, Petitioner challenged
3 the adequacy of the Final EIS upon which approval of the project was based and sought
4 direct review under RCW 43.21C.075. *See*, Petitioner's Complaint, ¶6.1.¹

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6 However, no judicial review of an environmental determination can be separated
7 from the governmental action it accompanies. *See, e.g.*, RCW 43.21C.075(2)(a); RCW
8 43.21C.075(6)(e). Judicial reviews, "shall without exception be of the governmental action
9 together with its accompanying environmental determinations. RCW 43.21C.075(6)(e).
10 Appeals of agency environmental determinations shall consolidate an appeal of
11 environmental determinations with an appeal on the underlying governmental action. RCW
12 43.21C.075(3).

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14 In this case, the adequacy of the FEIS is linked on appeal with the governmental
15 action (construction on the Missing Link Trail). Judge Chung's order addressed the
16 adequacy of the FEIS in a detailed, thoughtful manner. He also cited to the statute governing
17 appeals of governmental land use decisions ("Under RCW 36.70C.040, the Petitioners sought
18 judicial review."). *See*, Judge Chung's *Order I* (December 21, 2019, Sub #83), Attachment
19 to Order (Oral Decision Transcript). But it did not directly address what to do next.

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21 The Court has many options about how to address the government's proposed action.
22 RCW 36.70C.140. The court may affirm or reverse the land use decision under review or
23 remand it for modification or further proceedings. RCW 36.70C.140. If the decision is
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26 ¹ Although Petitioner sought other alternative forms of jurisdiction (writs, injunctions, declaratory judgments),
Petitioner primarily wanted direct review of the Hearing Examiner's decision, and wanted that decision
overturned. It was pursuant to this direct review that Judge Chung issued his order.

1 remanded for modification or further proceedings, the court may make such an order as it
2 finds necessary to preserve the interests of the parties and the public, pending further
3 proceedings or action by the local jurisdiction. RCW 36.70C.140. Per SEPA, the Court's
4 order cannot begin and end with an answer on the adequacy of the FEIS. The Court must
5 address the status of the construction itself.
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7 The Court has jurisdiction to clarify Judge Chung's Orders to determine the status of
8 the governmental action (Missing Link Trail construction) as a result of Judge Chung's
9 decision on the adequacy of the environmental determination. Judicial reviews must
10 combine SEPA actions with their related governmental actions. RCW 43.21C.075. As such,
11 this Court accepts the parties' briefing, arguments, declarations, and exhibits, as a Motion to
12 Clarify the Order on Adequacy of FEIS.
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14 **2. The Status of The Missing Link Project**

15 The superior court determined that the City's FEIS was inadequate. This Court is
16 tasked with determining what to do about it. The parties have asked the Court to make a
17 conditional legal decision about whether an addendum might be a legally sufficient way to
18 fix the inadequate FEIS, or whether a Supplemental EIS is the only way to fix the problem.
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20 An addendum is designed to add analysis or information about a proposal but does
21 not substantially change the analysis of significant impacts and alternatives in the existing
22 environmental document. SMC 25.05.625. The City here has conducted additional analysis.
23 They have conducted additional outreach to affected businesses and communities. Based on
24 that work, they have determined that an addendum is sufficient to satisfy the requirements of
25 an FEIS.
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1 Preparation of a supplemental EIS is required if: (1) there are substantial changes to a
2 proposal so that the proposal is likely to have significant adverse environmental impacts, or
3 (2) there is new information indicating a proposal's probable significant adverse
4 environmental impacts. (This includes discovery of misrepresentation or lack of material
5 disclosure.) SMC 25.05.600(C)(2). A new threshold determination or SEIS is not required if
6 probable significant adverse environmental impacts are covered by the range of alternatives
7 and impacts analyzed in the existing environmental documents. SMC 25.05.600(C)(2).
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9 Petitioner argues that, because a Superior Court Judge found the FEIS inadequate, the
10 inadequacy is *by definition* significant and only cured with a Supplemental EIS.²

11 SDOT cites to Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wash.
12 App. 34, 52 P.3d 522 (Div. I, 2002) for the proposition that an addendum is a sufficient way
13 to solve the inadequacy of their FEIS. In Thornton Creek, the City Department of Land Use
14 and Construction used a 1998 addendum to an Environmental Impact Statement to
15 conditionally approve construction in the south parking lot of the Northgate Mall. The
16 decision to approve was appealed to a hearing examiner. The hearing examiner's decision
17 was appealed to the Superior Court. The Superior Court found that a SEIS was unnecessary
18 for approval of the developer's general development plan.
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22 ² The Seattle Municipal Code sets forth a comprehensive and detailed manner for reviewing potential projects
23 for environmental impacts. Only when a proposal "continues to have a probable significant adverse
24 environmental impact, even with mitigation measures, [shall] an EIS be prepared." SMC 25.05.350(B). Thus,
25 the simple act of preparing an EIS requires a finding of "probable significant adverse environmental impact."
26 An EIS shall provide impartial discussion of significant environmental impacts and shall inform decisionmakers
and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse
impacts or enhance environmental quality. SMC 25.05.400(B). The analysis must include economic impacts.
SMC 25.05.400E. An EIS need analyze only the reasonable alternatives and probable adverse environmental
impacts that are significant. SMC 25.05.402(A).

