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HEARING EXAMINER

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File No. S-15-001  
FOSS MARITIME COMPANY ) (DPD Project No. 3020324)  
from an Interpretation by the Director, Department )  
of Planning and Development. )  
\_\_\_\_\_)  
In the Matter of the Appeal of the: ) Hearing Examiner File No. S-15-002  
PORT OF SEATTLE, ) (DPD Project No. 3020324)  
from Interpretation No. 15-001 of the Director of ) MOTION TO INTERVENE  
the Department of Planning and Development. )  
\_\_\_\_\_)

INTRODUCTION

Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club, and Washington  
Environmental Council (collectively "Proposed Intervenors") seek to intervene in these  
consolidated cases pursuant to HER 3.09.<sup>1</sup> Proposed Intervenors have longstanding interests in

<sup>1</sup> Counsel for Proposed Intervenors contacted counsel for the City of Seattle and Appellants in  
these consolidated appeals. The City of Seattle has no objection to this motion. Counsel for the  
Port stated that they could not indicate their position before reviewing this motion, and counsel  
for Foss did not indicate the position Foss will take on this motion.

1 using, protecting, and restoring Puget Sound, the Duwamish River, and Elliott Bay, all of which  
2 are affected by the conversion of Terminal 5 into a homeport for Shell's Arctic drilling fleet.  
3 Proposed Intervenor also have an interest in ensuring that the Port seeks a shoreline permit  
4 when it changes the use of a container terminal to serve as a homeport, because they and the  
5 public can then participate in the permitting process and ensure that the environmental and  
6 navigational effects of the new use are fully considered and mitigated before the change of use  
7 occurs. The Seattle Department of Planning and Development's ("DPD") interpretation would,  
8 if upheld in this appeal, require the Port to obtain a shoreline permit, which would protect  
9 Proposed Intervenor's interests in preventing added pollution from Shell's homeport use,  
10 preserving navigation around Terminal 5, and having an opportunity to participate in the  
11 permitting process for a new use of Terminal 5.

12 Proposed Intervenor brought their own related lawsuit against the Port of Seattle for  
13 leasing Terminal 5 to Foss Maritime Company ("Foss") for a homeport for Shell's Arctic drilling  
14 fleet because the Port failed to conduct any environmental review under the State Environmental  
15 Protection Act ("SEPA"). Ex. 1 (*See Puget Soundkeeper Alliance v. Port of Seattle*, No.  
16 15-2-05143-1 SEA, Complaint (King County Superior Court, filed Mar. 2, 2015)). The Port has  
17 claimed that the lease is exempt from SEPA asserting that the use of Terminal 5 will remain  
18 essentially the same as the prior container terminal use. The DPD interpretation confirms that  
19 the lease changed the use of Terminal 5, thereby reinforcing Proposed Intervenor's legal claims.  
20 Moreover, the Port and the City would need to comply with SEPA in connection with seeking a  
21 permit for the homeport use of Terminal 5, which would provide Proposed Intervenor and the  
22 public a candid assessment of the homeport's environmental and community impacts, an  
23 opportunity to participate in that assessment, and a right to seek mitigation. In order to enable  
24

1 Soundkeeper to protect these interests, Proposed Intervenor ask the Hearing Examiner to grant  
2 this motion to intervene.

### 3 BACKGROUND

4 Terminal 5 is located on the West Waterway at the mouth of the Duwamish River,  
5 adjacent to state-owned aquatic lands reserved for public navigation and use. Terminal 5 has  
6 been designated as a premier marine container terminal for decades because of its ideal location  
7 through long-range public planning processes, comprehensive environmental reviews, and  
8 permitting. In the 1990s, the Port undertook a major expansion and redevelopment of Terminal  
9 5 to upgrade it to a state-of-the-art container terminal. As part of that process, the City of Seattle  
10 issued a shoreline permit that designates Terminal 5 as a “cargo terminal.” City of Seattle  
11 Department of Planning and Development, Permit for Shoreline Management Development  
12 No. 9404118 (Sept. 21, 1995). The Port has embarked on another modernization to enable  
13 Terminal 5 to handle even larger container ships, which led to the termination of the prior lease,  
14 and the search for an interim tenant.

15 After more than six months of closed-door negotiations, the Port revealed that it had been  
16 negotiating with Foss to lease Terminal 5 for a homeport for Shell’s Arctic drilling fleet. By the  
17 time the negotiations became public in January 2015, it was a done deal. On February 9, 2015,  
18 the Port and Foss signed the lease that formally consummated the agreement to make Terminal 5  
19 Shell’s homeport for the next 2-4 years. Rather than conduct an environmental review and open  
20 public process as required by SEPA and the Shoreline Management Act (“SMA”), the Port  
21 invoked a SEPA categorical exemption applicable to leases where the property use will remain  
22 “essentially the same.” Mem. from Paul Meyer, Seaport Environmental and Planning, to Port of  
23 Seattle Terminal 4 SEPA File, re SEPA Exemption for lease at Terminal 5, at 139-42 (Feb. 5,  
24 2015).

1 On March 2, 2015, Proposed Intervenor filed a Complaint for Writ of Review seeking  
2 vacatur of the lease because the Port had failed to conduct the required environmental analysis  
3 under SEPA. Proposed Intervenor also argued that the Port's shoreline permit for a cargo  
4 terminal would be inconsistent with Shell's homeport use. On March 20, 2015, the King County  
5 Superior Court granted Proposed Intervenor's Motion for Writ of Review as to SEPA, finding  
6 that the activities Foss and the Port proposed for Terminal 5 "appear to be qualitatively different  
7 than Eagle Marine Services' previous use of Terminal 5 as a marine container terminal." Ex. 2  
8 (*Puget Soundkeeper Alliance*, No. 15-2-05143-1 SEA, Order (King County Superior Court, filed  
9 Mar. 20, 2015)). The court did not grant the writ as to Proposed Intervenor's SMA claim, but by  
10 then, DPD had commenced an investigation into the Port's shoreline permit and use.

11 DPD's investigation resulted, on May 7, 2015, in issuance of an interpretation finding  
12 that "[a]n additional use permit is required for the proposed seasonal moorage at the Port of  
13 Seattle's Terminal 5 facility of a drilling rig and accompanying tugboats." City of Seattle  
14 Department of Planning and Development, Interpretation of the Director No. 15-001 (May 7,  
15 2015) (Ex. 1 to Port of Seattle's and Foss's Appeals). The Port of Seattle and Foss appealed that  
16 interpretation on May 15 and May 12, respectively, and the appeals in front of the Hearing  
17 Examiner have subsequently been consolidated. On May 18, 2015, DPD issued a Notice of  
18 Violation to the Port of Seattle and Foss, detailing violations of the existing shoreline permit.  
19 City of Seattle Department of Planning and Development, Shoreline Notice of Violation (Case  
20 No. 1034649 May 18, 2015), *available at* [https://www.scribd.com/embeds/265898312/](https://www.scribd.com/embeds/265898312/content?start_page=1&view_mode=scroll&show_recommendations=true)  
21 [content?start\\_page=1&view\\_mode=scroll&show\\_recommendations=true](https://www.scribd.com/embeds/265898312/content?start_page=1&view_mode=scroll&show_recommendations=true).

## 22 ARGUMENT

23 Because Proposed Intervenor's longstanding interests in preserving and protecting Puget  
24 Sound, Elliott Bay, and the Duwamish River will be affected by the outcome of this appeal, and

1 because the City cannot adequately represent Proposed Intervenor's interests, Proposed  
2 Intervenor's request to intervene under HER 3.09. In Washington, intervention requirements<sup>2</sup> are  
3 "liberally construed to favor intervention." *Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*,  
4 98 Wn. App. 618, 623 (1999).

5 I. PROPOSED INTERVENORS HAVE INTERESTS THAT WILL BE AFFECTED BY  
6 THESE APPEALS.

7 Each of the Proposed Intervenor is a nonprofit environmental organization with a  
8 longstanding interest in conservation and use of Puget Sound, Elliott Bay, and the Duwamish  
9 River. In addition to enjoying Puget Sound for its recreational opportunities, Proposed  
10 Intervenor advocates for protection of the Sound and the Duwamish River and their recovery in  
11 numerous forums and public processes. Proposed Intervenor has participated in administrative  
12 proceedings, litigation, enforcement actions, and cleanups—all to ensure protection against the  
13 pollution and contamination from vessels like these oil rigs and their fleet of icebreakers and  
14 other support vessels. Turning a longstanding container terminal into a homeport calls for  
15 scrutiny by the City of Seattle as part of the shoreline permitting process to ensure pollution from  
16 the vessels, maintenance, and repair activities is prevented. Proposed Intervenor seeks to  
17 intervene to ensure this regulatory scrutiny will occur and that it will afford an opportunity for  
18 Soundkeeper and the interested public to provide input into future shoreline permits related to the  
19 lease of Terminal 5 as a homeport.

20 Washington Courts broadly interpret the meaning of "interest" for purposes of

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21 <sup>2</sup> Washington Civil Rule 24(a) is similarly worded to HER 3.09 and states that "Upon timely  
22 application anyone shall be permitted to intervene in an action: (1) when a statute confers an  
23 unconditional right to intervene; or (2) when the applicant claims an interest relating to the  
24 property or transaction which is the subject of the action and he is so situated that the disposition  
of the action may as a practical matter impair or impede his ability to protect that interest, unless  
the applicant's interest is adequately represented by existing parties."

1 intervention. *In re Dependency of J.H.*, 117 Wn.2d 460, 468, (1991). Indeed, Washington courts  
2 have observed that “[n]ot much of a showing is required [ ] to establish an interest. And  
3 insufficient interest should not be used as a factor for denying intervention.” *Columbia Gorge*  
4 *Audubon Soc’y*, 98 Wn. App. at 629 (citing *Am. Discount Corp. v. Saratoga W., Inc.*, 81 Wn.  
5 App. 2d 34 (1972)). The “interest test” does not require an economic or property interest in the  
6 action, *see Saratoga W., Inc.*, 81 Wn.2d at 41-42 (quoting *Smuck v. Hobson*, 408 F.2d 175, 178-  
7 80 (D.C. Cir. 1969)), and instead includes a “broad range of possible interests which elude  
8 satisfactory classification under the terms of the rule.” *Id.*

9 A. Proposed Intervenors Have a Strong Interest in Using and Enjoying Puget Sound.

10 Proposed Intervenors’ extensive use and enjoyment of Puget Sound and the area around  
11 Terminal 5 is just the sort of interest that warrants intervention under HER 3.09. *See Sagebrush*  
12 *Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983) (environmental groups’  
13 “environmental, conservation and wildlife interests” were sufficient for intervention as a matter  
14 of right).<sup>3</sup> The four Proposed Intervenors are environmental and conservation organizations with  
15 longstanding interests in preserving water quality in Puget Sound, including Elliott Bay and the  
16 Duwamish River.

