BEFORE THE HEARING EXAMINER
THE CITY OF SEATTLE

In the Matter of the Appeals of the **FOSS MARITIME COMPANY AND PORT OF SEATTLE,** from an Interpretation Issued by the Director, DEPARTMENT OF PLANNING AND DEVELOPMENT,	Hearing Examiner File: S-15-001 S-15-002 Department Reference: 3020324 **PORT OF SEATTLE'S OPPOSITION TO MOTION TO INTERVENE**

On May 27, 2015, the Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club, and Washington Environmental Council ("Proposed Intervenors") filed a motion to intervene in this consolidated appeal by the Port of Seattle and Foss Maritime Company of Interpretation No. 15-001 issued by the Department of Planning and Development (DPD) on May 7, 2015.

The Port of Seattle opposes the proposed intervention for the following reasons.

First, the motion is unsupported by declaration or other evidence, and depends upon repeated factual allegations that require the Hearing Examiner to make unwarranted factual inferences, e.g., that resolution of the appeal in favor of the Port and Foss will lead to pollution in Puget Sound.

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Second, the motion does not once refer to the code provisions at issue in this appeal, or make any showing that Proposed Intervenors have anything to contribute to the appeal other than political rhetoric. Rhetoric substitutes for both facts and analysis in their motion, e.g.:

> Turning a longstanding container terminal into a homeport calls for scrutiny by the City of Seattle as part of the shoreline permitting process to ensure pollution from the vessels, maintenance, and repair activities is prevented.

(Motion at p. 5.) Compressed into this single sentence are three of the rhetorical themes that Proposed Intervenors employ throughout their motion:

- Proposed Intervenors refer to Terminal 5, the subject of the Interpretation, as a "container terminal," but there is no such use in the City's Shoreline Master Program (SMP); Terminal 5 is a "cargo terminal" that prior tenants used primarily for container cargo, but a new tenant – and the loading and unloading of non-containerized as well as containerized cargo – are not changes in "cargo terminal" use;
- "Homeport" is a term not used anywhere in the SMP but used repeatedly and pejoratively in the motion; and
- Allegations about "pollution" have nothing to do with the issues in this appeal, yet Proposed Intervenors repeatedly make unsupported allegations about pollution and ask the Hearing Examiner to accept such allegations as a basis for intervention.

Even though Proposed Intervenors' motion asserts that they have no plans to raise new issues in this appeal, their motion is entirely about issues not raised by the Port or Foss.

Third, the motion is less than straightforward. In March of this year, the Proposed Intervenors filed a lawsuit against the Port and Foss in King County Superior Court, Cause No. 15-2-05143-1 SEA, seeking a constitutional writ of certiorari and a declaratory judgment on two grounds: (1) that the lease between the Port and Foss violates the Shoreline Management Act (SMA), and (2) that the Port violated SEPA by determining that the lease was categorically exempt from SEPA. When the Proposed Intervenors brought a motion seeking issuance of the

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writ on both grounds, the Port demonstrated in its Response that the Proposed Intervenors cannot privately enforce the SMA, and Judge Spearman agreed in her Order:

> The Port argues that there is no private right of action to enforce the SMA. This court agrees.

(Order at p. 3 (Dkt. 27).)

As a result of Judge Spearman's ruling, the only issue that remains in the superior court action is the Proposed Intervenors' challenge to the Port's action as SEPA lead agency, an issue that is manifestly not part of this appeal of the DPD Interpretation. Yet the Proposed Intervenors tell the Hearing Examiner that one of the reasons they should be allowed to intervene is that:

> . . . an adverse ruling [in this appeal of the DPD Interpretation of the Shoreline Master Program] may undermine the similar legal claims Soundkeeper is litigating in King County Superior Court.

(Motion at p. 10.)

There are no similar legal claims in the SEPA appeal pending in superior court. By seeking to intervene in this appeal of DPD's Interpretation, the Proposed Intervenors seek to do through the back door what the superior court has ruled they cannot do through the front door. In order to meet the test in Rule 3.09 of the Hearing Examiner Appeal Rules, however, the Proposed Intervenors must demonstrate that they have "a substantial interest that is not otherwise adequately represented." Their own motion demonstrates that their substantial interest is in environmental and political issues that are not the subject of this appeal.

Proposed Intervenors seek to intervene as Respondents rather than Appellants, but their motion demonstrates that their issues are not the issues raised by the Port and Foss and that they intend to raise new issues despite their assertion that they have no plans to do so. Proposed Intervenors admit as much by acknowledging that their issues are not those of Respondent DPD: "Proposed Intervenors' specific environmental focus is narrower than the City's broader permitting considerations." (Motion at p. 11.) But there is no narrow environmental focus to

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this appeal, which is about the use provisions of the City's SMP and the meaning and integrity of DPD's interpretation of those use provisions.

Proposed Intervenors should be required to pursue their "specific environmental focus" in another forum, and their motion to intervene should be denied. If they are allowed to intervene, their participation should be strictly limited to the issues raised by the appeals of the Port and Foss.

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

PORT OF SEATTLE

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