1 While the Court rejects the idea propounded by Petitioner that the difference in
2 procedural posture between the instant case and Thornton Creek makes it irrelevant, the
3 Court also does not find it is precisely on point as argued by the City. In fact, the Thornton
4 Creek court summarized the use of addenda as, "SEPA authorizes the use of addendums to
5 add nonsignificant new information on a proposal that has already undergone EIS review."
6 Id., at 44, fn. 7. Moreover, in Thornton Creek, once the addendum was adopted into the
7 existing EIS (pursuant to SMC procedures), the complete FEIS went through two levels of
8 administrative appeal. That has not happened in the current case.
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10 A court has rejected the City's FEIS as incomplete. The City has conducted
11 additional work and written an addendum to the FEIS. Bowers Declaration, Attachment #1.
12 The City wishes to have this Court impliedly bless their addendum without abiding by the
13 procedural requirements of the City's SEPA statute, including its administrative review
14 process. That process is found in the City's SEPA. SMC 25.05.630, .635.
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16 The Court finds that, if the City wishes to proceed, it must use its own procedures to
17 issue a sufficient FEIS, adopting whatever documents it believes will create a sufficient
18 FEIS. SMC 25.05.460. For example, a FEIS shall be issued by the responsible official and
19 sent to the Department of Ecology (two (2) copies), to all agencies with jurisdiction, to all
20 agencies who commented on the DEIS, to the SEPA Public Information Center, and to
21 anyone requesting a copy of the FEIS. SMC 25.05.460(A). The responsible official shall
22 send the FEIS, or a notice that the FEIS is available, to anyone who commented on the DEIS
23 and to those who received but did not comment on the DEIS. SMC 25.05.460(B). If the
24 agency receives petitions from a specific group or organization, a notice or EIS may be sent
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1 to the group or organization, a notice or EIS may be sent to the group and not to each
2 petitioner. SMC 25.05.460(B). The lead agency should make additional copies available in
3 its offices for review. SMC 25.05.460(C). The date of issue is the date the FEIS, or notice of
4 availability, is sent to the persons, agencies and SEPA Public Information Center specified in
5 the preceding subsections and the FEIS is publicly available. SMC 25.05.460(D).
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7 This Court will not rule on the adequacy of an addendum in a vacuum. The Court
8 will not rule on the adequacy of a non-existent SEIS in a vacuum. This Court is required to
9 rule on the adequacy of an FEIS after administrative appeals have been exhausted. No such
10 document is properly before the Court.

11 Judge Chung found that a very specific potential impact was missing – adverse
12 economic impacts associated with the potential risks from vehicle to bicycle/pedestrian
13 traffic conflicts. This Court remands the matter to the Lead Agency in order to issue an
14 adequate, complete FEIS (adopting or incorporating whatever information it believes will fix
15 the problem identified by Judge Chung) prior to commencing construction on the Missing
16 Link Trail. As described in this Court’s earlier ruling on Motion for Contempt, the City is
17 free to commence any construction in the area if that construction has independent utility.
18 But such construction cannot violate Judge Chung’s order (and this current order) by
19 commencing Missing Link Construction without a completed FEIS.
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22 Judge Chung’s description of what information was missing from the current FEIS is
23 crystal clear, and this Court need not further explain it. If SDOT believes that adoption of an
24 addendum to their current FEIS is appropriate, this is a decision they must make. If they
25 believe a supplemental environmental impact statement is sufficient, they should follow that
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1 path. The Court understands it is likely that however SDOT attempts to fix its current FEIS,
2 Petitioner here will object and appeal the decision to the hearing examiner and then back to
3 the superior court. The purpose of an EIS is to provide decision-makers and the public
4 information about any potential adverse impacts of the proposed construction. Glasser v.
5 City of Seattle, 139 Wash. App. 728, 736, 162 P.3d 1134 (Div. I, 2007). A hearing examiner
6 will determine who is right, and if further objections exist, an appeal to the Superior Court is
7 appropriate.
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9 The City must issue a new, final EIS which incorporates or adopts its additional
10 analysis at the agency level. SDOT's additional analysis need only address the single
11 potential significant impact that Judge Chung determined was insufficiently addressed in the
12 FEIS. The decision makers need to make the decision about whether this additional
13 information affects their decision about the project.
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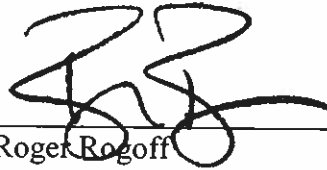
15 ORDER

16 **IT IS HEREBY ORDERED** that Petitioner's Motion to Enforce is considered by the
17 Court as a Motion to Clarify. The Motion to Clarify is GRANTED. Pursuant to Judge Chung's
18 two previous orders, this matter is remanded to the Lead Agency for adoption or incorporation
19 of its additional analysis into a FEIS.
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21 **IT IS HEREBY FURTHER ORDERED** that SDOT shall not conduct any
22 construction under the FEIS considered by Judge Chung unless that construction can stand on
23 its own, or has independent utility beyond furthering the Missing Link Trail Project. SDOT
24 shall comply with this order unless and until it issues a FEIS pursuant to SEPA procedures and
25 SMC 25.05.460, subjecting itself to SEPA appeals process. If SDOT does construction which
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1 would be useless or without benefit absent their hoped-for Missing Link Trail Project, such
2 construction would violate Judge Chung's (and these) orders.
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4 DONE IN OPEN COURT this 2nd day of July, 2019.
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8 Judge Roger Rogoff
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