

RECEIVED BY
2015 JUN -3 PM 3:11
OFFICE OF
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
) (DPD Project No. 3020324)
FOSS MARITIME COMPANY)
)
from an Interpretation by the Director, Department)
of Planning and Development.)

_____)
) Hearing Examiner File No. S-15-002
In the Matter of the Appeal of the:) (DPD Project No. 3020324)

PORT OF SEATTLE,)
)
from Interpretation No. 15-001 of the Director of)
the Department of Planning and Development.)
)
_____)

REPLY IN SUPPORT OF
SOUNDKEEPER'S MOTION TO
INTERVENE

Proposed Intervenors, Puget Soundkeeper Alliance *et al.*, submit this brief reply to the Port's and Foss's objections to Soundkeeper's motion to intervene. Although the Port and Foss raise various, hyperbolic attacks on Soundkeeper's intentions with respect to intervention, none of their objections undermine the controlling standards of affected interests and inadequate representation by existing parties that control the Hearing Examiner's decision here.

First, Washington courts routinely grant intervention requests, as the requirements for intervention are "liberally construed to favor intervention." *Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*, 98 Wn. App. 618, 623 (1999). The Port and Foss complain that Soundkeeper's

1 allegations of affected interests in environmental harms and impairment of public access to the
2 water around Terminal 5 are not supported by specific declarations, but they notably do not
3 dispute the real-world interest that Soundkeeper has in the health and protection of Elliott Bay.
4 This appeal will likely determine whether the Port is required to seek a new shoreline permit for
5 use of Terminal 5 as an Arctic drill rig terminal. A new permitting process would include
6 environmental review, public involvement, and potential mitigation measures, all of which bear
7 directly on Soundkeeper's conservation and public access interests.¹

8 Neither the Port nor Foss address Soundkeeper's strong interest in monitoring the area
9 around Terminal 5, including the mouth of Longfellow Creek. That interest is likely to be
10 impaired by Shell's use of Terminal 5 because of the exclusion zone set around every Shell
11 vessel. That harm is described in the Declaration of Chris Wilke at paragraph 35. Notice of
12 Filing, Ex. 3.² That likely impairment is in addition to Soundkeeper's strong conservation
13 interests, also described in the declarations. *See* Wilke Decl. at ¶23; North Decl. ¶ 4. If the
14 City's interpretation is affirmed, these harms would be largely redressed as the Port would need a
15 new shoreline permit that would address mitigation.

16 *Second*, the City of Seattle does not adequately represent Soundkeeper's interests. The
17 Washington Supreme Court has allowed intervention by private parties to defend a city
18 ordinance, even when the city is already present as a party in the case. *Pub. Util. Dist. No. 1 of*
19 *Okanogan Cnty. v. State*, 182 Wn.2d 519, 532 (2015) (citing *CLEAN v. City of Spokane*, 133
20 Wn.2d 455, 460–62, 474 (1997)). The Supreme Court has "repeatedly concluded that [a

21 ¹ These interests are beyond that of simply "pollution." Port Opp. at 2; Foss Opp. at 3-4.

22 ² Declarations are not needed to decide this motion to intervene, but as the Port and Foss seem
23 particularly troubled by supposedly unsubstantiated allegations, Soundkeeper submitted
24 declarations demonstrating their strong interests—and the impairment of those interests—in
Shell's use of Terminal 5 and, therefore, the outcome of this appeal. Notice of Filing, Exs. 1-3
(June 2, 2015).

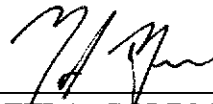
1 government entity's] general duty to protect the public's interest does not sufficiently protect the
2 narrower interests of private groups." *Id.* The clearest example of a divergence of interest is that
3 the City would not appeal an adverse decision—in fact, it would defend any such decision—
4 leaving Soundkeeper as the only party willing to further appeal.

