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 IN OPPOSITION TO SDOT'S MOTION *IN LIMINE* and TO QUASH SUBPOENAS

The Seattle Department of Transportation ("SDOT")'s motion to limit the discovery and presentation of evidence by the Ballard Coalition (the "Coalition") (the "SDOT Motion") is without a basis in law or in fact. SDOT yet again demonstrates its subtle but oft repeated refrain: it does not take proceedings before this Hearing Examiner seriously. "Although generally informal in nature, appeal hearings have a structured format to elicit relevant evidence efficiently while *providing the parties a fair opportunity for hearing.*" HER 3.14(a) (emphasis added). Despite this clear structure, SDOT believes it can dictate the terms of discovery, and that an environmental impact statement ("EIS") is a trivial matter that can be disposed of at its whim. The complexity of environmental review is demonstrated by the fact that SDOT took five years and an army of twenty-seven consultants and SDOT staff to issue the final EIS.

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The Hearing Examiner's Rules are clear: "Each party in an appeal proceeding has the right to notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the *full disclosure of facts and a fair hearing.*" HER 3.13 (emphasis added). The five-year development of a fourteen chapter, three hundred page environmental document with technical appendices at a taxpayer cost of $2.5 Million is worthy of full disclosure in discovery and a fair hearing. The Coalition has limited the number of deponents to the most crucial ones, and has attempted on many occasions—with no cooperation from SDOT or the Cascade Bicycle Club—to coordinate discovery and litigate this case in an efficient matter. As set forth below, not only is SDOT's Motion without a basis in law or fact, due process also dictates that SDOT should not be able to limit discovery and hearing in the manner sought by its Motion.

SDOT agreed to pre-hearing discovery, and agreed to a five-day hearing. *Pre-Hearing Order*, W-17-004 (July 7, 2017). Now, on the eve of hearing, and immediately after the Coalition filed its Motion to Continue to request additional time to complete its discovery, SDOT seeks to avoid disclosure of key witnesses' information, substantially limit the Coalition's right to discovery, and limit the Coalition's presentation of evidence to two of the five reserved hearing dates. In support of its Motion, SDOT does nothing more than make bald assertions of the burden and duplicity of producing witnesses for depositions, participating in hearing, and does not cite to any testimony, declarations, or admissible evidence to support these assertions. Because SDOT's Motion does not meet the standard for a motion in limine or motion to quash, and the Coalition is entitled to adequate discovery and presentation of evidence, SDOT's Motion should be denied.

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I. ARGUMENT

A. SDOT's Motion Does Not Meet the Standard to Limit or Exclude Testimony

Three of SDOT's five requests for relief involve limiting the testimony and witnesses at hearing. SDOT requests that the Examiner "[l]imit the testimony of fact witnesses to non-expert testimony," "[l]imit the Ballard Coalition's presentation of witnesses, including rebuttal, to two days of hearing," "[p]reclude the Coalition from presenting testimony and documentary evidence on the advances in project design since the publication of the EIS," and "[p]reclude [the] Ballard Coalition from calling City witnesses on direct examination." SDOT Motion at p. 2. The last of these can be dispensed of summarily. There is absolutely no legal basis for a respondent in a SEPA appeal to dictate which witnesses the Coalition may use to build its case in chief. This is especially so when SEPA compliance is determined by whether or not SDOT adequately evaluated environmental impacts. SDOT only acts through its employees and consultants, and only these employees or consultants can testify to the issues they considered and the decisions they made. Each of the witnesses named by the Coalition is specifically listed as EIS preparers. Declaration of Joshua C. Allen Brower ("Brower Decl.") at ¶ 3 & Ex. A. SDOT argues that some of the proposed witnesses authored the same section or worked in the same division. But SDOT cites to no evidence and makes no offer of proof. The Hearing Examiner should not allow SDOT to hide its evaluation from the public by strategically listing only certain witnesses on its witness list and then preventing the Coalition from calling City employees or consultants. There is simply no basis for this exclusion.