17 Puget Soundkeeper Alliance members regularly kayak, fish, clean up, and take part in  
18 other on-the-water activities in Puget Sound. In particular, Soundkeeper’s members will be  
19 harmed by the pollution impacts from vessels moored at Terminal 5 on aquatic species and  
20 wildlife that Soundkeeper’s members observe and enjoy. Pollution from vessels moored at  
21 Terminal 5 and from vessel repair and maintenance activities taking place at Terminal 5 will

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22  
23 <sup>3</sup> Washington Courts may look to federal intervention decisions for guidance. *Columbia Gorge*  
24 *Audubon Soc’y*, 98 Wn. App. at 623 n.2 (“Washington’s CR 24 is the same as the federal rule.  
Therefore, we may look to federal decisions and analysis for guidance.”).

1 reduce Soundkeeper's members' recreational and aesthetic enjoyment of nearby waters.

2 Likewise, Sierra Club's members have recreational, aesthetic, and other interests in the  
3 preservation of Puget Sound, Elliott Bay, and the Duwamish River. Sierra Club members use  
4 these waters for recreational and aesthetic purposes. Their use and enjoyment of these waters  
5 will be harmed by an adverse ruling in these appeals, which would allow Terminal 5 to be used  
6 as a homeport and may result in water pollution from the vessels that call at the terminal and  
7 from repair and maintenance activities.

8 Washington Environmental Council ("WEC") is a non-profit, statewide advocacy  
9 organization that has been driving positive change to solve Washington's most critical  
10 environmental challenges since 1967. WEC's People for Puget Sound Program is focused on  
11 ensuring that Puget Sound is an economic driver and a resource that enhances the quality of life  
12 in the region. WEC works to engage citizens to advocate for restoration of Puget Sound and its  
13 efforts have driven hundreds of millions of dollars for Puget Sound restoration. WEC's  
14 members include individuals who engage in recreational, aesthetic, and economic pursuits in  
15 Puget Sound, Elliott Bay, and the Duwamish River. Their enjoyment of these waterways will be  
16 undermined by additional polluting activities like those likely to occur if Terminal 5 serves as a  
17 homeport for Shell's Arctic drilling fleet.

18 Seattle Audubon Society was founded in 1916 and is the oldest conservation organization  
19 in the State of Washington. The Seattle Audubon Puget Sound Recovery Program focuses on  
20 improving the health of this large estuary, which supports over 100 seabird species, 211 fish  
21 species, and 13 marine mammal species. Seattle Audubon is focused on promoting an  
22 ecologically healthy Puget Sound by advocating for oil and chemical spill contamination  
23 prevention, objecting to increased oil transport and terminal development, promoting watershed  
24

1 protection, and implementing proactive seabird monitoring to create baseline data for the region.  
2 Members of Seattle Audubon engage in bird watching and other recreational and aesthetic  
3 pursuits in and around Puget Sound. Many migratory and breeding bird species that are already  
4 in decline use our waters as their homes and are at great risk from oil and other pollutants.  
5 Seattle Audubon also has serious concerns about allowing Terminal 5 to serve as a homeport for  
6 Shell's Arctic drilling fleet because Shell's vessels have returned from the Arctic battered and in  
7 need of extensive repairs and because one of the drill rigs—Noble Discoverer—pled guilty to  
8 eight felonies last December and paid over \$12 million in fines for violating water pollution and  
9 safety laws.

10 The homeport use of Terminal 5 may increase pollution and runoff into these waters used  
11 extensively by the members of the Proposed Intervenor organizations. Such increased pollution  
12 will harm Proposed Intervenors and their members' interest in enjoying Puget Sound for  
13 recreation and its birds, fish, and other wildlife.

14 B. Proposed Intervenors Have a Strong Interest in Access to and Monitoring of the  
15 Area Around Terminal 5.

16 Puget Soundkeeper Alliance is dedicated to protecting and preserving Puget Sound,  
17 including by monitoring and stopping toxic pollution entering its waters, but use of Terminal 5 as  
18 a homeport for Shell has already interfered with those monitoring activities. Soundkeeper has  
19 for years been actively engaged in a variety of educational and advocacy efforts to improve  
20 water quality and to address sources of water quality degradation in the waters of Puget Sound,  
21 the Duwamish Waterway, and Elliott Bay. As a critical part of its community monitoring  
22 program, it operates weekly on-water pollution patrols around Puget Sound. Soundkeeper's boat  
23 patrols most regularly depart from Elliott Bay Marina and patrol Elliott Bay and the Duwamish  
24 River, including the immediate vicinity of Terminal 5 and other properties owned by the Port of



1 Seattle.

2 Soundkeeper would be and has already been harmed by use of Terminal 5 as a homeport  
3 due to the loss of full access to public waters in the immediate vicinity of Terminal 5, where  
4 Soundkeeper makes regular stops during its weekly boat patrols. At the immediate south end of  
5 Terminal 5 is the mouth of Longfellow Creek—an important creek for monitoring and  
6 researching the effects of urban stormwater on juvenile and adult salmon, including through  
7 studies conducted by NOAA, the City of Seattle, Washington State University, and Soundkeeper.  
8 For at least ten years, Soundkeeper has routinely pulled its patrol boat close to the terminus of  
9 the creek, which is located mere feet from Terminal 5, in order to monitor for salmon and discuss  
10 the implications of the research with volunteers, the media, and guests.

11 The Coast Guard has established a 100-yard exclusion zone around Shell's vessels  
12 moored at Terminal 5, and a 500-yard exclusion zone around Shell's vessels while they are in  
13 transit. The exclusion zone has already interfered with Soundkeeper's Puget Sound monitoring  
14 operations, forcing Soundkeeper to operate on the wrong side of the West Waterway channel  
15 under radioed direction of the Coast Guard to Soundkeeper's patrol boat's skipper. The  
16 exclusion zone could impede Soundkeeper's access to Longfellow Creek, which Soundkeeper  
17 has been monitoring for years. There is no other way for Soundkeeper to monitor Longfellow  
18 Creek because it travels underground for its final stretch. That disruption will interfere with  
19 Soundkeeper's routine stops at Longfellow Creek to explain its patrol operations to supporters  
20 and the media, thus harming Soundkeeper's ability to carry out its mission of protecting these  
21 important waters.

22 On May 22, 2015, the Washington State Department of Natural Resources ("DNR")  
23 informed Shell that long-term use of the West Waterway for moorage would violate the State  
24

1 Constitution and impede public access to the West Waterway. Ex. 3 (Letter from Megan Duffy,  
2 Deputy Supervisor for Aquatics and Geology, Washington State Department of Natural  
3 Resources, to Tracy Harris, Northwest Operations Manager, Shell Corporation (May 22, 2015)).  
4 State-owned aquatic lands are reserved as highways for public navigation, and uses that interfere  
5 with that use are not appropriate, which “is especially true with respect to the West Waterway.”  
6 *Id.* at 1. The right to public navigation is of utmost importance for Soundkeeper to fulfill its  
7 mission, and as DNR has found, that right is inhibited by Shell’s use of Terminal 5 for moorage.

8 C. Use of Terminal 5 as a Homeport Would Harm These Interests.

9 Proposed Intervenor’s strong interests in using, enjoying, and protecting Puget Sound and  
10 the Duwamish River will be directly affected by the decision in these appeals. If the mooring of  
11 these vessels is characterized as a cargo terminal use, and they are allowed to remain at Terminal  
12 5, the public access limitations and environmental harms will continue to harm Proposed  
13 Intervenor’s members. Likewise, an adverse ruling may undermine the similar legal claims  
14 Soundkeeper is litigating in King County Superior Court. Conversely, if DPD’s interpretation is  
15 upheld, the Port would be required to obtain a new shoreline permit for use of Terminal 5 as a  
16 homeport, which would afford Soundkeeper and the public an opportunity to comment on the  
17 conversion of Terminal 5 to a homeport. There is no requirement that an intervenor applicant’s  
18 interest be threatened by an actual legal effect of the litigation; an intervenor need show only a  
19 practical impairment of an interest. *See Saratoga W., Inc.*, 81 Wn.2d at 41-42. Proposed  
20 Intervenor’s easily meet this requirement because its members stand to be affected by a ruling in  
21 these appeals.

22 II. THE CITY OF SEATTLE DOES NOT ADEQUATELY REPRESENT PROPOSED  
23 INTERVENORS.

24 Like the “interest test,” this requirement is broadly interpreted and requires only that

1 applicants make “a minimal showing that its interests may not be adequately represented.”

2 *Columbia Gorge Audubon Soc’y*, 98 Wn. App. at 630. The questions are whether the existing  
3 party will undoubtedly make all the proposed-intervenor’s arguments, and whether the proposed-  
4 intervenor will more effectively articulate any aspect of its interest. *Id.* “When in doubt,  
5 intervention should be granted.” *Id.*

6 The City of Seattle does not adequately represent Proposed Intervenor’s interests because  
7 it is a government entity with varied and broad interests. Proposed Intervenor’s specific  
8 environmental focus is narrower than the City’s broader permitting considerations. Moreover,  
9 the Hearing Examiner’s decision on these appeals will become the City’s interpretation, one that  
10 the City will not be in a position to appeal, regardless of the negative environmental  
11 consequences and impacts to Proposed Intervenor’s missions and members. Rather, the City of  
12 Seattle would defend such a ruling on appeal. Proposed Intervenor, on the other hand, will  
13 advocate for the outcome that will be most environmentally protective, preserve navigation and  
14 public access to these important waterways, and allow public input and participation in  
15 governmental decisionmaking concerning uses of Terminal 5, at any and every level of review.  
16 Toward that end, and in contrast to the City, Proposed Intervenor would be in a position to  
17 appeal a decision of the Hearing Examiner that cuts back on their ability to promote their  
18 interests. As the case law reveals, there is no requirement that the existing party and proposed-  
19 intervenors be in direct conflict, only that the interest *may* not be adequately articulated and  
20 addressed. *See Columbia Gorge Audubon Soc’y*, 98 Wn. App. at 630.

21 Additionally, Proposed Intervenor will offer evidence in defense of the City’s  
22 interpretation. Since well before the arrival of the first Shell vessels, Proposed Intervenor have  
23 been photographing and documenting activity occurring on Terminal 5 from the water and the  
24

1 public park on the north end of Terminal 5. Proposed Intervenor can offer this relevant  
2 evidence in this proceeding.

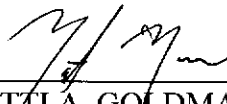
3 III. PROPOSED INTERVENORS' APPLICATION FOR INTERVENTION IS TIMELY  
4 AND WILL NOT ADD ADDITIONAL ISSUES.

5 This motion to intervene is timely because there have been no proceedings of substance  
6 in this case to date. HER 3.09(b) requires intervention motions to be filed at least ten days  
7 before the hearing, and the hearing has not yet been set in these appeals. Neither Appellants nor  
8 the City of Seattle would be prejudiced by the timing of this motion or Proposed Intervenor's  
9 intervention, and Soundkeeper agrees to comply with all deadlines set by the Hearing Examiner.  
10 Further, Proposed Intervenor has no plans to file a cross-appeal or otherwise raise new issues.

