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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of
FOSS MARITIME COMPANY
From an Interpretation by the Director,
Department of Planning & Development.

Hearing Examiner Files: S-15-001 & S-15-002
Department Reference: 3020324

FOSS MARITIME’S OPPOSITION
TO MOTION TO INTERVENE

In the Matter of the Appeal of
PORT OF SEATTLE
From an Interpretation by the Director,
Department of Planning & Development.

I. INTRODUCTION

Foss Maritime Company (“Foss”) respectfully requests that the Hearing Examiner deny the Motion to Intervene (“Motion”) filed by Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club and Washington Environmental Council (collectively, “Proposed Intervenors”) in this appeal.

II. STATEMENT OF FACTS

The relevant facts are set forth in the Notice of Appeals filed herein.

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2 **III. STATEMENT OF THE ISSUE**

3 Should the Hearing Examiner grant the Motion when Foss has demonstrated that
4 Proposed Intervenors do not satisfy the Hearing Examiner Rule of Procedure Rule 3.09 standards
5 to allow intervention?
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7 **IV. EVIDENCE RELIED UPON**

8 This Motion relies upon the pleadings and papers on file in this matter.

9 **V. ARGUMENT**

10 The Hearing Examiner Rules of Procedure (“HER” or “Rules”) on intervention state:

- 11
- 12 (a) Intervention is not a substitute means of appealing a decision for those who could
13 have appealed but failed to do so.
 - 14 (b) A person, organization or other entity who has not filed an appeal may request by
15 motion to participate in the appeal. The request must state how the person or
16 entity making it is affected by or interested in the matter appealed, and must
17 demonstrate a substantial interest that is not otherwise adequately represented.
18 Except as provided in HER 3.09(d) below, a written request for intervention must
19 be filed with the Hearing Examiner and served on all parties to the appeal no later
20 than 10 business days prior to the scheduled hearing date.
 - 21 (c) In determining the merits of a request for intervention, the Hearing
22 Examiner shall consider whether intervention will unduly delay the hearing
23 process, expand the issues beyond those stated in the appeal, or prejudice the
24 rights of the parties. If intervention is granted, the Hearing Examiner may limit its
25 nature and scope.
 - 26 (d) The Hearing Examiner may allow a substantially interested person, organization,
27 or other entity who has not filed an appeal to intervene for the sole purpose of
28 preserving the right to appeal. Such intervention may be permitted at any time up
to the start of the hearing.

HER 3.09.

1 Proposed Intervenors have failed to satisfy HER 3.09 for intervention in this appeal for
2 three reasons. Accordingly, Foss respectfully requests that the Hearing Examiner deny the
3 Motion.

4 In order for Proposed Intervenors to attempt to establish standing, they must demonstrate
5 that they have a substantial interest in the appeal. This purported interest is their “longstanding
6 interests in preserving and protecting Puget Sound, Elliott Bay and the Duwamish River,”
7 interests which it claims will be “affected by the outcome of this appeal.” “Turning a
8 longstanding container terminal into a homeport calls for scrutiny by the City of Seattle as part of
9 the shoreline permitting process to ensure pollution from the vessels, maintenance, and repair
10 activities is prevented.” Motion for Intervention at 5.

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13 The Motion is misconceived for several reasons. First, the foundational element of
14 Proposed Intervenors’s “interest” – that its members will be “harmed by the pollution impacts
15 from vessels moored at Terminal 5” – is not at issue in this Appeal, nor can the outcome of this
16 Appeal affect that interest in any way. This Appeal relates solely to the Code classification of
17 certain uses conducted at Terminal 5; whether those uses could result in pollution is not a
18 criterion the Examiner will be applying in resolving the appeal, nor will the outcome of the
19 Appeal – the Examiner’s decision regarding such classification – create a greater or lesser
20 likelihood of “pollution” in Puget Sound.

