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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File:  
) **S-15-001 and S-15-002**  
)  
**FOSS MARITIME COMPANY** ) DEPARTEMENT OF PLANNING AND  
) DEVELOPMENT'S OPPOSITION TO  
) MOTION TO QUASH AND OR FOR  
from an interpretation by the Director, ) PROTECTIVE ORDER  
Department of Planning and Development. )  
\_\_\_\_\_ )

DPD seeks to take a Rule 30(b)(6) deposition of a Foss representative(s) on the subject of the activities that Foss, Shell or Shell contractors have conducted or will conduct at Terminal 5 in connection with the proposed oil rig moorage, including a description of the vessels that have or will use Terminal 5. Baxendale Declaration ¶ 2. Before Foss filed its motion, counsel for DPD and Foss had generally agreed on the scope of topics, and the remaining issue is timing. West Declaration ¶ 11; Baxendale Declaration ¶ 2.

DPD flatly rejects Foss's surprising and unfounded argument that DPD's motive for this deposition is unrelated to DPD's interests in this matter. Such argument is surprising because 3 hours before filing this motion counsel for Foss and DPD reviewed the scope of the topics, and Foss's counsel stated he did not think DPD was "playing games" with this request. Foss's

1 argument is unfounded because DPD has early and consistently demonstrated its interest in this  
2 topic.

3 DPD identified this topic as necessary to resolve this appeal back in June 15 in its Motion  
4 to Dismiss,<sup>1</sup> and Foss was specifically aware of this topic from DPD's July 9 written discovery  
5 requests, as Foss's motion acknowledges (p. 4, lines 8-9).

6 Foss seeks a motion to quash or a protective order because Foss is concerned that this  
7 will impact Foss's hearing preparation. Foss's hearing preparation should be including  
8 preparation on this topic, and indeed Foss's Witness and Exhibit List includes witnesses from  
9 Foss and generalized exhibits on this topic:

10 1. Paul Gallagher, Foss. May testify regarding (i) Foss's actual  
11 and intended activities at Terminal 5 and other facilities in the City  
12 of Seattle and Puget Sound; (ii) the operations of drilling rigs at  
13 Terminal 5 and at sea and the loading and unloading of goods  
14 and/or cargo therefrom; and (iii) other issues relevant to the  
15 appellant's case.

16 2. Paul Stevens, Foss. May testify regarding (i) Foss's  
17 negotiations of its lease of Terminal 5 with the Port of Seattle; (ii)  
18 Foss's communications with the Port of Seattle and the City of  
19 Seattle regarding intended operations at Terminal 5; (iii) Foss's  
20 actual and intended activities at Terminal 5 and at other facilities in  
21 the City of Seattle and Puget Sound; and (iv) other issues relevant  
22 to appellant's case.

23 3. Michael Wardwell, Foss. May testify regarding (i) the  
operations of drilling rigs at Terminal 5 and at sea and the loading  
and unloading of goods and/or cargo therefrom, and (ii) other  
issues relevant to appellant's case.

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21 21. Records of the activities performed at Terminal 5, including  
22 logs and manifests; work logs; delivery slips; stow plans for  
vessels; summaries of loading, unloading, and storage activities;  
and employee shift records.

<sup>1</sup> Motion, page 3 lines 10 -15, describing the issues in the appeal; *see* item 2: "what activities are being carried out on/by the oil rig and accompanying vessels at the cargo terminal."

1  
2 29. Photographs and/or graphics relating to cargo loading  
3 operations, goods loaded onto the Polar Pioneer and/or supporting  
4 vessels at Terminal 5, drilling rigs in Puget Sound, the Polar  
5 Pioneer, Noble Discoverer, and associated vessels.

6 Foss describes the onerous nature of preparing for a 30(b)(6) deposition, Motion, p. 2, line  
7 25, to p. 3, line 11. But in choosing which witnesses to put on the Witness List, Foss presumably  
8 chose knowledgeable representatives from the company and will make sure they are fully prepared  
9 and have reviewed the company's knowledge on these topics before they testify to the Hearing  
10 Examiner, just as they would for a 30(b)(6) deposition. One would not expect that Foss's  
11 preparation for the hearing will be less rigorous. So deposition preparation is not unduly  
12 burdensome.

13 Foss expresses concern about its ability to prepare, and DPD would concur that Foss is  
14 behind in providing the detail customary in an exhibit list. Foss's claim that its discovery plan has  
15 promoted timeliness in the discovery process has not borne fruit in its hearing preparation. Foss  
16 failed to timely review DPD's privilege document log, served 15 days before the McKim  
17 deposition, and so failed to ask DPD to reconsider items on that log prior to the deposition.<sup>2</sup> Foss  
18 has yet to produce the specific documents described in the general categories of its exhibits above.  
19 Foss's reason for not producing them, or any specific exhibits, is that Foss has had to sort through  
20 voluminous documents produced by various City departments in response to Foss's Public Records  
21 Act requests. But the information in the exhibit categories listed above is not from the City's public  
22 records documents – they are in Foss's control. Foss's extensive PRA requests, which are not  
23 subject to hearing and discovery deadlines, have created a document identification delay for Foss  
that affects all parties' preparation. Foss also asserts that its attention has been divided because of

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<sup>2</sup> Baxendale Declaration ¶ 4.

1 another appeal in King County Superior Court – but that date was set much earlier, and Foss could  
2 have taken that hearing into account when Foss requested an August 13 hearing date, and resisted a  
3 later date that might have lessened this problem.