11 CONCLUSION

12 For all these reasons, Proposed Intervenor requests that the Hearing Examiner grant  
13 intervention.

14 Respectfully submitted this 27th day of May, 2015.

15   
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21 *Attorneys for Proposed Intervenor Puget*  
22 *Soundkeeper Alliance, Seattle Audubon Society,*  
23 *Sierra Club, and Washington Environmental*  
24 *Council*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I HEREBY CERTIFY that on May 27, 2015, I served the following documents on the following parties:

1. Motion to Intervene.

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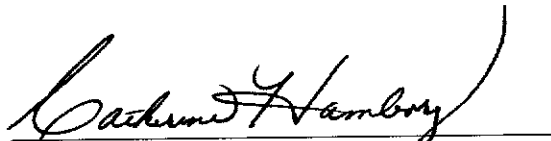
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11 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and  
12 correct. Executed this 27th day of May, 2015, at Seattle, Washington.

13  
14   
15 Catherine Hamborg

# **EXHIBIT 1**

1  
2  
3  
4  
5  
6  
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF KING

9 PUGET SOUNDKEEPER ALLIANCE, a ) NO.  
10 Washington corporation; SIERRA CLUB, a )  
11 California corporation; and WASHINGTON ) COMPLAINT FOR WRIT OF  
12 ENVIRONMENTAL COUNCIL, ) REVIEW SEEKING VACATUR OF  
13 a Washington corporation; and SEATTLE ) PORT OF SEATTLE LEASE FOR A  
14 AUDUBON SOCIETY, a Washington corporation, ) HOMEPORT AT TERMINAL 5 AND  
15 ) FOR DECLARATORY JUDGMENT

16 Plaintiffs, )

17 vs. )

18 PORT OF SEATTLE, a special purpose municipal )  
19 corporation; TOM ALBRO, in his official capacity )  
20 as a Port of Seattle Commissioner; STEPHANIE )  
21 BOWMAN, in her official capacity as a Port of )  
22 Seattle Commissioner; BILL BRYANT, in his )  
23 official capacity as a Port of Seattle Commissioner; )  
24 JOHN CREIGHTON, in his official capacity as a )  
25 Port of Seattle Commissioner; COURTNEY )  
26 GREGOIRE, in her official capacity as a Port of )  
Seattle Commissioner, )

Defendants, )

and )

FOSS MARITIME COMPANY, a Washington )  
corporation, )

Joined Party-Defendant. )

COMPLAINT FOR WRIT OF REVIEW SEEKING  
VACATUR OF PORT OF SEATTLE LEASE FOR  
A HOMEPORT AT TERMINAL 5 AND FOR  
DECLARATORY JUDGMENT



## INTRODUCTION

1. This case challenges the Port of Seattle's entry into a lease with Foss Maritime Company to serve as a homeport for Royal Dutch Shell's Arctic drilling fleet. The lease is attached to this Complaint as Exhibit 1. The Port entered into this lease without complying with the State Environmental Policy Act (SEPA). The Port invoked a categorical exemption to SEPA that applies to leases of real property only when the use will remain essentially the same as the prior use, even though Terminal 5 previously housed a container terminal and the new use would be a homeport for Shell's Arctic drilling fleet, a substantively different use with distinct environmental impacts. The Port also entered into a lease knowing that the use of Terminal 5 would be inconsistent with the cargo terminal use authorized under the Port's Shoreline Substantial Development Permit. By circumventing SEPA and acting in violation of its shoreline permit, the Port made this controversial decision without the public process, candid disclosure, objective assessment and mitigation of environmental and community impacts, and public participation that the law requires. Plaintiffs ask the Court to declare that the lease between the Port and Foss is null and void, to declare that the Port violated SEPA, the Port's SEPA Resolution, the Port's Shoreline Substantial Development Permit, the Shoreline Management Act and the City of Seattle's shoreline rules, and to issue an order vacating the lease.

## NAMES AND ADDRESSES OF PLAINTIFFS

2. The names and mailing addresses of the plaintiffs are as follows:

Puget Soundkeeper Alliance  
130 Nickerson St.  
Seattle, WA 98109

COMPLAINT FOR WRIT OF REVIEW SEEKING  
VACATUR OF PORT OF SEATTLE LEASE FOR  
A HOMEPORT AT TERMINAL 5 AND FOR  
DECLARATORY JUDGMENT

- 2 -

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10 NAMES AND ADDRESS OF THE COUNSEL FOR PLAINTIFFS

11 Plaintiffs are represented by:

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16 705 Second Avenue, Suite 203  
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18 NAME AND ADDRESS OF PUBLIC ENTITY WHOSE ACTIONS ARE AT ISSUE

19 Port of Seattle  
20 2711 Alaskan Way  
21 Seattle, WA 98121

22 NAME AND ADDRESS OF JOINED INTERESTED PARTY

23 Foss Maritime Company  
24 1151 Fairview Avenue N.  
25 Seattle, WA 98109

26 IDENTIFICATION OF AGENCY ACTION AT ISSUE

3. This case seeks review of the Port of Seattle's entry into a lease with Foss  
Maritime Company for use of Terminal 5, the Port's failure to comply with SEPA before  
entering into this lease, and the Port's authorization of a use of Terminal 5 that is not permitted  
under the Port's Shoreline Substantial Development Permit. The lease is attached as Exhibit 1.

The Port's documentation of the Port's decision not to comply with SEPA and the relevant

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1 portions of its Shoreline Substantial Development Permit are contained in Exhibit 2, which  
2 consists of the Port's memorialization of its SEPA determination and associated records  
3 produced by the Port under the Public Records Act, RCW 42.46. Citations to records produced  
4 under the Public Records Act are to the page preceded by "PRA."

#### 5 THE PARTIES

6 4. Puget Soundkeeper Alliance (Soundkeeper) is a non-profit corporation registered  
7 in the State of Washington and based in Seattle. Soundkeeper is dedicated to protecting and  
8 preserving Puget Sound, including by tracking down and stopping toxic pollution entering its  
9 waters. Soundkeeper has been actively engaged in a variety of educational and advocacy efforts  
10 to improve water quality and to address sources of water quality degradation in the waters of  
11 Puget Sound and its tributaries, including significant efforts specific to the Duwamish Waterway  
12 and Elliott Bay. As a critical part of its citizen and watch-dog monitoring program, it operates  
13 weekly on-water pollution patrols around Puget Sound. Soundkeeper's boat patrols most  
14 regularly depart from Elliott Bay Marina and patrol Elliott Bay and the Duwamish River,  
15 including the immediate vicinity of Terminal 5 and other properties owned by the Port of Seattle.  
16 Uses of Terminal 5 as a homeport for Shell's Arctic drilling fleet will directly impact  
17 Soundkeeper and its members' aesthetic enjoyment of local waterways and their ability to view  
18 wildlife and enjoy recreational interests in the vicinity of Terminal 5. In particular,  
19 Soundkeeper's members have reasonable concerns about the effects of pollution from vessels  
20 moored at Terminal 5 on aquatic species and wildlife that Plaintiff's members observe and enjoy.  
21 Pollution from vessels moored at Terminal 5 and from vessel repair and maintenance activities  
22 taking place at Terminal 5 will lessen Soundkeeper's members' recreational and aesthetic  
23 enjoyment of nearby waters. Soundkeeper would also likely be harmed by the lease due to the

1 loss of access to public waters in the immediate vicinity of Terminal 5, where Soundkeeper  
2 makes regular stops during its weekly boat patrols. At the immediate south end of the facility is  
3 the mouth of Longfellow Creek - an iconic creek for monitoring and researching the effects of  
4 urban stormwater on juvenile and adult salmon, including through studies conducted by NOAA,  
5 the City of Seattle, Washington State University, and Soundkeeper. For at least ten years,  
6 Soundkeeper has routinely pulled its patrol boat close the terminus of the creek, which is located  
7 mere feet from Terminal 5, in order to monitor for salmon and discuss the implications of the  
8 research with volunteers, the media and guests. If Shell's drilling fleet is moored regularly at  
9 this location, it is likely that the Coast Guard will establish an exclusion zone around the vessels,  
10 similar to what was established around one of Shell's Arctic exploration vessels when it was in  
11 dry dock at Vigor Shipyard. Such an exclusion zone would deprive Soundkeeper of access to  
12 Longfellow Creek.

13         5.       Sierra Club, a national environmental organization founded in 1892, is devoted to  
14 the study and protection of the earth's scenic and ecological resources, including wild shores and  
15 rivers, estuaries, wetlands, and their wild flora and fauna. Sierra Club is incorporated under the  
16 laws of California and has its principal place of business in San Francisco, California. It has  
17 many dozens of chapters throughout the United States and Canada, including the Cascade  
18 Chapter, which encompasses Seattle and Puget Sound. The Sierra Club has more than 1 million  
19 members and supporters nationwide, including 24,137 members in Washington State. Sierra  
20 Club's members have recreational, aesthetic, and other interests in the preservation of Puget  
21 Sound, Elliott Bay, and the Duwamish River. Sierra Club members use these waters for  
22 recreational and aesthetic purposes. Their use and enjoyment of these waters will be harmed by  
23 the Port's decision to allow Terminal 5 to be used as a homeport, which may result in water

1 pollution from the vessels that call at the terminal and from repair and maintenance activities.

2         6.         Washington Environmental Council ("WEC") is a non-profit, statewide advocacy  
3 organization, incorporated in the State of Washington and with its principal place of business in  
4 Seattle. WEC's mission is to protect, restore, and sustain Washington's environment. It has  
5 been driving positive change to solve Washington's most critical environmental challenges since  
6 1967. WEC was instrumental in passing (and is now enforcing) the foundational laws that help  
7 keep Washington's environment healthy: the State Environmental Policy Act, the State  
8 Superfund Law, the Growth Management Act, and the Shoreline Management Act. WEC has  
9 approximately 20,000 members statewide. WEC's People for Puget Sound Program is focused  
10 on ensuring that Puget Sound is an economic driver and a resource that enhances the quality of  
11 life in the region. WEC works to engage citizens to advocate for restoration of Puget Sound and  
12 its efforts have driven hundreds of millions of dollars for Puget Sound restoration. WEC's  
13 members include individuals who engage in recreational, aesthetic, and economic pursuits in  
14 Puget Sound, Elliott Bay, and the Duwamish River. Their enjoyment of these waterways will be  
15 undermined by additional polluting activities like what is likely to occur if Terminal 5 serves as a  
16 homeport for Shell's Arctic drilling fleet.

17         7.         Seattle Audubon Society was founded in 1916 and is the oldest conservation  
18 organization in the State of Washington. It is incorporated in Washington and has its place of  
19 business in Seattle. The mission of Seattle Audubon is to cultivate and lead a community that  
20 values and protects birds and the natural environment. With approximately 5000 members,  
21 Seattle Audubon is one of the largest and most active Audubon chapters in the country. Staff  
22 and volunteers effect change throughout western Washington through a variety of strategies,  
23 including close engagement with our members, elected officials, agency staff, and the public.