With respect to the argument regarding expert testimony, the parties have already agreed to designate which witnesses will be providing expert testimony, and which witnesses will provide factual or lay opinion testimony. Each of the non-expert witnesses proposed by the Coalition will offer testimony based on their personal knowledge and experience in their own neighborhoods, businesses, and use of the area covered by the Missing Link, and SDOT has set

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forth no evidence to the contrary. To the extent that SDOT wishes to object to the presentation of certain facts, such objections can only be made at the time the witness testifies. Alternatively, SDOT may depose the Coalition's witnesses prior to Hearing, and move to exclude actual testimony if such testimony violates HER 3.11. To date, SDOT has not deposed or obtained any testimony from these witnesses that would support a motion in limine to prevent the Coalition from offering this evidence.

The remainder of the issues raised by SDOT are governed under HER 3.11, and SDOT has provided no evidence in support of its argument of burden or duplicity. Because SDOT cannot meet the standard for exclusion or limiting of evidence under HER 3.11, there is no basis for its Motion.

1. Legal Standard for Limiting or Excluding Evidence

HER 2.17 governs the admissibility of evidence before the Hearing Examiner. Evidence is generally admissible if it is relevant. *Id.* Relevance is defined as "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. HER 2.17 *broadens*, not narrows, the scope of admissible evidence in this Hearing, admitting any evidence so long as it is "relevant to the issue on appeal, comes from a reliable source, and has probative (proving) value." HER 2.17(a). For example, HER 2.17(a) allows for admissibility of hearsay, HER 2.17(d) allows for "opinion evidence from non-experts," and HER 2.18(a) allows the Hearing Examiner to take notice of "general, technical, or scientific facts within his or her specialized knowledge." Evidence is excludable before the Hearing Examiner only if "irrelevant, unreliable, immaterial, unduly repetitive, or privileged" or if the "Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal." HER 2.17(b) & 3.11.

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2. SDOT Offers Zero Evidence to Support Exclusion of Witness Testimony

SDOT makes unsupported arguments that the Coalition's witnesses are duplicative, apparently simply because of the number and topics set forth in the Coalition's preliminary witness and exhibit list (the "Coalition's Preliminary List"). The only argument SDOT makes with respect to these witnesses is that the testimony might be "identical" and "duplicative." SDOT Motion at p. 4.[1] Although the Hearing Examiner may exclude evidence if it finds that it is "unduly repetitive," SDOT makes no offer of proof, nor cites to any evidence in support of its argument. In fact, had SDOT sought to take the depositions of these witnesses, it would find that each witness is uniquely situated within the several miles of "Study Area" comprising the Missing Link. The Coalition therefore agrees that it does not intend to present two witnesses with identical testimony. Instead, each witness will present testimony that is unique to their experiences, location, and workplace. Brower Decl. at ¶ 4 & Ex. B. SDOT is certainly entitled to renew its objection should it believe the witnesses present actual testimony at hearing in violation of HER 3.11.

3. The Hearing Examiner Rules Specifically Allow Opinion Testimony from Lay Witnesses

SDOT's argument at p. 4-5 of its Motion is simply wrong. SDOT argues that lay witnesses cannot present opinion testimony, citing ER 702. First, SDOT has presented no evidence that the testimony to be submitted by the Coalition would not meet the standards under ER 702. For instance, SDOT suggests that Mara Garrity may not testify regarding "impacts to individuals who live aboard boats and vessels at those marinas, as well as impacts to the local live-aboard community" on the basis that such knowledge exceeds her first-hand experiences.

[1] As its basis for its Motion in Limine, SDOT cites as its only basis for exclusion "Hearing Examiner 2.14(e) and "Hearing Examiner Rule 12(b)." HER 2.12(b) relates to the disqualification of an Examiner and is not applicable here. HER 2.14(e) allows the Hearing Examiner to limit testimony, but only with "the maximum practicable advance notice of such time limitations."

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SDOT Motion at p. 6. Had SDOT sought discovery, or deposed Ms. Garrity, they would discover that Ms. Garrity has actually live in a live-aboard community for nearly 20 years and does have direct experiences relevant to the issues raised in this lawsuit. Moreover, Rule 702 allows opinion testimony based upon experience alone. *See, e.g. Katare v. Katare*, 175 Wn. 2d 23, 38, 283 P.3d 546, 553 (2012).