4         DPD’s written discovery was initiated later than Foss’s due to DPD’s need to file a motion  
5 to dismiss claims, and DPD’s discovery was served 3 days after the Hearing Examiner’s July 6  
6 Order on DPD’s Motion to Dismiss, which narrowed the issues on appeal requiring discovery  
7 considerably. While the responses to that discovery will not produce documents that DPD can list  
8 in its exhibits, that is not the sole purpose for discovery – DPD will obtain information to use in the  
9 hearing examination and to understand the facts supporting Appellants’ legal theories, which will  
10 promote a more focused hearing. The same is true for this deposition.

11         DPD has not set a date for the deposition or sent out a subpoena because DPD expected to  
12 coordinate that with Foss’s counsel. Providing the list of topics was the first step, and that matter  
13 was resolved in a few phone calls within 3 business days. DPD did not provide the list of topics  
14 sooner due to other litigation deadlines, including drafting DPD’s written discovery requests that  
15 have a 30 day response time, preparing for depositions, reviewing both Foss’s and the Port’s witness  
16 and exhibit lists, and meeting immediately after the depositions to try to resolve issues over those  
17 lists. It was at that meeting where the parties again discussed DPD’s 30(b)(6) deposition and when  
18 DPD’s counsel proposed to write up the specific topics by Friday (the next day) or Monday. Earth  
19 Justice counsel offered to draft the scope. Counsel for DPD was not able to review and revise that  
20 draft until the following Wednesday because DPD’s own witness list and exhibit list was due  
21 Tuesday. The hearing schedule is very tight, creating many demands.

22         Because the relevant information is in Foss’s control and because DPD believes that Foss’s  
23 deposition preparation time is consistent with hearing preparation of Foss’s proposed witnesses and

1 exhibits, DPD believes taking this deposition will not be burdensome. It should facilitate the  
2 hearing by allowing examination and testimony to be more focused and informed. The time spent  
3 on filing and responding to this motion could have been spent on preparing for this deposition.

4 DPD respectfully requests the Examiner deny Foss's motion to quash. DPD also objects to  
5 the proposed protective order restricting DPD's time to examine to less than the one half day DPD  
6 requested.

7 DATED this 5<sup>th</sup> day of August, 2015.

8 PETER S. HOLMES  
9 Seattle City Attorney

10 By: s/Eleanore S. Baxendale, WSBA #20452  
11 Assistant City Attorney  
12 [elianore.baxendale@seattle.gov](mailto:elianore.baxendale@seattle.gov)  
13 Seattle City Attorney's Office  
14 701 Fifth Ave., Suite 2050  
15 Seattle, WA 98104-7097  
16 Ph: (206) 684-8232  
17 Fax: (206) 684-8284  
18 *Attorneys for Respondent*  
19 *Department of Planning and Development*  
20  
21  
22  
23

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **Department of Planning**  
3 **and Development's Opposition to Motion to Quash and or for Protective Order and**  
4 **Declaration of Eleanore S. Baxendale on DPD Opposition to Foss Motion to Quash** with the  
5 Seattle Hearing Examiner using its e-filing system.

6 I also certify that on this date, a copy of the same document was sent to the following  
7 parties listed below in the manner indicated:

8 John C. McCullough (X) email: [jack@mhseattle.com](mailto:jack@mhseattle.com)  
9 McCullough Hill Leary P.S.  
701 Fifth Avenue, Suite 6600  
Seattle, WA 98104-7006  
10 *Attorneys for Appellant*  
*Foss Maritime Co.*

11 David R. West (X) email: [drwest@gsblaw.com](mailto:drwest@gsblaw.com)  
12 Donald B. Scaramastra (X) email: [dscaramastra@gsblaw.com](mailto:dscaramastra@gsblaw.com)  
Daniel J. Vecchino (X) email: [dvecchio@gsblaw.com](mailto:dvecchio@gsblaw.com)  
13 Garvey Schuber Barer  
1191 - 2<sup>nd</sup> Avenue, 18<sup>th</sup> Floor  
Seattle, WA 98101-2939  
14 *Attorneys for Appellant*  
*Foss Maritime Co.*

15 Traci Goodwin (X) email: [goodwin.t@portseattle.org](mailto:goodwin.t@portseattle.org)  
16 Senior Port Counsel  
Port of Seattle  
17 P. O. Box 1209  
Seattle, WA 98111-1209  
18 *Attorneys for Appellant*  
*Port of Seattle*

19 Patrick J. Schneider (X) email: [schnp@foster.com](mailto:schnp@foster.com)  
20 Foster Pepper PLLC  
1111 Third Ave., Suite 3400  
Seattle, WA 98101-3299  
21 *Attorneys for Appellant*  
*Port of Seattle*

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23

Patti A. Goldman  
Matthew R. Baca  
Earthjustice  
705 Second Ave., Suite 203  
Seattle, WA 98104-1711  
*Attorneys for Intervenors  
Puget Soundkeeper Alliance, Seattle  
Audubon Society, Sierra Club, and  
Washington Environmental Council*  
Joshua C. Allen Brower  
Molly K.D. Barker  
Veris Law Group PLLC  
1809 Seventh Avenue, Suite 1400  
Seattle, WA 98101-1394  
*Attorneys for T-5 Intervenors*

(X) email: [pgoldman@earthjustice.org](mailto:pgoldman@earthjustice.org)  
(X) email: [mbaca@earthjustice.org](mailto:mbaca@earthjustice.org)

(X) email: [josh@verislawgroup.com](mailto:josh@verislawgroup.com)  
(X) email: [molly@verislawgroup.com](mailto:molly@verislawgroup.com)

the foregoing being the last known address of the above-named parties.

Dated this 5<sup>th</sup> day of August, 2015, at Seattle, Washington.

  
ROSIE LEE HAILEY