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1 Seattle Audubon has a history of promoting strong, science-based advocacy that is supported by  
2 nearly a century of bird survey work. The Seattle Audubon Puget Sound Recovery Program  
3 focuses on improving the health of this large estuary, which supports over 100 seabird species,  
4 211 fish species, and 13 marine mammal species. Seattle Audubon is focused on promoting an  
5 ecologically healthy Puget Sound by advocating for oil and chemical spill contamination  
6 prevention, objecting to increased oil transport and terminal development, promoting watershed  
7 protection, and implementing proactive seabird monitoring to create baseline data for the region.  
8 Members of Seattle Audubon engage in bird watching and other recreational and aesthetic  
9 pursuits in and around Puget Sound. Allowing Terminal 5 to serve as a homeport for Shell's  
10 Arctic drilling fleet may result in oil and chemical pollution due to the transit, transport, berthing,  
11 and maintenance of weathered, damaged, and contaminated oil industry vessels and equipment.  
12 Many migratory and breeding bird species that are already in decline use our waters as their  
13 homes and are at great risk from oil and other pollutants. By proceeding with this lease without  
14 environmental review and public engagement, the Port denied Seattle Audubon and its members  
15 the ability to help shape this decision. This is extremely troubling given how much work has  
16 been done to improve the health of Puget Sound and of the Duwamish Waterway.

17 8. Plaintiffs are environmental and conservation organizations with longstanding  
18 interests in preserving water quality in Puget Sound, including Elliott Bay and the Duwamish  
19 River. Terminal 5 is located at the mouth of a salmon stream and a Superfund site undergoing  
20 remediation. It is in Elliott Bay, which is a hub for water-based recreation. New uses of  
21 Terminal 5 that increase pollution and runoff into these sensitive environments used extensively  
22 by the public, including members of the plaintiff organizations, will harm plaintiffs' interests.

1           9.       Plaintiffs' interests are within the zone of interests of both SEPA and the  
2 Shoreline Management Act. In enacting SEPA, the legislature declared "that each person has a  
3 fundamental and inalienable right to a healthful environment," and it established environmental  
4 review requirements as a means to enable Washington citizens to know about and influence  
5 governmental decisions that can affect that right. RCW 43.21C.020(3). The SEPA process of  
6 disclosing the environmental and community impacts of proposed governmental actions and  
7 allowing public participation in the review of such impacts provides a mechanism for the  
8 plaintiff organizations to further their missions and protect their members' enjoyment of the  
9 natural environment. SEPA is a critical tool for educating the public about the risks facing Puget  
10 Sound and engaging them in advocacy for solutions, including by promoting a green and  
11 sustainable Port of Seattle. The Shoreline Management Act is designed to protect the shorelines  
12 of the state and preserve and enhance public access to the shorelines by establishing a planning  
13 and permitting system "to prevent the inherent harm in an uncoordinated and piecemeal  
14 development of the state's shorelines." RCW 90.58.020. The permitting process affords  
15 opportunities for public review and appeals. Plaintiffs participate in both SEPA and permitting  
16 processes to further their missions and protect their members' interests. By failing to comply  
17 with SEPA, the Port deprived plaintiffs of the statutory mechanism to participate and seek to  
18 influence the Port's assessment of environmental impacts and its ultimate decision. By allowing  
19 a use of Terminal 5 that violates its Shoreline Substantial Development Permit without obtaining  
20 a revision of that permit, the Port deprived plaintiffs of the statutory mechanism designed for  
21 them to protect shorelines of the state and their members' interests in such shorelines and  
22 connected waters.

10. The Port of Seattle is a municipal corporation established by public vote of the voters in King County in 1911 to construct and operate a Port. RCW 53.04.010. It has committed itself to be “the greenest and most energy efficient port in North America” and has reinforced that commitment through its tagline, “where a sustainable world is headed.” Five elected Port Commissioners constitute the governing body of the Port. The Commissioners maintain public oversight over the Port and declare that they lead through the principle that public service is a public trust and by promoting accountability, transparency, and public confidence in their actions.

11. Defendants Tom Albro, Stephanie Bowman, Bill Bryant, John Creighton, and Courtney Gregoire are the current elected Port Commissioners. They are named in their official capacity as Port Commissioners. The Commissioners have delegated operational functions to Port staff, including the Chief Executive Officer. That delegation currently includes the authority to enter into leases for a term of less than five years and that involve no more than \$300,000 in Port monetary obligations. Resolution 3605, as amended, ¶ 2.3.1.

12. Foss Maritime Company is a Washington Corporation that provides a full range of maritime transportation and logistics services, including vessel repair, maintenance, and conversions. It is wholly owned by Saltchuk Resources, a privately owned investment company. It is joined as an interested party pursuant to Superior Court Civil Rule 19(a) and the Uniform Declaratory Judgments Act, RCW 7.24.110, because it has an interest in the lease, which is the subject of this case.

## JURISDICTION AND VENUE

13. This Court has jurisdiction pursuant to the inherent power of the judiciary under Article IV, Section 6 of the Washington Constitution to review claims that a public entity has

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1 acted illegally or has engaged in arbitrary or capricious actions in violation of fundamental  
2 rights. The Washington Supreme Court has held that the right to a healthful environment is a  
3 fundamental and inalienable right protectable through the Constitutional Writ of Review. *Leschi*  
4 *Improvement Council v. Washington State Highway Commission*, 84 Wn.2d 271 (1974). This Court  
5 has the inherent power to decide whether the Port violated plaintiffs' fundamental rights to a  
6 healthful environment as embodied in SEPA and the Shoreline Management Act in entering into the  
7 challenged lease without complying with those statutes.

8 14. Plaintiffs have no adequate remedy at law. The Port's SEPA Resolution provides  
9 for an administrative appeal of final environmental impact statements and mitigated  
10 determinations of non-significance, but not of a failure to comply with SEPA through invocation  
11 of a categorical exemption. Resolution 3650, as amended, §§ 21.1 & 21.10(1). SEPA provides a  
12 basis for challenging governmental action that is out of compliance with SEPA's procedural and  
13 substantive requirements, but requires that challenges be of the governmental action together  
14 with the associated environmental determinations. RCW 43.21C.075(1), (2)(a) & (6)(c).  
15 Neither the Port nor leases are subject to judicial review under the Administrative Procedure Act,  
16 34.05.010(2) (agency does not include municipal corporations); RCW 34.05.010(3) (agency  
17 action does not include leases of real estate). The Shoreline Management Act, RCW  
18 90.58.180(1), provides for an appeal of decisions to grant, deny, or rescind a permit, but not  
19 where a permittee, here the Port, fails to obtain a permit or permit revision.

20 15. The Port's SEPA Resolution provides that "Port SEPA decisions not subject to  
21 administrative appeal under Section 21 may be appealed to the King County Superior Court by  
22 application for writ of review" within 21 days of the date the decision is issued. Port Resolution  
23 3650, as amended, § 21.10(2). The lease was signed on February 9, 2015. This complaint is

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being filed with 21 days and therefore is timely.

16. This Court also has jurisdiction to issue declaratory relief under the Uniform Declaratory Judgments Act, RCW 7.24, under which this Court has the power to issue declaratory relief whether or not further relief is or could be claimed.

17. Venue is proper in King County pursuant to RCW 4.92.010 because the real property that is the subject of the action is situated in King County, the cause of action arose in King County, and plaintiffs Puget Soundkeeper, Washington Environmental Council, and Seattle Audubon Society have their principal places of business in King County. Venue is also proper in King County pursuant to RCW 4.12.025 because the Port of Seattle resides in King County.

## STATEMENT OF FACTS

18. This case concerns Terminal 5, a container terminal located on the West Waterway at the entrance to the Duwamish River. Terminal 5 has long been a container terminal. The Port's long-range plan adopted through extensive public process in 1985 screened and reserved Terminal 5 and several other port sites for upgraded container cargo facilities. PRA 227. In 1991, the Port prepared an environmental impact statement and adopted a Container Plan that "determined the Port should increase the efficiency of its container terminals" and identified areas in the southwest portion of Elliott Bay, including Terminal 5, as needed to meet existing and projected container cargo service demands. PRA 228. The Port conducted a major redevelopment and cleanup of Terminal 5 as part of the Southwest Harbor Cleanup and Redevelopment Project, based on a 1994 environmental impact statement, to accommodate expanded container handling and marshaling of cargo at Terminal 5. PRA 231. In November 1997, the Port entered into a 30-year Port Management Agreement with the Washington Department of Natural Resources for management of aquatic lands owned by the State of

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1 Washington. PRA 38. That agreement identifies the current and planned uses of the terminals  
2 operated by the Port. It designates Terminal 5 as an existing marine container terminal. PRA 56.

3 19. In keeping with these plans, the Port's Shoreline Substantial Development Permit  
4 received from the City of Seattle in 1996 (project number 94004118, 1996) "[c]onfirmed and  
5 established Terminal 5 as "cargo terminal." PRA 136. Eagle Marine Services operated the  
6 marine container terminal at Terminal 5 under a 1985 lease with the Port. The Port terminated  
7 that lease in July 2014, upon determining that major cargo terminal operations would interfere  
8 with the Port's planned modernization project designed to enable larger containerships to call at  
9 Terminal 5.

10 20. Port staff began looking for a new tenant to use Terminal 5 and bring in revenues  
11 during the modernization process. The Port established several parameters for the new tenancy,  
12 primarily that the use be consistent with the Port's permits and covenants, that it involve minimal  
13 financial outlay by the Port, and that it not interfere with the modernization project.

14 21. By May 2014, Port staff began discussing leasing part of Terminal 5 to Foss  
15 Maritime Company. Initially Foss proposed to use Terminal 5 to receive components by truck,  
16 rail and breakbulk ship to be assembled into modules for a Liquid Natural Gas (LNG) plant that  
17 would be transported by barge to Canada for final assembly. In June 2014, Foss expressed  
18 interest in leasing an additional 50 acres of berth and yard area to serve as a homeport for the  
19 Shell Arctic drilling fleet. Foss also identified other prospects for uses of Terminal 5 as part of  
20 its tenancy.

