BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of **FOSS MARITIME COMPANY AND PORT OF SEATTLE** from an interpretation issued by the Director, Department of Planning and Development	Hearing Examiner File Nos. S-15-001; S-15-002 (Director's Interpretation: 15-001) FOSS MARITIME'S MOTION TO QUASH AND/OR FOR PROTECTIVE ORDER

I. MOTION

Appellant Foss Maritime Company ("Foss") respectfully requests that the Hearing Examiner enter a protective order quashing an as-yet unnoticed eve-of-hearing deposition requested by Appellee City of Seattle Department of Planning and Development (the "City" or "DPD") of a Foss designee pursuant to CR 30(b)(6). The City requested this deposition much too late in this matter, while the parties and their counsel are preparing for the hearing next week. This Motion is supported by the Declaration of David West, submitted herewith.

II. FACTS AND PROCEDURAL BACKGROUND

Foss and co-appellant Port of Seattle ("Port") instituted these consolidated appeals of Director's Interpretation 15-001 (the "Interpretation") on May 12, 2015. At the prehearing conference held on June 3, 2015, the hearing in this matter was scheduled for July 23 and 24,

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2015. On July 6, 2015, the hearing was rescheduled by the Hearing Examiner at the request of the parties to August 13, 14, and 26, 2015.

Prior to the prehearing conference, Foss notified the City that it intended to conduct both written and deposition discovery of the City. Foss's desire for discovery was specifically noted and approved in the Hearing Examiner's Order of June 3, 2015. Foss sent Public Record Act requests to City departments on May 22, 2015; promulgated written discovery requests to the City on June 3, 2015; and scheduled and conducted the depositions of two City witnesses during the week of July 20, 2015. These latter depositions were noticed by Foss in early June 2015, providing the City substantial time to bring motions to quash and/or to limit the depositions. The City's motions were resolved and the discovery completed, all in a timely fashion because of Foss's timely initiation of the discovery process.

By contrast, the City did not disclose its desire or intent to conduct any discovery in this matter at the prehearing conference, or for more than five weeks thereafter. On July 9, 2015, the City served interrogatories and requests for production on both Foss and the Port.[1] This discovery was promulgated almost two months after the appeals were initiated, and just three days after the Hearing Examiner continued the hearing date from July 23-24, 2015 to August 13 and 14, 2015. After another week passed, and less than a month before the rescheduled hearing dates, the City notified Foss and the Port (by email) on July 15, 2015 of its general desire to take CR 30(b)(6) depositions of Foss and the Port, stating that the City would "try to get [Foss] and the Port the scopes tomorrow." However, the City did not serve any deposition notices, nor did the City provide the scope of any proposed depositions the following day, or indeed at all.

At this juncture, it is important to note how a CR 30(b)(6) deposition differs from the deposition of a fact witness. A fact witness is required only to testify to his or her knowledge of facts relevant to a matter. Under CR 30(b)(6), in contrast, a corporate deponent is required

[1] Foss's responses to the City's written discovery are due August 10, 2015.

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to testify as to the matters "known or reasonably available to the organization" on a list of "matters on which examination is requested" by the party noting the deposition. Thus, a CR 30(b)(6) is generally initiated by a deposition notice, directed to an organizational defendant, seeking discovery of knowledge of the organization on a list of topics or matters. These topics or matters must be identified "with reasonable particularity." CR 30(b)(6). Assuming the topics are in fact clear and particular, the organization then must present one or more witnesses which it designates to testify on those matters. The witness(es) must prepare by searching out the knowledge of the organization, which can require review of documents and interviews of persons who have or may have knowledge. The broader and more numerous the topics, the more preparation that is required of the witness(es) (and the organization's counsel, who generally assists the witness to locate evidence and to prepare). Given the nature of a CR 30(b)(6) deposition, preparation of the witness for the deposition often takes many more days than the actual testimony itself. And the deponent can do nothing to begin preparing witnesses until the topics of the deposition are actually provided.

