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 MOTION TO CONTINUE PREHEARING ORDER DATES UNTIL DISCOVERY IS COMPLETE

The Ballard Coalition (the "Coalition") respectfully moves for a continuance of dates in the Hearing Examiner's July 7, 2017 Prehearing Order.[1] The public debate over the Missing Link is no trivial matter. Building a bicycle and pedestrian track through a heavily industrialized area requires care, consideration, and evaluation of many concerns, including pedestrian and cyclist collisions with large commercial trucks, both of which regularly result in serious injury and fatalities. The Coalition contends that the evidence will show that the Seattle Department of Transportation ("SDOT") pre-selected the outcome of its alternatives analysis and arbitrarily rejected or failed to consider other or less hazardous alternatives, which, among other factors, is the purpose of an environmental review required by the State Environmental Policy Act

[1] The Coalition is filing this Motion pursuant to CR 7 and is respectfully requesting it be briefed and decided on a 6-day calender due to the time constraints at issue.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

("SEPA"). SDOT's choices will affect the safety of thousands of cyclists, children, and other users of the trail, in addition to disrupting the viability of Ballard's working class economy – the maritime and industrial businesses that are at the heart of the Ballard community. The Coalition, and the general public, deserves the right to know what their public officials are doing, and whether their analysis and choices comply with SEPA. SDOT has a duty in this litigation to timely provide complete/compliant responses to discovery in order for the Coalition to explore these issues to allow for the reasonable deposition of witnesses under the applicable rules of discovery to properly prepare for hearing. Despite the seriousness of this project, SDOT brushes off its duties as if it cannot be bothered.

Discovery in this matter has been hampered by SDOT's repeated improper productions and obstructionist discovery tactics. Despite the Coalition's discovery requests, which were timely served on SDOT in June, SDOT continues to produce documents with only 14 working days before final witness and exhibit lists are due, and only 20 working days before this hearing is set to begin—some as recently as September 12, 2017. Declaration of Leah B. Silverthorn ("Silverthorn Decl.") at ¶ 6. Likewise, SDOT estimates that it will produce documents responsive to the Coalition's pending public records requests (which were submitted in April) in the first few weeks of October—mere days before hearing. *Id.* at ¶¶ 16-17. SDOT has not given any indication that these October productions will capture the rest of its responsive records, and as a result, it is plausible, if not likely, that SDOT will continue its rolling production of responsive records during or well after the current hearing dates. *Id*.

Making matters worse, SDOT has batch-dumped its responses. SDOT's production of documents responsive to the Coalition's discovery requests were produced without any reference to any category of requests, without any organization, and, as of its September 12, 2017

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

production, total number 21,967 documents.[2] *Id.* at ¶¶ 6 & 11. The Coalition has been diligently reviewing these documents. However, at the current rate of approximately fifteen hours for every thousand documents, it will take the Coalition another 315 hours—40 days of staff and attorneys working full time—to cull through and evaluate all of the documents produced by SDOT. *Id.* at ¶ 13. This number is in addition to the thousands of documents produced pursuant to the Coalition's public records requests, which, at this same review rate, will take another 100 hours—or 7 days—to review. *Id.* at ¶ 16. SDOT has also refused to voluntarily produce witnesses for depositions, forcing the Coalition to subpoena agency employees to compel the depositions. *Id.* at ¶ 10 & Ex. E. The depositions currently planned by both SDOT and the Coalition now exceed 48 hours, and SDOT indicates it plans to depose additional witnesses. *Id.*

As a result of SDOT's production deficiencies, a deadline of October 6, 2017 to file and serve the final witness and exhibit list and an October 16, 2017 hearing date is no longer feasible. Failing to reschedule the hearing to allow for completion of discovery deprives the Coalition an adequate time to prepare for depositions. *Id.* at ¶ 18. It also leaves the Coalition severely prejudiced in its choice of exhibits or witnesses and deprives the Coalition of a reasonable opportunity to discover and present evidence to this Hearing Examiner on SDOT's failure to comply with SEPA. *Id.* There is no prejudice to SDOT to move the hearing dates, as SDOT has already moved forward with design and planning meetings for the Missing Link project in spite of this lawsuit.