21 22. These negotiations were shrouded in secrecy with the deliberations among the  
22 Port staff and Commissioner over the Foss lease taking place in executive sessions. The Port  
23 Commissioners entered into a verbal nondisclosure agreement not to reveal the facts or any

1 details of the negotiations to lease Terminal 5 to be a homeport for Shell's Arctic fleet. "How  
2 Seattle Agreed to Stash a Climate Bomb in its Seaport: To Make Shell's Arctic Drilling Dreams  
3 Come True, the Port of Seattle Held Secret Negotiations and Entered into a 'Verbal  
4 Nondisclosure' Agreement to Help an Oil Company," *The Stranger*, Feb. 25, 2015, available at  
5 [http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-](http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-climate-bomb-in-its-seaport)  
6 [climate-bomb-in-its-seaport](http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-climate-bomb-in-its-seaport). That secrecy ended when the press reported that "Terminal 5 is  
7 being proposed as a repair and service center for vessels engaged in Shell Oil's troubled, delayed  
8 program to drill for oil in Arctic waters of the Chukchi and Beaufort Seas off Alaska." "Will  
9 Port of Seattle Be Repair Center for Shell's Arctic Vessels," *Seattle PI*, Jan. 7, 2015, available at  
10 [http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-](http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-oils-arctic-vessels/)  
11 [oils-arctic-vessels/](http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-oils-arctic-vessels/); see also "Foss Maritime Floats Plan to Use Port's Terminal 5," *Seattle*  
12 *Times*, Jan. 8, 2015, available at [http://o.seattletimes.nwsources.com/html/business/technology/](http://o.seattletimes.nwsources.com/html/business/technology/2025417726_portterminal5.xml.html)  
13 [2025417726\\_portterminal5.xml.html](http://o.seattletimes.nwsources.com/html/business/technology/2025417726_portterminal5.xml.html).

14 23. The sole public process consisted of discussion of the lease at a routine public  
15 meeting of the Port Commission held in a conference room at Sea-Tac Airport on the afternoon  
16 of January 13, 2015. For the first time, the Port released information about the "proposed" lease  
17 in the form of a staff briefing memorandum and a PowerPoint presentation (attached as Exhibit  
18 3). The staff briefing memorandum depicts the homeport use as "vessel berth moorage and  
19 provisioning" and indicates that Terminal 5 would receive equipment and supplies that would be  
20 loaded onto the fleet. Briefing Mem. at 6. The briefing memorandum and presentation indicated  
21 that the full panoply of Arctic drilling vessels from drill rigs, ice-breakers and environmental  
22 response vessels to tugs and barges would berth and undergo maintenance at Terminal 5. The  
23 vessels would over-winter at Terminal 5 from late summer through May and the lease would

1 generate jobs and funds that could defray ongoing Port expenses and help fund aspects of the  
2 modernization project. *Id.* The briefing memorandum describes the LNG terminal assembly  
3 operation and other prospective breakbulk and bulk business uses that would complement the  
4 homeport and LNG assembly projects. *Id.* at 5-7.

5 24. While some businesses voiced support for the lease, several civic leaders and  
6 conservation organizations expressed opposition. The Commissioners individually voiced  
7 opposition to drilling for oil in America's Arctic, and two of the Commissioner indicated that  
8 they opposed entering into the lease. Commissioner Courtney Gregoire supported delaying a  
9 vote in order to allow more public debate and at least one more public meeting, but a majority of  
10 the Commissioners did not support such a delay. Another Commissioner, Tom Albro, moved to  
11 strip the Port staff of the authority to enter into short-term leases like this one, but no other  
12 Commissioner seconded that motion. In the end, it emerged that two of the five Commissioners  
13 opposed entering into the lease and a majority opposed taking steps to enable Arctic drilling, but  
14 the Commission took no action to revoke the Port Chief Executive Officer's authority to execute  
15 the lease or to block the lease in any other manner. In a matter of a few short hours, that single  
16 public meeting began and ended the public process surrounding this decision.

17 25. What was not disclosed in the public meeting was the fact that Port staff had  
18 already taken two significant steps toward sealing the deal. First, Port staff and Foss had drafted  
19 a letter of understanding, or term sheet, laying out key elements that would be incorporated into a  
20 two-year lease that could be extended. PRA 1. Those terms envisioned use of only 50 acres of  
21 Terminal 5 and the berth area "as a Vessel Supply Base and Storage Depot." In other words, the  
22 lease would be for the homeport use only and not for the LNG plant assembly, despite the  
23 emphasis on both uses in the public meeting. PRA 2. The President and CEO of Foss signed the

1 letter of understanding on January 9, 2015, and the Port CEO Theodore Fick signed it the day of  
2 the public meeting. Second, on January 9, 2015, Port staff had issued a license to Foss for  
3 temporary use of Terminal 5 until February 28, 2015 for the purpose of making repairs,  
4 refurbishments, replacements and upgrades. The refurbishments included replacing bollards  
5 with heavier capacity bollards. The heavier capacity bollards modify Terminal 5 for mooring  
6 Shell's Arctic drilling fleet. PRA 9-13. Foss agreed to the terms of the license on the day of the  
7 public meeting. PRA 12-13.

8         26. Rather than quell the public's interest, the January 13 meeting triggered an  
9 outpouring of criticism of the Port for embarking on such a significant change in direction  
10 without public process. On January 28, 2015, a group of 15 conservation organizations and civic  
11 leaders sent a letter to the Port Commissioners asking them to reconsider the decision to allow  
12 the lease to go forward (attached as Exhibit 4). The letter took issue with the Port's plan to  
13 circumvent SEPA review of the lease and complained that the public disclosures about the  
14 proposed homeport had been exceedingly vague, revealing little about the actual activities that  
15 would be allowed at Terminal 5.

16         27. The letter presented serious concerns about allowing Terminal 5 to serve as a  
17 homeport for Shell's Arctic drilling fleet, such as toxic runoff from vessel repairs and  
18 maintenance and water pollution from the vessels at port and during transit. After a season in the  
19 Arctic, Shell's vessels have returned battered and have needed extensive repairs and  
20 maintenance. The letter pointed to Shell's abysmal track record in complying with water  
21 pollution laws, highlighting the exposé in a recent New York Times Magazine article, called  
22 "The Wreck of the Kulluk," which recounted the myriad ways in which Shell cut corners on  
23 safety in its Arctic drilling operations, as well as a Department of Interior review in which it

1 found that Shell's 2012 Arctic offshore drilling program "raised serious questions regarding its  
2 ability to operate safely and responsibly" and its weak oversight of its contractors and of the risks  
3 associated with maritime transportation and logistics activities. "The Wreck of the Kulluk," *New*  
4 *York Times Magazine*, Dec. 30, 2014, available at [www.nytimes.com/2015/01/04/magazine/the-](http://www.nytimes.com/2015/01/04/magazine/the-wreck-of-the-kulluk.html)  
5 [wreck-of-the-kulluk.html](http://www.nytimes.com/2015/01/04/magazine/the-wreck-of-the-kulluk.html); Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration  
6 Program at 1, 30-31 (March 8, 2013), available at  
7 [www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf](http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf). The letter raised specific  
8 concerns about allowing the *Noble Discoverer* to homeport in Elliott Bay in light of its violations  
9 of water pollution and other laws, which led its operator, Noble Drilling (US) LLC to plead  
10 guilty in December 2014 to eight felony offenses and agree to pay \$12.2 million dollars in fines  
11 and community service payments. U.S. Department of Justice, Drilling Company Charged with  
12 Environmental and Maritime Crimes in Alaska (Dec. 8, 2014), available at  
13 [http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-](http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska)  
14 [alaska](http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska). As the letter (at 3) explained:

15 Among its offenses, Noble failed to have operational pollution control equipment,  
16 developed make-shift systems that discharged bilge and wastewater directly  
17 overboard, pumped oil-contaminated water into the ballast water tanks and  
18 discharged the contents overboard instead of through pollution control equipment,  
19 failed to notify the Coast Guard of hazardous conditions with the vessel's  
20 equipment, which led to an explosion and engine fire, and falsified records  
21 pertaining to its collection, transfer, storage and disposal of oil and the  
22 inoperability of pollution control equipment. Noble's actions led to the discharge  
23 of oil-contaminated water, which in one instance created an oily sheen in Broad  
24 Bay, Unalaska.

25 28. On February 11, 2015, the Port CEO, Theodore Fick, responded (attached as  
26 Exhibit 5). In the response, CEO Fick disclosed that he had already signed a lease with Foss,  
two days earlier on February 9<sup>th</sup>, and that the lease had become effective immediately. The  
response calls the use of Terminal 5 a cargo terminal, but also describes the use as "moorage for

vessels” and compares it to an existing homeport for large at-sea processor fishing vessels. It makes no mention of the type of maintenance and repair activities that would be permitted at Terminal 5, except to say that major repairs would occur only at a permitted shipyard. It imposes no limits on the types of vessels that can be moored at Terminal 5. In fact, the CEO letter instructs that “Should you have questions about the vessels to be moored under the proposed lease, we encourage you to consult Foss Maritime directly.” *Id.* at 2.

29. The response indicates that the Port invoked categorical exemptions from SEPA review for both the lease and replacement of the bollards, although the response did not provide the rationale. The Port did not release the SEPA documentation until February 19, 2015 under the Public Records Act. It released the lease on February 13, 2015.

30. By its terms, the lease authorizes Foss to use Terminal 5 “for a cargo terminal which means a transportation facility in which quantities of goods or container cargo are stored without undergoing and manufacturing process, transferred to other carriers or stored outdoors in order to transfer them to other locations.” Lease § 5.1. The term is for two years with the possibility of two one-year extensions. Lease §§ 2.1 & 2.4. Under the lease, Foss would pay \$550,000 per month for a total of \$13.17 million in rent over the lease term. Port CEO Response at 1.

31. Pursuant to the Port’s SEPA Resolution, which requires the Port to document its analysis of how a project meets the requirements of a categorical exemption, SEPA Resolution 3650 § 9.3, Port staff wrote multiple memos to the file invoking SEPA categorical exemptions for both the short-term license and the lease. The Port initially invoked several categorical exemptions for the short-term license, but eventually settled on WAC 197-11-800(3), which covers repair, remodeling and maintenance activities “involving no material expansions or



1 changes in use beyond that previously existing.” PRA 130-34; *see also* 151; 163-167 (original  
2 SEPA exemptions claimed). The SEPA documentation states that a previous tenant removed  
3 heavy-capacity bollards, but there is no indication when or why the bollard removal occurred or  
4 that it occurred during Eagle Marine’s 29-year tenancy. PRA 130.

5         32. For the lease, the Port invoked a categorical exemption that applies to leases of  
6 real property but only “when the property use will remain essentially the same as the existing use  
7 for the term of the agreement. . .” PRA 140-42 (quoting WAC 197-11-800(5)). To justify  
8 invocation of this exemption, the SEPA documentation asserts that “Terminal 5 will continue to  
9 be used as a cargo terminal by the new tenant.” PRA 139. The SEPA documentation recites the  
10 definitions in the Seattle Municipal Code of “cargo terminal” as “a transportation facility in  
11 which quantities of goods or container cargo are stored without undergoing any manufacturing  
12 processes, transferred to other carriers or stored outdoors in order to transfer them to other  
13 locations.” PRA 140 (quoting Seattle Municipal Code 23.60.840). The SEPA documentation  
14 never addresses the fact that the Shell homeport will not be in the business of storing and  
15 transferring goods or cargo in order to ship it to other locations. Nor did the Port evaluate the  
16 types of vessel maintenance and repair activities that would take place at Terminal 5 under the  
17 lease. In fact, the Port’s SEPA documentation states that “[i]t is not possible to describe the  
18 specific types of vessels that will be served” or “or to anticipate the specific types of cargo  
19 activities that will take place at Terminal 5 in the next months and years.” PRA 143, 145.