Knowing that the hearing was quickly approaching, the City did nothing to move the issue of a deposition forward. Foss conducted the depositions of the City's personnel on Wednesday, July 22, 2015 (Mr. McKim) and Thursday, July 23, 2015 (Mr. Perkowski). After the Perkowski deposition was completed, counsel for the parties had an oral discussion about preparations for the hearing. During the discussion, counsel for Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club and Washington Environmental Council (hereafter "Environmental Intervenors") asked when Foss's CR 30(b)(6) deposition was going to be held. Counsel for the City admitted that she had never sent any deposition topics to Foss or the Port, and stated that she was unsure whether she would conduct any deposition, but if she intended to do so, she would send topics to Foss and the Port no later than the following Monday (July 27, 2015). Foss's counsel expressed concern that any depositions at that late date would distract the parties from their hearing preparation; stated that there was no reason for delay of the

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hearing; and indicated that a deposition would require Foss's counsel to spend time not only in the deposition itself, but preparing a corporate witness on (at that point unknown) subjects. Foss of course could not even begin to prepare a witness when no topics had been identified.

The second self-imposed deadline set by the City for its notice and list of topics (Monday, July 27) came and passed, with no indication that the City wished to take the deposition. However, on the afternoon of July 29, 2015 – just 15 days before the rescheduled hearing, and after all parties had submitted their preliminary witness and exhibit lists – the City sent a list of nine topics to Foss for Foss's CR 30(b)(6) deposition. The nine topics are largely duplicative of the City's written discovery requests.

The parties discussed the City's CR 30(b)(6) topics via telephone on July 29, 2015. Foss expressed its concerns about the late timing of the deposition topics, as well as the confidential nature of certain of the information sought and the inability to protect information by means of a protective order as one would in a court proceeding. Foss further noted that the memorandum identifying the topics had been authored not by the City, but counsel for the Environmental Intervenors. Counsel for the City acknowledged that the Environmental Intervenors had drafted the topics; counsel for the City stated that she had edited the topics. When asked how long the deposition would take, the City's counsel stated that a half day would be sufficient, but counsel for the Environmental Intervenors interjected to state that she intended to examine Foss's witness(es) and that a full day would be required.

To summarize – the City raised the possibility of a Foss deposition, but took no action to schedule or take that deposition, or to provide Foss sufficient time to prepare its witnesses; a week later, the Environmental Intervenors asked about the scheduling of the deposition, and the City admitted it had not pursued the deposition, and was not sure if it would; when the City took no action to send deposition topics by the City's own deadline, the Environmental Intervenors drafted the topics for the City, and the City transmitted those topics to Foss as its own; and when the City said it could conduct such a deposition in half a day, the

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Environmental Intervenors indicated they intended to take at least as much time as the City to examine Foss's witness(es).

The City has still failed to note a Foss deposition, which would require at least five court days' notice under CR 30. That would require a deposition to be conducted the same week as the hearing itself. No transcript would even be available at the hearing.

Counsel for the City and for Foss convened again by phone today to discuss this motion. They reached agreement on narrowing of the deposition topics, alleviating much of Foss's concerns about that matter. They were not able to reach agreement on the matters addressed below.

III. AUTHORITY AND ARGUMENT

HER 3.11 states in part as follows:

> Appropriate prehearing discovery, including written interrogatories, and deposition upon oral and written examination, is permitted. In response to a motion, or on the Hearing Examiner's own initiative, the Examiner may compel discovery, or may prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal.

The Hearing Examiner also may look to the Superior Court Civil Rules (CR) for guidance. HER 1.03(c). Under CR 26(c), a court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that "the discovery not be had."

A. <u>The Proposed Deposition Should Be Prohibited as Untimely, Unneeded and Inappropriate.</u>

The City's requested discovery is not appropriate given how late it has been requested; given that it is primarily motivated by the Environmental Intervenors, who promised that their intervention would not raise new issues nor delay this matter but waited until the last minute to request discovery; and given that it would be unduly burdensome.

As noted above, the City did not indicate its intent to take any depositions in this matter

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until July 15, 2015, which was almost two months after the appeal was filed, and then less than a month before the hearing. The City then did nothing to advance its request, instead stating as late as July 23, 2015 that it had not yet decided to pursue the depositions. (Notably, the City appears without explanation to have entirely abandoned its request to depose a representative of the Port.) The City did not tell Foss it actually wanted a deposition until July 29, 2015, only 15 days prior to the hearing on August 13, 2015. When asked why it had taken so long to clarify its position, the City claimed it had been too busy to address the issue until then.