What SDOT's Motion fails to disclose is that the Hearing Examiner's Rules already contemplate this situation, dictating that "opinion evidence from non-experts is discouraged but may be admitted and given appropriate weight by the Examiner." HER 2.17(d). As indicated above, each witness called by the Coalition will present testimony that is unique to their experiences, location, and workplace, and SDOT has set forth no basis for exclusion under HER 3.11. Although the Coalition does not intend to designate these witnesses as "experts," to the extent that they have opinion testimony based on personal experiences, such testimony is admissible under HER 2.17 and the Examiner will give it appropriate weight. SDOT's Motion on this issue is without a basis, and should be denied.

4. SDOT Offers Zero Evidence to Support its Request to Reduce the Coalition's Presentation of its Case In Chief and Rebuttal to Two of the Five Hearing Days

At this Hearing Examiner's July 6, 2017 pre-hearing conference, the parties agreed to pre-hearing discovery and five dates for hearing. *Pre-Hearing Order*, W-17-004 (July 7, 2017). Now, on the eve of hearing and only after the Coalition filed its Motion to Continue to allow for completion of discovery, does SDOT seek, without any reason, to limit the Coalition's presentation of its case in chief and rebuttal to two of the five hearing dates. SDOT's only argument is that "[t]he Coalition's challenge to the adequacy of the Project's EIS on specified grounds is technical and involves evaluation of expert analysis." SDOT Motion at p. 3. The Coalition is aware of no law that would support the notion that the only basis for challenging SEPA compliance is through the presentation of expert and technical testimony.

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The definition of environmental impacts under SEPA is much broader, and encompasses a number of factual and technical issues, all of which are set forth in the Coalition's Notice of Appeal. For example, lay witnesses can provide relevant and probative testimony regarding land uses in the Study Area, which is one of the issues on appeal. Further, the parties already agreed to dispense with closing statements. Finally, the previous hearings before the Hearing Examiner on the Missing Link involved review of a one-page determination of non-significance based on a 20+ page SEPA Checklist, not a multi-hundred, multi-volume Draft and Final EIS. The Coalition's presentation in those more limited hearings took at least two hearing days. Brower Decl. at ¶ 5. It is unreasonable to limit the Coalition to merely two days of presentation of its case in chief on the EIS, which is a fourteen chapter, almost three-hundred-page document with computer-aided drafting files and which took twenty-seven preparers five years to complete. There is simply no basis for such a limit, and the parties should be given, at minimum, equal time for presentation of evidence.

B. SDOT's Motion Does Not Meet the Legal Standard to Quash a Subpoena

1. The Applicable Legal Standard

HER 3.11 allows the parties to engage in discovery, including depositions, which is defined as "documents and information that are relevant to the subject matter of an appeal, or are reasonably calculated to lead to documents and information that are relevant to the subject matter of the appeal." HER 2.02(l). CR 45 governs the issuance of subpoenas, and states as follows:

> Upon a timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:
> (i) fails to allow reasonable time for compliance;
> (ii) fails to comply with RCW 5.56.010 or subsection (e)(2) of this rule;
> (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
> (iv) subjects a person to undue burden, provided that the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

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CR 45(c)(3)(A). The Hearing Examiner also may limit discovery if it is "unduly burdensome, harassing, or unnecessary under the circumstances of the appeal." HER 3.11.

The burden of persuasion is upon the party seeking to avoid discovery. *See, e.g. Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 696, 295 P.3d 239, 244 (2013) (noting that "opponent of disclosure bore 'heavy burden of showing why discovery [should be] denied.'"); *Detention of Petersen v. State*, 145 Wn.2d 789, 801-802, 42 P.3d 952, 959 ("the party opposing discovery (here, the State) must show 'good cause' to prevent or limit discovery. Placing the duty to show good cause on [the discovery proponent] violated CR 26(c) and erroneously denied [the discovery proponent] the right to depose the State's expert.") "Undue burden," which is also used in the state and federal discovery rules under CR 26, has been described as "including one that outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 464 (N.D. Tex. 2015).

The Hearing Examiner is charged with "manag[ing] the discovery process in a fashion that will implement the goal of *full disclosure of relevant information* and at the same time afford the participants protection against harmful side effects." *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673, 677 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (citing 4 J. Moore, Federal Practice ¶ 26.67, at 26–487 (2d ed. 1982)). "The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process." *Id.* at 256.