20         33. The Port’s Shoreline Substantial Development Permit establishes the designated  
21 use of Terminal 5 as a “cargo terminal.” PRA 136, 140, 156. The Port’s SEPA documentation  
22 acknowledged that a cargo terminal is a use that “supports or provides a means of transporting  
23 people and/or goods from one location to another.” PRA 136, 140, 156, 222. The SEPA

1 documentation also recognized that the designation of Terminal 5 as a cargo terminal was based  
2 on environmental reviews and public processes that committed to “[m]aintaining marine  
3 industrial cargo transshipment uses and activities at Terminal 5.” PRA 135-36, 139-140, 155-56.

4 34. The Port obtained an exemption from its Shoreline Substantial Development  
5 Permit from the City of Seattle for the bollards replacement upon representing that Terminal 5  
6 would continue to be used as a cargo terminal and characterizing the replacement as  
7 “[r]estoration of heavy-capacity bollard capability at Terminal 5.” PRA 151-53, 160, 188, 190.  
8 The exemption is subject to conditions, including that “[n]o change in use at Terminal 5 is  
9 approved as part of this exemption.” PRA 153.

10 35. The Port did not seek a revision of its Shoreline Substantial Development Permit  
11 for the lease. Its SEPA documentation claims that use of Terminal 5 under the lease would be  
12 consistent with the previously approved use and would not be a change in use. PRA 137, 141,  
13 143, 157. In support of this conclusion, the SEPA documentation states that the shoreline permit  
14 and shoreline master plan “are silent concerning the types of vessels serving the sites” and that  
15 they allow vessels calling at Terminal 5 to receive specialized equipment and cargo for use on  
16 the vessel. PRA 137, 139, 141, 155. Nothing in the Port’s SEPA documentation addresses the  
17 fact that Foss is not proposing to use Terminal 5 to transport goods or cargo from one location to  
18 another, which is the essential and defining characteristic of a cargo terminal.

## 19 LEGAL BACKGROUND

### 20 I. PERTINENT SEPA REQUIREMENTS

21 36. SEPA was enacted in 1971 to infuse objective information about environmental  
22 impacts into government decision-making at all levels in the state and to provide express  
23 authority to base decision on environmental values. RCW 43.21C.010-020. Toward this end,

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1 SEPA creates a process for identifying possible environmental impacts that may result from  
2 proposed governmental decisions. RCW 43.21C.030(2)(c). SEPA review helps government  
3 decision-makers, applicants, and the public understand how a proposal will affect the  
4 environment. The information generated through the SEPA process can be used to change a  
5 proposal to reduce likely impacts or to condition or deny a proposal when adverse environmental  
6 impacts are identified. RCW 43.21C.060.

7 37. SEPA requires municipal corporations, along with state and local agencies, to  
8 prepare a detailed environmental impact statement on their proposals for major actions that may  
9 have significant adverse environmental impacts. RCW 43.21C.030(2)(c). Draft environmental  
10 impact statements are made available to the public for comment and often for public hearings.  
11 WAC 197-11-455. The initial step is for the public entity to make a threshold determination as  
12 to whether an environmental impact statement is required. RCW 43.21C.033. To make such a  
13 determination, the responsible official must review the project's effects and document his or her  
14 decision in the form of an environmental checklist. An environmental impact statement is not  
15 required if the official makes a determination of non-significance. WAC-11-360. The official  
16 also may mitigate adverse environmental impacts to reduce them to insignificance in which case  
17 no environmental impact statement is required. WAC 197-11-350. A mitigated determination of  
18 non-significance can produce conditions that limit the types of activities that can occur or impose  
19 safeguards on them. A determination of non-significance cannot rely on other laws to prevent  
20 environmental impacts without assessing whether that will in fact be the case. The fact that a  
21 project will need to obtain and comply with other laws or permits is not a sufficient basis to  
22 avoid detailed review of the project's effects under SEPA.

1           38.     SEPA authorizes the Department of Ecology to promulgate regulations that  
2 include categorical exemptions from SEPA for “[c]ategories of governmental actions which are  
3 not to be considered as potential major actions significantly affecting the quality of the  
4 environment.” Such exemptions must be limited to actions that do not have significant  
5 environmental impacts. RCW 43.21C. 110(1)(a). This limitation is pivotal since invocation of a  
6 categorical exemption eliminates SEPA review and deprives the public of an objective  
7 assessment of the project’s environmental effects.

8           39.     The Department of Ecology has promulgated categorical exemptions, including  
9 for minor new construction and for leasing of real property. WAC 197-11-800(3) & (5). The  
10 leasing exemption applies only “when the property use will remain essentially the same as the  
11 existing use for the term of the agreement. . .” WAC 197-11-800(5). The Port has adopted  
12 Resolution 3650 governing its compliance with SEPA, which adopts the categorical exemptions  
13 in the Ecology rules. SEPA Resolution 3650, § 23.

## 14     II.     PERTINENT SHORELINE MANAGEMENT ACT REQUIREMENTS

15           40.     Washington’s Shoreline Management Act (SMA) was passed by the State  
16 Legislature in 1971 and adopted by voters in 1972. The overarching goal of the Act is to  
17 establish coordinated planning by state and local governments “to prevent the inherent harm in  
18 an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020. The  
19 Act is designed to foster reasonable and appropriate uses of shorelines and to protect “against  
20 adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the  
21 state and their aquatic life.” *Id.*

1           41.     The SMA establishes a collaborative system between the Washington Department  
2 of Ecology and local jurisdictions. Local jurisdictions have primary responsibility for the SMA  
3 regulatory program, are charged with issuing shoreline permits, and must adopt rules for the  
4 administration and enforcement of the Act. RCW 90.58.050. The City of Seattle has adopted  
5 rules implementing its responsibilities under the SMA.

6           42.     The SMA prohibits substantial development activities without a permit from the  
7 appropriate local jurisdiction. RCW 90.58.140. A substantial development is any development  
8 whose total cost or fair market value exceeds \$5000, adjusted for inflation. RCW  
9 90.58.030(3)(e).

10          43.     Under Seattle's Shoreline rules, it is unlawful to maintain or use any property  
11 without an appropriate shoreline permit. Seattle Municipal Code 23.60.082, 23.90.002. It also is  
12 unlawful to use a property "in any manner that is not permitted by the terms" of the governing  
13 shoreline permit. Seattle Municipal Code 23.90.002.

14          44.     Under both the state and Seattle SMA rules, a permit revision is required  
15 whenever substantive changes are made to the design, terms or conditions of a project from that  
16 approved in the permit. WAC 173-27-100; Seattle Municipal Code 23.60.076. If the change is  
17 within the scope of the original permit and no adverse environmental impact will be caused by  
18 the project revision, the local jurisdiction may approve a permit revision. WAC 173-27-100(1)-  
19 (2). If the changes are not within the scope of the original permit, the local jurisdiction cannot  
20 approve a permit revision. WAC 173-27-100(4). A change in the use authorized pursuant to the  
21 original permit is not within the scope of the original permit and cannot be approved through a  
22 permit revision. WAC 173-27-100(2)(e). In this situation, the applicant may seek a new permit.  
23 WAC 173-27-100(4).

45. The Port is a person subject to the SMA. RCW 90.58.030(1)(e) (“person” includes municipal corporations). Port operations at Terminal 5 are part of a substantial development operating under a permit under the SMA.

## CLAIMS FOR RELIEF

I. THE PORT ACTED ILLEGALLY AND ARBITRARILY AND CAPRICIOUSLY BY NOT PROPERLY DEFINING THE PROPOSED USE OF TERMINAL 5.

46. Plaintiffs reallege and incorporate ¶¶ 1-45.

47. The Port's SEPA Resolution adopts the common sense requirement that "[i]n determining whether a proposal is exempt, the Port shall make certain the proposal is properly defined." SEPA Resolution 3650, § 9. Without properly defining the proposal, the Port cannot determine whether the proposal falls within a categorical exemption, nor can the Port accurately and fully assess the project's environmental impacts.

48. The letter of understanding between the Port and Foss identifies the use of Terminal 5 as a “Vessel Supply Base and Storage Depot,” PRA 2, and the public disclosures at the Port’s January 13, 2015 public meeting identify the use of Terminal 5 as “Vessel Berth Moorage and Provisioning.” Staff Briefing at 6.

49. The lease abandons the prior description of the use. In its place, the lease authorizes use of Terminal 5 “for a cargo terminal” and it recites the Seattle shoreline rule’s definition of cargo terminal as “a transportation facility in which quantities of goods or container cargo are stored without undergoing and manufacturing process, transferred to other carriers or stored outdoors in order to transfer them to other locations.” Lease § 5.1.

50. The Port had no basis for characterizing the use of Terminal 5 planned by Foss as a cargo terminal. Neither Foss nor Shell will be in the business of transporting goods from one location to another. Terminal 5 may receive provisions or equipment that would be loaded onto

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1 the drilling fleet vessels before they ship out to the Arctic, but the provisioning activity is not for  
2 the purpose of transshipping the goods or cargo to another location.

3 51. At the public meeting, a representative of Foss indicated that maintenance  
4 activities would be part of the homeport uses, yet the Port failed to identify what types of vessel  
5 maintenance and repairs would take place under the lease. When pressed, it indicated that “[i]t is  
6 not possible to anticipate the specific types of cargo activities that will take place at Terminal 5  
7 in the next months and years.” PRA 145. This oversight is significant given the accidents and  
8 near-disasters encountered by Shell’s Arctic fleet in 2012, felony violations of environmental  
9 laws by the contractor that runs one of the two drill ships that could come to Terminal 5, and a  
10 federal government report chastising Shell for failing to oversee its contractors effectively.

11 52. The description of the use of Terminal 5 in the lease and SEPA documentation  
12 cannot be reconciled with the Port’s public disclosures about the nature of the activities likely to  
13 take place at Terminal 5. By failing to make certain the proposal is properly defined, the Port  
14 acted illegally, arbitrarily and capriciously and in violation of SEPA Resolution § 9.

15 II. THE PORT ACTED ILLEGALLY, ARBITRARILY AND CAPRICIOUSLY, AND IN  
16 VIOLATION OF SEPA BY INVOKING THE LEASING CATEGORICAL  
17 EXEMPTION (WAC 197-11-800(5)) WHEN THE NEW USE AS A HOMEPORT IS  
18 NOT ESSENTIALLY THE SAME USE AS THE PRIOR USE AS CARGO  
19 TERMINAL.

20 53. Plaintiffs reallege and incorporate ¶¶ 1-45.

21 54. The SEPA categorical exemption for leases applies only “when the property use  
22 will remain essentially the same as the existing use for the term of the agreement. . .” WAC 197-  
23 11-800(5).