A continuance of dates set in the Prehearing Order is the only way to ensure that due process is achieved. Contrary to SDOT's statements, this tribunal is not less important than any

[2] SDOT also failed to bates stamp any pages of the document production, so the Coalition cannot estimate how many total pages are included in the almost 22,000 documents produced to date. This total does not include the number of documents that SDOT has produced, on a rolling basis, pursuant to the Coalition's public records requests. To date, the Coalition has received approximately 6,900 documents pursuant to its public records requests, and SDOT's production continues.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

other fact finding body and, despite SDOT's attempts, it should not be able to pick and choose the discovery to which it thinks the Coalition is entitled. SDOT's attempts to thwart the Civil, Superior Court, and Hearing Examiner rules and diminish the importance of this fact-finding adjudicatory body must be rejected, and the parties should have the chance to review and evaluate the tens of thousands of pages, and depose the authors of the Environmental Impact Statement ("EIS") that is the subject of this proceeding in order to adequately prepare for hearing. Failure to do so renders appeal inevitable and fails to comport with due process.

I. Relief Requested

The Coalition respectfully requests a minimum of a six-week continuance—or until discovery is complete--of the following dates set forth in the Prehearing Order: October 6, 2017, which is the current date for disclosure of final witness lists and exhibit lists, and the hearing in this matter, which is set to begin on October 16, 2017.[3]

II. Status of Discovery and Document Productions

Soon after this Examiner's pre-hearing conference in which the parties agreed to hearing dates, the Coalition crafted targeted discovery requests to SDOT. SDOT now describes them as "extensive." However, when read closely, the Coalition made every attempt to limit the discovery topics to those directly relevant to its issues to be determined at hearing. The Coalition served its First Set of Interrogatories and Requests for Production on SDOT on June 30, 2017 ("Coalition's Discovery Requests"). Silverthorn Decl. at ¶ 4. Pursuant to HER 3.11, CR and KCLR 26 and 33, and CR 34, SDOT's responses were due on or before July 30, 2017. *Id.* at ¶ 4. On July 25, 2017, counsel for SDOT sent an email to coordinate on the format of production, which led the Coalition to believe that documents would be produced on time and in

[3] Pursuant to CR 26(f) (meet and confer), the Coalition conferred with SDOT and the Cascade Bicycle Club on its motion to extend hearing dates on September 14, 2017. SDOT and the Cascade Bicycle Club objected to any continuance of the pre-hearing dates. Silverthorn Decl. at ¶ 19.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

an organized manner. Silverthorn Decl. at ¶ 7 & Ex. B. SDOT did not produce any documents on July 30. *Id.* at ¶ 5. On July 31, 2017, counsel for SDOT sent an email, indicating that it was still working on discovery responses. *Id.* at ¶ 8 & Ex. C. SDOT still had not served objections or responses to Coalition's Discovery Requests.[4] *Id.*

The Coalition received SDOT's first set of responsive documents on July 31, 2017, which consisted of 290[5] unorganized, uncategorized, and un-bates-stamped documents. *Id.* at ¶¶ 6 & 11. On August 4, SDOT delivered a second installment, consisting of 2,318 documents in the same unorganized and unlabeled format. *Id.* at ¶¶ 6, 11 & Ex. 9. Additional installments continued on the following dates:

- August 10 (608 documents, and an additional 493 GB of video data);
- August 11 (699 documents);
- August 16 (189 documents);
- August 17 (9,919 documents);
- August 23 (6,705 documents);
- August 31 (1,168 documents); and
- September 12 (71 documents).