5 *Third*, Soundkeeper is not attempting to bring a back-door shorelines enforcement action.
6 *See* Port Opp. at 2-3. This appeal only concerns an interpretation arising under SMC 23.88.020.
7 There is no question that Soundkeeper could seek its own interpretation in the first instance or
8 appeal an adverse interpretation pursuant to SMC 23.88.020(A), (F)(1); it would be illogical to
9 exclude Soundkeeper from defending an interpretation in its favor. Moreover, this case is legally
10 distinct from the King County Superior Court case, but the similarity, which Soundkeeper
11 highlighted in its motion, is that both cases relate to whether Arctic drill rig moorage is
12 consistent with cargo terminal use. An adverse ruling in this case may prejudice the outcome of
13 the King County Superior Court case and the similar legal question there, even though that case
14 arises under a distinct legal framework.

15 Soundkeeper will not expand the issues beyond those identified in the appeals. If
16 relevant to the final list of issues, Soundkeeper will offer evidence to rebut the Port's anticipated
17 factual presentation that "Foss's activities are and will be consistent with the SMP." Port of
18 Seattle Appeal at 5.

1 For the reasons stated above and in its opening brief, Soundkeeper respectfully requests
2 that the Hearing Examiner grant its full intervention.

3 DATED this 3rd day of June, 2015.

4
5 

6 PATTI A. GOLDMAN, WSBA No. 24426
7 MATTHEW R. BACA, WSBA No. 45676
8 Earthjustice
9 705 Second Avenue, Suite 203
10 Seattle, WA 98104-1711
11 (206) 343-7340 | Phone
12 (206) 343-1526 | Fax
13 pgoldman@earthjustice.org
14 mbaca@earthjustice.org

15 *Attorneys for Proposed Intervenors*
16 *Puget Soundkeeper Alliance, Seattle Audubon*
17 *Society, Sierra Club, and Washington*
18 *Environmental Council*

CERTIFICATE OF SERVICE RECEIVED BY

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 June 3, 2015, I served the following documents on the following parties:

- 1. Reply in Support of Soundkeeper's Motion to Intervene.

John C. McCullough
McCullough Hill Leary, PS
701 - 5th Avenue, Suite 6600
Seattle, WA 98104
(206) 812-3388 | Phone
(206) 812-3389 | Fax
jack@mhseattle.com
Attorney for Appellant Foss Maritime Company

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

David R. West
Donald B. Scaramastra
Daniel J. Vecchio
Garvey Schubert Barer
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
(206) 464-3939 | Phone
(206) 464-0125 | Fax
drwest@gsblaw.com
dscar@gsblaw.com
dvecchio@gsblaw.com
Attorneys for Appellant Foss Maritime Company

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Eleanore S. Baxendale
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8232 | Phone
(206) 684-8284 | Fax
eleanore.baxendale@seattle.gov
Attorney for Respondent Department of Planning and Development

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

1 Traci Goodwin
2 Senior Port Counsel
3 Port of Seattle
4 P.O. Box 1209
5 Seattle, WA 98111
(206) 787-3702 | Phone
(206) 787-3205 | Fax
goodwin.t@portseattle.org
Attorney for Appellant Port of Seattle

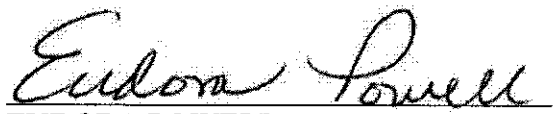
- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

6 Patrick J. Schneider
7 Foster Pepper PLLC
8 1111 Third Avenue, Suite 3400
9 Seattle, WA 98101-3299
(206) 447-4400 | Phone
(206) 447-9700 | Fax
schnp@foster.com
Attorney for Appellant Port of Seattle

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

11 I, Eudora Powell, declare under penalty of perjury that the foregoing is true and correct.

12 Executed this 3rd day of June, 2015, at Seattle, Washington.

13 
14 EUDORA POWELL