24 55. Terminal 5 has been designated and used as a cargo terminal for many decades,  
25 including in the Port’s Port Management Agreement with the Washington Department of Natural  
26

1 Resources for management of state-owned aquatic lands, PRA 38, 56, in the Port's 1985 long-  
2 range plan, PRA 227, in the Port's 1991 Container Plan, PRA 228, and in the Port's Shoreline  
3 Substantial Development Permit, PRA 136, 140, 156.

4 56. Under a 1985 lease, Eagle Marine Services operated a marine container terminal  
5 at Terminal 5 for nearly three decades. Eagle Marine received and stored large quantities of  
6 container cargo and then transferred the cargo to other carriers for shipment to other locations.

7 57. The Port is planning a modernization project to enable Terminal 5 to handle larger  
8 container ships. The Port terminated the lease with Eagle Marine in July 2014, upon determining  
9 that major cargo terminal operations would interfere with the Port's planned modernization  
10 project.

11 58. The Seattle Municipal Code defines "cargo terminal" as a "transportation facility  
12 in which quantities of goods or container cargo are stored without undergoing any manufacturing  
13 processes, transferred to other carriers or stored outdoors in order to transfer them to other  
14 locations." Seattle Municipal Code 23.60.906. To qualify as a cargo terminal, a transportation  
15 facility must: (1) receive and store quantities of goods or cargo; (2) transfer the goods or cargo to  
16 other carriers (3) that transport the goods or cargo to other locations. Transshipment is the key  
17 requirement for a transportation facility to meet the City's definition of "cargo terminal."

18 59. Foss does not plan to operate Terminal 5 as a cargo terminal. Foss does not plan  
19 to engage in the transshipment of quantities of goods or cargo to and from vessels in order that  
20 they may be shipped to other locations. Foss has proposed to use Terminal 5 for activities that  
21 include mooring, repairing, and servicing the vessels that are part of Shell's Arctic drilling fleet.  
22 Foss plans to receive some provisions and equipment that will be loaded onto vessels that are  
23 part of the Shell drilling fleet and are moored at the pier.



1           60.     The lease does not impose express limits on the activities that would be permitted  
2 at Terminal 5. A Port document states “[i]t is not possible to anticipate the specific types of  
3 cargo activities that will take place at Terminal 5 in the next months and years.” PRA 145.

4           61.     The vessels in Shell’s Arctic drilling fleet have sustained extensive damage in  
5 past years. The weather conditions in the Arctic can be severe. Heavy storms, with strong winds  
6 and roaring waves, have damaged vessels. One of the drill ships that could call at Terminal 5  
7 violated environmental laws, had serious water pollution equipment malfunctions, and  
8 discharged oily water both in transit and at port. During the off-season, vessels in Shell’s Arctic  
9 drilling fleet have needed extensive maintenance and repairs. Vessel repairs and maintenance  
10 are likely to take place at Terminal 5 under the lease.

11           62.     In the briefing at the January 13, 2015 public meeting, Port staff identified the  
12 proposed use of Terminal 5 as “Vessel Berth Moorage and Provisioning.” Staff Briefing at 6.  
13 The Seattle Municipal Code defines “commercial moorage” as “a parking and moorage use in  
14 which a system of piers, buoys, or floats is used to provide moorage, primarily for commercial  
15 vessels, except barges, for sale or rent, usually on a monthly or yearly basis.” Seattle Municipal  
16 Code 23.60.906. The definition of commercial moorage in the Seattle Municipal Code specifies  
17 that minor vessel repair “is often accessory to or associated with the use.” *Id.* The Seattle  
18 Municipal Code’s definition of cargo terminal does not expressly authorize vessel repair and  
19 maintenance activities. Seattle Municipal Code 23.60.906.

20           63.     The Port’s CEO has stated that major vessel repairs would occur in a shipyard,  
21 rather than at Terminal 5. The lease appears to allow other vessel repairs and maintenance to  
22 take place at Terminal 5. Response at 2.

1           64.     Foss obtained a short-term license from the Port to make repairs and changes to  
2 Terminal 5. One such change consisted of replacing the prior bollards with heavy-capacity  
3 bollards strong enough for the vessels that could call at Terminal 5 under the lease. This  
4 modification is evidence that the use of Terminal 5 under the Foss lease differs from the use  
5 under the prior lease.

6           65.     SEPA categorical exemption WAC 197-11-800(5) applies to leases "only when  
7 the property use will remain essentially the same as the existing use for the term of the  
8 agreement." The Port has entered into a lease for a use of Terminal 5 that is not essentially the  
9 same as the prior use of Terminal 5. The use of Terminal 5 under the lease will not be  
10 essentially the same as the cargo terminal use designated in the Port's long-range plan, Container  
11 Plan, the Port Management Agreement, and the Port's Shoreline Substantial Development  
12 Permit. By invoking the leasing categorical exemption contained in WAC 197-11-800(5), the  
13 Port acted illegally, arbitrarily and capriciously and in violation of the terms of the SEPA  
14 exemption.

15     III.     THE PORT ACTED ILLEGALLY, ARBITRARILY AND CAPRICIOUSLY, AND IN  
16               VIOLATION OF THE SHORELINE MANAGEMENT ACT, THE CITY OF  
17               SEATTLE'S SHORELINE RULES, AND ITS SHORELINE SUBSTANTIAL  
18               DEVELOPMENT PERMIT BY FAILING TO OBTAIN A REVISION TO ITS  
19               SUBSTANTIAL SHORELINE DEVELOPMENT PERMIT BEFORE ENTERING  
20               INTO A LEASE FOR A USE OF TERMINAL 5 FOR PURPOSES OTHER THAN A  
21               CARGO TERMINAL.

22           66.     Plaintiffs reallege and incorporate ¶¶ 1-45.

23           67.     The SMA prohibits substantial development activities without a permit from the  
24 appropriate local jurisdiction. RCW 90.58.140. Operation of Terminal 5 is a substantial  
25 development requiring a permit under the SMA. The City of Seattle has the authority to permit  
26 substantial shoreline development activities at the Port of Seattle. RCW 90.58.050. Under the

1 City of Seattle's Shoreline rules, it is unlawful to use a property "in any manner that is not  
2 permitted by the terms" of the governing shoreline permit. Seattle Municipal Code 23.90.002.

3 68. The City of Seattle has issued a Shoreline Substantial Development Permit to the  
4 Port of Seattle (project number 94004118, 1996). Under this permit, the designated use of  
5 Terminal 5 is use as a cargo terminal. PRA 136. This permit remains in effect.

6 69. The Seattle Municipal Code defines a "cargo terminal" as a "transportation  
7 facility in which quantities of goods or container cargo are stored without undergoing any  
8 manufacturing processes, transferred to other carriers or stored outdoors in order to transfer them  
9 to other locations." Seattle Municipal Code 23.60.906. Under this definition, goods and cargo  
10 transferred to or stored at the terminal must be transferred to other carriers in order to be  
11 transferred to other locations. Transshipment of good and cargo is a required activity in order for  
12 a facility to be a cargo terminal.

13 70. Foss does not plan to operate Terminal 5 as a cargo terminal. Foss does not plan  
14 to engage in the transshipment of quantities of goods or cargo to other locations. Foss plans to  
15 use Terminal 5 for mooring vessels that are part of Shell's Arctic drilling fleet. Foss plans to  
16 receive some provisions and equipment that will be loaded on vessels moored at the pier. At the  
17 January 13, 2015 public meeting, Port staff characterized the proposed use of Terminal 5 as  
18 "Vessel Berth Moorage and Provisioning." Staff Briefing at 6.

19 71. The vessels in Shell's Arctic drilling fleet have sustained extensive damage in  
20 past years. During the off-season, vessels in Shell's Arctic drilling fleet have needed extensive  
21 maintenance and repairs. Vessel repair and maintenance activities are likely to take place at  
22 Terminal 5.

1           72.     The activities Foss plans to conduct at Terminal 5 meet the definition of  
2 commercial moorage in Seattle's shoreline rules. Seattle Municipal Code 23.60.906. The  
3 Seattle Municipal Code allows minor vessel repair and maintenance to take place as part of  
4 commercial moorage activities, but does not expressly allow such vessel repair and maintenance  
5 activities to take place at cargo terminals.

6           73.     The Port neither sought nor received a revision to the Shoreline Substantial  
7 Development Permit covering Terminal 5 for the purpose of allowing the use to change from a  
8 cargo terminal to a homeport and commercial moorage facility. In so failing, the Port deprived  
9 the public of the review process required for permit revisions.

10          74.     By failing to obtain a permit revision and subsequently entering into a lease for  
11 use of Terminal 5 for purposes that do not meet the definition of "cargo terminal" in Seattle's  
12 shoreline rules, the Port has authorized use of Terminal 5 in a manner that is not permitted by the  
13 terms of its Shoreline Substantial Development Permit in violation of Seattle Municipal Code  
14 23.90.002. Authorizing a use that differs from that approved in a Shoreline Substantial  
15 Development Permit is prohibited under the SMA without a permit revision or issuance of a new  
16 permit, depending on the magnitude of the change in use. WAC 173-27-100. The Port did not  
17 seek approval from the City of Seattle in the form of either a permit revision or issuance of a new  
18 permit for a change in use for Terminal 5. The Port acted contrary to the Shoreline Management  
19 Act, Ecology's shoreline rules, and Seattle's shoreline rules by not seeking and obtaining a  
20 revision of its current Shoreline Substantial Development Permit before authorizing use of  
21 Terminal 5 for purposes other than a cargo terminal that will engage in the transshipment of  
22 goods and cargo. WAC 173-27-100; SMC 23.60.076.

75. The Port acted illegally, arbitrarily and capriciously, and in violation of the SMA, Ecology's shoreline rules, and Seattle's shoreline rules by failing to seek and obtain a revision to its shoreline permit and by allowing uses of Terminal 5 that are not permitted by the terms of the Port's current Shoreline Substantial Development Permit.

RELIEF REQUESTED

76. Plaintiffs respectfully request that the Court review the Port's actions and decisions, declare that the Port acted illegally, arbitrarily and capriciously and in violation of the law, and order relief as follows:

**WHEREFORE, Plaintiffs ask that the Court:**

1. Enter an order declaring the lease between the Port and Foss to be invalid, null and void;

2. Enter an order declaring that the Port acted illegally, arbitrarily and capriciously, and in violation of its SEPA Resolution by not properly identifying the project;

3. Enter an order declaring that the Port acted illegally, arbitrarily and capriciously, and in violation of SEPA by invoking the categorical exemption for leases when the use of Terminal 5 will not remain essentially the same as the prior use, as required by the terms of the categorical exemption;

4. Enter an order declaring that the Port acted illegally, arbitrarily and capriciously, and in violation of the Shoreline Management Act, Ecology's shoreline rules, and Seattle's shoreline rules by failing to seek and obtain a permit revision and by subsequently allowing use of Terminal 5 for activities that do not fall within the use authorized in the Port's Shoreline Substantial Development Permit;

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## **EXHIBIT 2**

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SUPERIOR COURT

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

PUGET SOUNDKEEPER ALLIANCE, et al.