Id. at ¶¶ 6 & 11. SDOT did not produce its written responses to interrogatories until August 10, 2017. *Id.* at ¶ 14. SDOT never asked for additional time, or indicated to the Coalition when its production would be complete. Instead, SDOT seems to argue that the rules of discovery and the HER do not apply to it. For instance, counsel for SDOT indicated in its August 9, 2017 email:

> I think it is important to note that this is a proceeding before the Hearing Examiner, with a truncated schedule and typically more limited discovery. . . .

[4] SDOT waived its objections to the Coalition's Discovery Requests by failing to state with particularity its objections to relevant requests within the time set for responses to discovery. SDOT did not request additional time to produce responses, and thus waives all objections.

[5] Because SDOT did not bates stamp the pages of its production, or produce them in the promised format (a Concordance load file), it remains to be seen how many actual pages its total production count amounts to.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

> While the information the City provides may be relevant to your rebuttal, you should not need to wait for discovery responses to decide what evidence you will present to make an affirmative case on the issues you raise in your appeal.

Id. at ¶ 9 & Ex. D. Counsel for SDOT also indicated that "we expect to produce the remaining responsive documents by late this week or early next" (i.e., by mid-August). *Id*. As shown above, documents continue to roll in mere weeks before the hearing date, and after the Coalition's deadline to disclose preliminary witness and exhibit lists.

Depositions have also yet to occur and SDOT has taken the inexplicable position that the Coalition may not depose employees and contractors that were directly responsible for drafting and analysis of the EIS, or are listed in the EIS as responsible parties. *Id.* at ¶ 10 & Ex. E. SDOT does so without any basis, and with complete disregard for this tribunal and the rules of procedure. For example, SDOT indicated to the Coalition that it could not depose the three primary authors of the land use discipline report, and must choose one of the three. *Id.* SDOT also contends that the Coalition may not depose the person listed as the "responsible SEPA official" in the EIS. SDOT has no basis for this response. The Coalition seeks to depose these witnesses—each of whom have independent judgment, thoughts, and contributions to the analysis under SEPA, and the Coalition is entitled to discover that information.[6]

The Coalition tried to obtain information relavant to this matter sooner, through public records requests that were submitted as early as March 10, 2017, in order to avoid a discovery fight with SDOT on the eve of hearing. Despite the Coalition's best efforts, SDOT continues to produce documents responsive to those requests in a similarly unorganized manner, and in almost every instance, produces batches of unorganized records many weeks after its own stated deadline. SDOT has indicated to our office that we should expect additional disclosures of an unknown number public records related to the Coalition's issues for hearing on September 18,

[6] The Coalition requested that SDOT inform the Coalition by close of business on September 15, 2017, whether it would voluntarily produce the witnesses or whether it would force the Coalition to subpoena these witnesses. At the time of filing, SDOT had not provided its response.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

22, 25, 27, 29, October 2, 13, 2017—merely three days before the hearing—and October 17—during hearing.

Based on the amount of documents disclosed by SDOT at late dates, it will take the Coalition approximately 315 hours to complete its review of responsive documents, in addition to the at almost 50 hours of in-person depositions scheduled to take place in this matter, all of which require review and evaluation of the disclosed records. Silverthorn Decl. at ¶¶ 12, 13 & 15. SDOT regularly responds that it thinks there is no need to comply with discovery, because SDOT believes that a hearing before this Hearing Examiner is less important than one before the Superior Court. To the contrary, this Hearing Examiner is the sole finder of fact in hearings that are appealed with a closed record *to* the Superior Court, which sits in its appellate capacity. The Coalition will not get a second bite at the apple in Superior Court to request discovery, and is entitled to properly evaluate the facts and evidence to present to this Examiner at hearing.