2. SDOT Offers Zero Reason to Not Allow the Depositions of the Preparers of the EIS

SDOT's Motion asserts that the subpoenas issued to certain individuals, including, without limit, Scott Kubly, Ben Perkowski, Claire Hoffman, and Jennifer Hagenow, who all

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directly participated in the EIS preparation or provided review oversight or technical support, are unduly burdensome, harassing, and unnecessary. Again, SDOT offers no evidence in support of these bald assertions. Mr. Kubly is listed as the SEPA responsible official for the EIS. SDOT indicates that he "delegated a *majority* of that role." SDOT Motion at p. 8 (again not citing any declarations or information other than the bald assertion of SDOT's attorney). Mr. Kubly is listed as the designated official, and, if SDOT's statement is to be believed, he did not delegate all of his SEPA duties. Mr. Kubly's testimony is relevant to the City's *procedural compliance with* SEPA for the Missing Link, and SDOT has provided no evidence to the contrary. Mr. Perkowski likewise provided technical support regarding SDOT's SEPA compliance vis-à-vis the Shoreline Management Act and the City's Shoreline Master Program.

The remaining witnesses are listed on SDOT's "Preparer List," and offered their unique background, training, and perspective to analyzing environmental impacts in the EIS. Brower Decl. at ¶ 3 & Ex. A. As purported support for its Motion, SDOT states that Ms. Hoffman and Ms. Hagenaw's testimony will be duplicative of the testimony offered by SDOT. While SDOT is certainly entitled to present their own testimony, there is no basis for not allowing the Coalition to depose the authors who are specifically listed in the EIS and offer unique backgrounds and perspective. *Id.* SDOT is also simply wrong regarding certain of its own staff's participation in preparing the EIS. For example, SDOT claims Mr. Scharf "was not involved in performing any analysis or drafting" the Draft or Final EIS. Motion at p. 9, lines 2-5, To the contrary, SDOT produced numerous documents showing Mr. Scharf reviewed and commented on the Draft EIS and recommended changes that were incorporated into the Final EIS.

SDOT has absolutely no right to limit the Coalition's ability to obtain full disclosure required by the Hearing Examiner Rules, especially when it comes to the listed preparers' participation and contributions to the analysis in the EIS, nor choose for the Coalition its own

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witnesses. The Coalition only seeks to depose eight of the twenty-seven separate preparers listed by SDOT in the FEIS. SDOT has not shown any basis for quashing these four subpoenas, and is thus not entitled to relief under HER 3.11 or CR 45(c). The Coalition is entitled to the very limited discovery it seeks from these eight individuals so that it can obtain the full disclosure necessary for a fair hearing under the law.

C. The Coalition's Evidence Regarding the Project Design Will be Limited to Issues Surrounding the Design Level at the Time the EIS was Prepared

SDOT next argues that the Hearing Examiner should "preclude the Coalition from presenting testimony and documentary evidence on the advances in project design since the publication of the EIS. SDOT Motion at pp. 2, 6-7. SDOT bases this argument on the description of the proposed testimony of Roque DeHerra and Brian Surratt. *Id.* at p. 6 n.8. The Coalition agrees that the adequacy of SEPA review of a project is determined by the record at the time the EIS issues. Testimony regarding design work conducted since issuance of the EIS is relevant to the whether SDOT advanced the project to an appropriate level of design for purposes of environmental review, and the level of design that could have been advanced. Brower Decl. at ¶ 4 & Ex. B. The Coalition does not intend to present evidence regarding the Design Advisory Committee's compliance with SEPA. Accordingly, the Coalition's testimony will be limited to issues that are relevant to the adequacy of the EIS. SDOT's arguments on this issue are without any basis.

II. CONCLUSION

SDOT's Motion offers no more than speculation about burden, with absolutely no evidentiary support. As set forth above, the Coalition already reasonably limited the number of parties it plans to depose (8 of the 27 EIS preparers) and limited the number of businesses and affected parties it plans to depose and call at trial (only a handful of the hundreds of businesses affected by the Missing Link). The parties already agreed to a five day hearing schedule, and to

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dispense with closing statements. Deposing eight witnesses and presenting several days of testimony on a three hundred page document that took twenty-seven authors five years to prepare is very reasonable and focused. To limit the Coalition more that it has already limited itself would be to violate HER 3.14 (a)'s goal of "providing the parties a fair opportunity for hearing." Accordingly, SDOT's Motion should be denied.

DATED this 28th day of September, 2017.

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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:

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