21
22 Even if the fear of “pollution” were a proper interest to support intervention in this
23 Appeal, Proposed Intervenors have not indicated how the outcome of this Appeal could lead to
24 an increase in such pollution. Absent the potential for such an increase, this “interest” of
25 Proposed Intervenors would not be implicated in any way by the outcome of this Appeal. *See,*
26 *e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (denying motion to
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1 intervene under Fed. R. Civ. P. 24(a)(2) because even though “a prospective intervenor's interest
2 need only be protected under some law, the interest must relate to the litigation in which it seeks
3 to intervene.”) (internal citation omitted). But the Appeal will not affect the likelihood of such
4 “pollution” – it will only result in a ruling on the classification of certain uses at Terminal 5.¹
5

6 Moreover, Proposed Intervenors fail to provide, beyond their unsupported assertions, any
7 reason to believe that “pollution” would result from the uses undertaken by Shell and Foss at
8 Terminal 5, and at levels greater than other uses to which Terminal 5 might be put under existing
9 permits. If those activities caused “pollution,” but at levels less than other uses at Terminal 5,
10 then even under Proposed Intervenors’s confused claim for intervention, it would have no
11 interest at stake.
12

13 So Proposed Intervenors’s claim for intervention is built upon a pyramid of erroneous
14 and speculative claims. To justify intervention on the theory Proposed Intervenors have
15 proposed, the following must be true:
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- 17 • The likelihood of “pollution” in Elliott Bay must have a role in this Appeal.
- 18 • The likelihood of “pollution” in Elliott Bay must have the potential to be affected by the
19 outcome of the Appeal.
- 20 • The Shell/Foss uses at Terminal 5 must be likely to create “pollution.”
- 21 • And any such “pollution” must be likely to be at levels greater than might otherwise
22 occur at Terminal 5.
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27 ¹ In this respect, Proposed Intervenors attempt to establish a false choice about uses – that the uses at Terminal 5
28 constitute a “homeport use”, as though this term had any significance under the Code. But “homeport” is not a term
used under the Land Use Code.

1 But Proposed Intervenors do not even *address* any of these issues in their motion, let alone
2 undertake to demonstrate they are true. Ultimately, that demonstration is not possible, since
3 “pollution” is not an issue in this Appeal, nor one that will be affected by its outcome.

4 Second, Proposed Intervenors’s interests are adequately represented by another party.
5 Proposed Intervenors seeks to intervene to ensure protection against alleged pollution of Elliott
6 Bay. To the extent that these issues are properly at interest in this Appeal (which they are not),
7 the City and its review processes will ensure that these issues are addressed. Indeed, proposed
8 Intervenors do not explain how its arguments regarding those issues within the Hearing
9 Examiner’s jurisdiction will differ from the City’s defense of its interpretation of its Code. *See,*
10 *e.g., Spokane Cnty. v. State*, 136 Wn.2d 644, 650, 966 P.2d 305, 308 (1998) (denying a union’s
11 motion to intervene even though the union may be affected by the outcome of the case because
12 its interest is not direct and the union presented no argument that is different from the arguments
13 advanced by the Public Employment Relations Commission).

14 Finally, Proposed Intervenors have failed to demonstrate that any of its members can
15 establish the interest necessary to justify intervention. Even if they were relevant, the allegations
16 pled in the Motion are not factually supported in the record. Instead of offering declarations of
17 its members in support of its factual claims, the Motion merely offers unsupported allegations of
18 counsel and attaches pleadings and correspondence from other forums.

19 Proposed Intervenors’s interest in this appeal is only political. They seek the opportunity
20 to participate in this Appeal so they can further this agenda, not because they have a
21 demonstrable interest in this Appeal that warrants intervention. Their disregard for the purpose
22 of this proceeding is evident: they makes no effort to relate their purported “interest” to this
23 Appeal; they fail to offer any factual support for their alleged interest, relying solely on the
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1 testimony of their counsel; and they do not even make a pretense of understanding the Code
2 governing this proceeding, instead railing against the dangers of a "homeport" use of Terminal 5,
3 as though that were even an issue before the Examiner.

4 The Examiner should decline the invitation to allow Proposed Intervenors and their
5 soapbox to join this proceeding. In the alternative, if Proposed Intervenors are permitted to
6 intervene, such intervention should be limited to providing briefing to the Examiner, and they
7 should not be permitted to participate as a party during the evidentiary portion of the Appeal.
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9 **VI. CONCLUSION**

10 Proposed Intervenors do not meet the intervention criteria set forth in HER 3.09 in this
11 Appeal. For these reasons, Foss respectfully requests that the Hearing Examiner deny the
12 Motion to Intervene.
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14 Respectfully submitted this 2d day of June, 2015.


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