Plaintiffs,

v.

PORT OF SEATTLE, et al.

Defendants.

NO. 15-2-05143-1 SEA

ORDER GRANTING PLAINTIFFS'  
MOTION FOR WRIT OF REVIEW

THIS MATTER came before the Court on Plaintiffs' Motion for Expedited Writ of Review. The Court has considered all of the records and files including:

1. Plaintiffs' Complaint and Exhibits 1-5;
2. Plaintiffs' Motion;
3. The Port of Seattle's Response;
4. Foss Maritime Company's Opposition;
5. Plaintiffs' Reply.

The Plaintiffs challenge the Port of Seattle's entry into a lease with the Foss Maritime Company which would allow Terminal 5 to serve as a homeport for Shell's Arctic Drilling fleet. The Plaintiffs contend that the Port entered into the lease without first conducting a State Environmental Policy Act (SEPA) review. They also allege that the Port entered into the



1 lease without first obtaining amendments to its Shoreline Substantial Development Permit in  
2 violation of the Shoreline Management Act (SMA).

3 It is the Plaintiffs' position that the Port acted arbitrarily, capriciously or illegally  
4 when it entered into the lease with Foss Maritime because it relied on an exemption to bypass  
5 SEPA review, specifically, that the use of Terminal 5 will remain the same under the new  
6 lease. WAC 197-11-800(5)(c). Plaintiffs claim that the Port purportedly leased Terminal 5 for  
7 use as a cargo terminal but that its actual use will be as a homeport for an Arctic drilling fleet.  
8 The Plaintiffs are concerned about toxic runoff from vessel repairs and maintenance as well as  
9 water pollution from the vessels while at the Port and during transit.

10 The Plaintiffs also argue that the Port acted arbitrarily, capriciously and illegally when  
11 it failed to obtain a permit prior to allowing Terminal 5 to be used as a vessel and moorage  
12 facility in violation of the SMA. The existing permit only allows Terminal 5 to be used as a  
13 cargo terminal. WAC 173-27-100.

14 The Washington State Constitution recognizes the right to seek discretionary review of  
15 an administrative agency decision under the court's inherent constitutional power. Const. art.  
16 IV, §§ 4, 6. The scope of review is limited to whether the agency's actions were arbitrary,  
17 capricious, or illegal, thus violating a claimant's fundamental right to be free from such action.  
18 "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review  
19 to determine whether the proceedings below were within the lower tribunal's jurisdiction and  
20 authority." *Saldin Secs., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370  
21 (1998). The right to be free from arbitrary, capricious and illegal action is itself a fundamental  
22 right that is subject to review. *Pierce County Sheriff v. Civil Service Commission*, 98 Wn.2d  
23 690, 693-94, 659 P.2d 648 (1983). However, the court should only accept review if the

1 appellant can allege facts that, if verified, would establish that the lower tribunal's decision  
2 was illegal or arbitrary and capricious. *Federal Way School Dist. v. Vinson*, 172 Wn.2d 756,  
3 769, 261 P.3d 145 (2011). Arbitrary and capricious action is “willful and unreasoning action,  
4 taken without regard to or consideration of the facts and circumstances surrounding the  
5 action.” *Id.* (citing *Foster v. King County*, 83 Wn. App. 339, 347, 921 P.2d 552 (1996)).  
6 Agency action is arbitrary and capricious if there is no support in the record for the action. *Id.*  
7 at 669 n.14. In the constitutional certiorari context, illegality refers to an agency's jurisdiction  
8 and authority to perform an act. *Id.* at 770. The review by constitutional writ is not a full  
9 appellate review on the merits. *Bridle Trails Community Club v. City of Bellevue*, 45 Wn.  
10 App. 248, 251-52, 724 P.2d 1110 (1986). It is limited to a review of the record to determine  
11 if the action was arbitrary and capricious or illegal. *Id.* at 252.

#### 12 The Shoreline Management Act

13 The Port argues that there is no private right of action to enforce the SMA. This court  
14 agrees. The provision in RCW 90.58.230 that private persons may sue on behalf of  
15 themselves and others similarly situated is subject to the requirements of CR 23 relating to  
16 class actions. *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wn.2d 203, 214–15, 571  
17 P.2d 196 (1977).

#### 18 The State Environmental Policy Act

19 A review of the record indicates that a staff briefing memo to Commission members  
20 dated January 8, 2015, indicated that “Vessel Berth Moorage and Provisioning” would take  
21 place at Terminal 5. This would include receiving, inventorying and staging equipment and  
22 supplies that would be loaded to a fleet of vessels, including exploration drill rigs, ice-  
23 breakers, provisioning vessels, environmental response vessels, tugs and barges for seasonal

1 operations in Alaska. Compl. Ex 3, p. 6. Under the Seattle Municipal Code, minor vessel  
2 repair is often associated with commercial moorage. SMC 23.60.906. In his February 11,  
3 2015, letter, Theodore Fick, Port CEO, stated that major repairs would only occur at permitted  
4 shipyards. At the Commission meeting on January 13, 2015, the Port Commissioners voted to  
5 allow the Port to enter into a lease with Foss. The lease was signed on February 9, 2015, and  
6 effective immediately. Under the terms of the lease, lessee (Foss) shall use the premises for a  
7 cargo terminal which means a transportation facility in which quantities of goods or container  
8 cargo are stored without undergoing any manufacturing process, transferred to other carriers  
9 or stored outdoors in order to transfer them to other locations. Lease, sec. 5.1. The permitted  
10 uses under the terms of the lease seem to contradict the expected uses outlined in the Port of  
11 Seattle's staff briefing memo. The staff memo goes on to state that the "fleet of vessels" (8)  
12 would depart for exploration in June and return to "homeport" at Terminal 5 late summer for  
13 over-wintering October through May. These activities appear to be qualitatively different than  
14 Eagle Marine Services' previous use of Terminal 5 as a marine container terminal.

#### 15 Alternative Remedy

16 The Port argues that the constitutional writ of review is legally unavailable to the  
17 Plaintiffs because they have the alternative remedy of seeking Declaratory Judgment. There  
18 are three methods to seek judicial review of an administrative decision: (1) direct appeal, (2)  
19 statutory writ of review, and (3) constitutional writ of review. *Bridle Trails Community Club*  
20 45 Wn. App. at 253. It is only when a statutory writ of review or direct appeal is available that  
21 the court has no discretion to issue a constitutional writ. *Torrance v King County*, 136 Wn.2d  
22 783, 793, 966 P.2d 891 (1998). In this case, there is no ordinance or statute that gives  
23 Plaintiffs the right to appeal the Port's decision to enter into the lease. Nor do they have a

1 statutory writ of review as this was not a quasi-judicial action. The option to seek Declaratory  
2 Judgment does not preclude the issuance of a constitutional writ.

3 Therefore, the Court orders that Plaintiffs' motion for a writ of review is GRANTED.  
4 Counsel are directed to confer to determine the appropriate "record" in this matter and arrange  
5 to have it filed with the court for review.

6  
7 DATED this \_\_\_\_ day of March, 2015.

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9 \_\_\_\_\_  
The Honorable Mariane C. Spearman  
Chief Civil Judge  
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King County Superior Court  
Judicial Electronic Signature Page

Case Number: 15-2-05143-1  
Case Title: PUGET SOUNDKEEPER ALLIANCE ET AL VS SEATTLE  
PORT OF ET AL  
Document Title: ORDER

Signed by: Mariane Spearman  
Date: 3/20/2015 10:11:57 AM



Judge/Commissioner: Mariane Spearman

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This document is signed in accordance with the provisions in GR 30.

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O=KCDJA, CN="Mariane  
Spearman:pv5n4Xr44hGCKOA5YYhwmw=="

## **EXHIBIT 3**



May 22, 2015

Tracy Harris  
Northwest Operations Manager  
Shell Corporation  
[charles.harris@shell.com](mailto:charles.harris@shell.com)

Shell Energy, Corporate Office  
601 W 1st Ave #1700  
Spokane, WA 99201

Dear Mr. Harris,

The Washington State Department of Natural Resources (DNR) is the proprietary manager of 2.6 million acres of state-owned aquatic lands, including the West Waterway adjacent to Terminal 5 in Seattle. As you know, Foss Maritime recently entered into a lease with the Port of Seattle for the use of Terminal 5 to provide support for the Shell arctic drilling fleet. Pursuant to that agreement, the mobile drilling platform Polar Pioneer is currently located adjacent to Terminal 5 in the West Waterway.

As the manager of the lands over which the Polar Pioneer is located, DNR would like additional information regarding Shell's proposed use of the area. In particular, DNR would like to know how long Shell plans to keep the Polar Pioneer in its present location. DNR understands that the Polar Pioneer may depart for Alaska for operations beginning sometime this summer. DNR would like to know how long Shell plans to keep the Polar Pioneer at Terminal 5 before it departs for Alaska. DNR would also like to know whether Shell plans to return the Polar Pioneer to Terminal 5 after it departs this summer and, if so, how long Shell plans to keep the Polar Pioneer at Terminal 5 upon its return. Finally, DNR would like to know if Shell plans to keep other equipment or vessels in the waterway adjacent to Terminal 5 and, if so, for how long.

Generally, activities on state-owned aquatic lands that interfere with the use of those lands by the general public require authorization from DNR. No authorization is required from DNR, however, for navigation over state owned aquatic lands. Accordingly, short-term use of the area adjacent to Terminal 5 incidental to navigation, such as temporary moorage for purposes of loading and unloading a vessel, would not create a need for a use authorization from DNR.

State owned aquatic lands which have been platted as waterways are generally reserved as highways for navigation under state law. Uses that interfere with navigation may not be appropriate in waterways. That conclusion is especially true with respect to the West Waterway. The West Waterway from the Spokane Street Bridge to Elliott Bay is bounded on the west and east by an outer harbor line which designates the outer limit of the harbor area adjacent to the waterway. Under



Tracy Harris  
May 22, 2015  
Page 2 of 2

Article XV, Section 1 of the State Constitution the state may not "give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines."

Because the state constitution prohibits private parties from acquiring rights to the waters beyond an outer harbor line, private parties may not occupy the West Waterway adjacent to Terminal 5 for long-term moorage or other exclusive uses. Consistent with the state constitution and the waterway designation, however, the area adjacent to Terminal 5 waterward of the outer harbor line may be used for temporary moorage incident to navigation.

So that DNR may determine whether Shell's proposed use of the West Waterway is consistent with its waterway designation and the state constitution, DNR requests that you provide the information identified above regarding Shell's current and future use of the waterway and its expected duration by close of business on Monday, June 1, 2015.

Sincerely,

A handwritten signature in black ink, appearing to be 'Megan Duffy', with a stylized, flowing script.

Megan Duffy  
Deputy Supervisor for Aquatics and Geology

c: Matthew Randazzo, Senior Advisor to the Commissioner of Public Lands  
Mr. Paul Stevens, President & CEO, Foss Maritime Company