The truth, Foss submits, is that it is the Environmental Intervenors who are pursuing this deposition, not the City. The City raised the issue late in the process, then twice dropped the matter. The Environmental Intervenors pushed the issue of the deposition forward after Mr. Perkowski's deposition; the Environmental Intervenors drafted the topics after the City let its own deadline for providing topics pass; and the Environmental Intervenors intend to take at least as much deposition time as the City. Indeed, the Environmental Intervenors have already raised the question of whether the hearing date should be pushed back because of the work necessary to prepare for hearing.

It is apparent to Foss that the Environmental Intervenors, having recently had summary judgment entered against them in the Superior Court, hope to use this appeal to advance their political agenda, which includes preventing Foss from conducting business with Shell and its affiliates. But the Environmental Intervenors are not entitled to take action which delays this matter, or which raises new issues, or which prejudices Foss's rights. HER 3.09 provides:

> In determining the merits of a request for intervention, the Hearing Examiner shall consider whether intervention will unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties. If intervention is granted, the Hearing Examiner may limit its nature and scope.

The Environmental Intervenors promised that their invention "will not add additional issues," and further promised "[n]either Appellants nor the City of Seattle would be prejudiced by . . .

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Proposed Intervenors' intervention." Motion to Intervene, p. 12. Further, the Environmental Intervenors specifically agreed "to comply with all deadlines set by the Hearing Examiner." *Id.* Contrary to these express assurances to the Hearing Examiner and the parties, the Environmental Intervenors made no attempt to conduct timely discovery on their own, despite having been granted party status on June 5, 2015. The Environmental Intervenors now seek to use the City as a proxy for their late requests. For its part, the City – through its inaction, its comments to counsel, and its repeated failures to perform in accordance with its own deadlines – has clearly indicated it has no real interest in this late-breaking deposition request. For whatever reason, the City has opted to carry water for the Environmental Intervenors, who seem unable to act on their own behalf. And in doing so (as is discussed below), the City seeks to undertake inquiry into a host of issues that the City itself previously argued were outside the scope of this proceeding (a position taken by the City before it accepted status as a surrogate for the Environmental Intervenors in this deposition request).

Discovery is inappropriate if it is requested or conducted in an unduly burdensome fashion, which can include conducting such discovery too close to a hearing or trial. That is precisely what is occurring here. The parties are preparing for a three day hearing, with a number of different witnesses and dozens of exhibits to prepare. Prehearing briefs are due in about a week. Foss and the Port have had their attention divided between this proceeding and the SEPA matter filed by the Environmental Intervenors, which was argued on summary judgment on Friday afternoon in Superior Court. It is much too late to ask Foss and its counsel to spend several days preparing corporate witnesses to testify on a late list of discovery topics, when Foss and its counsel are readying themselves for the orderly presentation of evidence to the Hearing Examiner.

Foss submits that this discovery is simply too late, and that the request for such a late deposition on the eve of the hearing should be quashed.

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B. Alternatively, the Hearing Examiner Should Enter a Protective Order Limiting the Participation of Intervenors.

Alternatively, the Hearing Examiner should enter an order limiting the scope of the deposition. The City said it could take the deposition of any Foss witness in half a day. The demand of the Environmental Intervenors for a full day means that the parties and their counsel must not only spend an extra half day in deposition in the short period now available before the hearing, but also that Foss's counsel must spend the better part of a day preparing a witness for the level of questions that a full day indicates. This is unfair, unduly burdensome, and inappropriate. Foss requests that the Hearing Examiner order that the City and the Environmental Intervenors may not extend the deposition past a half day (3.5 hours), assuming any deposition actually will take place. Lastly, Foss requests an order clarifying that the Environmental Intervenors are bound by the scope of the notices to which the City has agreed (in other words, an order that the Environmental Intervenors may not expand the topics of the deposition).

IV. CONCLUSION

Foss requests that the Hearing Examiner quash the deposition as described above. If the deposition is to proceed at this very late date, then it should be limited as described above.

DATED this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that on August 3, 2015, I caused to be served the foregoing document, FOSS MARITIME'S MOTION TO QUASH AND/OR FOR PROTECTIVE ORDER, on the person(s) identified below in the manner shown:

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Dated at Seattle, Washington, this 3rd day of August, 2015.

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