III. The Coalition is Entitled to Complete Discovery and Develop Evidence Prior to Hearing

SDOT seems to believe that the Office of the Hearing Examiner is not a true adjudicatory body and that it need not follow the rules of procedure and discovery when before it. SDOT makes up discovery rules and standards as it goes, and cites to no authority limiting discovery in the manner it seeks. SDOT did not request at the pre-hearing conference that discovery be limited, nor did it properly object to the Coalition's Discovery Requests. While the HER contains certain rules that broaden the Civil Rules (for example, hearsay is admissible under HER 2.17 so long as it is reliable and has probative value.), "discovery, including written interrogatories, and deposition upon written and oral examination, is permitted." HER 3.11. Contrary to SDOT's statements, partial compliance with the rules of discovery is not compliance. If anything, the HER broaden the scope of admissible evidence—they do not restrict discovery.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

Discovery is only limited by the applicable KCLR or HER rules, unless the parties or the Examiner agree to limit discovery. "The scope of discovery is very broad" and "an integral part of the right to access the courts." *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695, 295 P.3d 239, 244 (2013). As the Washington Supreme Court has stated on many occasions:

> there are practical reasons for discovery. Earlier experiences with a "blindman's bluff" approach to litigation, where each side was required "literally to guess at what their opponent would offer as evidence," were unsatisfactory. Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 Clev. St. L.Rev. 17, 22 (1988). As modern day pretrial discovery has evolved, it has contributed enormously to "a more fair, just, and efficient process." Id. at 20. Effective pretrial disclosure, so that each side knows what the other side knows, has narrowed and clarified the disputed issues and made early resolution possible. As importantly, early open discovery exposed meritless and unsupported claims so they could be dismissed. It is uncontroverted that early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims.

Id. An adjudicatory proceeding before this Hearing Examiner does not change that dynamic. *See, e.g. In re Queen Anne Community Council*, Seattle Hearing Examiner File No. W-16-004 (Oral Ruling of Oct. 4, 2017 & Findings and Decision, dated Dec. 13, 2016) (continuing matter mid-trial to allow for disclosure of the complete record of the agency and suggesting entire hearing should have been continued before it began); *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 275, 552 P.2d 674, 679 (1976) (holding that "[t]he SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of no environmental significance can be made. As a result, a reviewing court will always have a ***complete record*** upon which to review [SEPA compliance]."). Continuance of the final witness and exhibit lists and hearing dates is the only way to ensure due process and a fair hearing in this matter.

This adjudicatory body deserves as much respect as does the Superior Court, especially where the Hearing Examiner sits as the finder of fact. The Hearing Examiner sits as the first line

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

of defense against violations of SEPA, and there is nothing in the HER that allows SDOT to pick and choose the documents or witnesses it will disclose or to bacth-dump thousands of documents in a completely unorganized manner. An evaluation of SEPA requires discussion and review of a "complete record." Without completion of discovery, the record is, by default, incomplete. Because of the significant prejudice against the Coalition occasioned by SDOT's deficient document productions, the trial dates originally set in this matter are no longer viable. The Coalition respectfully requests a second pre-hearing conference to establish a new deadline for final witness and exhibit lists, and set a new hearing.

DATED this 18th day of September, 2017.

VERIS LAW GROUP PLLC

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

FOSTER PEPPER PLLC

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

Attorneys for Appellant the Ballard Coalition

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

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:

Peter S. Holmes
Erin Ferguson
Seattle City Attorneys
701 5th Avenue, Suite 2050
Seattle, WA 98104
Tel: (206) 684-8615
erin.ferguson@seattle.gov
alicia.reise@seattle.gov
Attorney for Respondent Seattle Department of Transportation

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

Matthew Cohen
Rachel H. Cox
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
Tel: (206) 386-7569
Fax: (206) 386-7500
matthew.cohen@stoel.com
rachel.cox@stoel.com
Attorney for Intervenor Cascade Bicycle Club

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

Tadas A. Kisielius
Dale Johnson
Clara Park
Van Ness Feldman
719 2nd Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
tak@vnf.com
dnj@vnf.com
cpark@vnf.com
map@vnf.com
Attorney for Respondent Seattle Department of Transportation

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

Dated at Seattle, Washington, this 18th day of September, 2017.

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

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245