

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeals of

Hearing Examiner Files:
S-15-001 and S-15-002

FOSS MARITIME and PORT OF SEATTLE

From an interpretation by the Director,
Department of Planning and Development

Director's Interpretation:
15-001

ORDER

1. On August 3, 2015, the Director moved for an order excluding certain categories of evidence on the grounds that they were not relevant as a result of the Hearing Examiner's Order of July 6, 2015. Appellants Foss Maritime and Port of Seattle filed responses on August 7, 2015. DPD filed a reply on August 11, 2015.
2. The motion seeks an order generally excluding evidence of "political motivation," "future actions of DPD," and evidence regarding past enforcement actions. The motion also seeks to exclude or limit the testimony of one of the Port's identified witnesses, Thomas Tanaka. According to the Port's witness list, "Mr. Tanaka may testify about how Federal regulations prohibit the Port from discriminating against or among vessels based upon the purpose or use of the vessels. Mr. Tanaka may also testify about moorage at Port facilities."
3. Under HER 2.17, evidence may be excluded if it is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.
4. Testimony and Evidence on Political Motivation. The motion and reply cite Foss exhibits 11, 12, 13 and 14, described as press releases and media articles, as evidence DPD asserts is intended to show political motivation. DPD also anticipates that witnesses will be questioned in an attempt to show political motivation. Evidence offered only for the purpose of showing the Interpretation was politically motivated will not be relevant to the issues remaining on appeal, as the parties already know. It should also be noted that press releases and media articles in general are rarely of assistance to the Hearing Examiner in resolving an appeal. The specific exhibits noted in DPD's Reply will be addressed at the outset of Foss's presentation.
5. Future Actions of DPD and Past Enforcement Actions. DPD's motion states that some of the Appellants' exhibits will be offered for the purpose of showing "future actions" by DPD. The July 6 Order dismissed the claim that the Interpretation erred because DPD would apply it to other uses at Terminal 5. DPD now seeks an order excluding evidence of activities at all other sites that do not have cargo terminal permits, and requiring a foundation establishing that all depicted sites have cargo terminal permits, based on the dismissal of that claim.

6. Similarly, DPD seeks exclusion of exhibits that it asserts are intended to show lack of enforcement. The July 6 Order dismissed Foss's claims that DPD's interpretation was in error because it was not consistent with past implementation and enforcement by DPD (Issue 3) and that the interpretation wrongfully modified rights granted by previous permits (Issue 7). The prehearing order stated, however, that evidence concerning other activities that "have been treated by the City as a cargo terminal use" would be relevant (Order, paragraph 8). This statement specifically responded to Foss's Appeal Issue 3, which referred to how "cargo terminal" had "been implemented and enforced by the Department in the past" and how the Department had "historically interpreted the term 'cargo terminal use.'" DPD argues that under the Order, only evidence concerning permitted cargo terminals (as opposed to sites for which there has been lack of enforcement) is relevant for any purpose, but that is not correct. The Order did not prohibit any use of evidence concerning uses and sites which have been operating in the absence of DPD enforcement actions, and the same is true regarding activities at sites which are not permitted cargo terminals.

7. Prior to being able to review the disputed exhibits and hearing the purpose for which they will be offered, the Examiner will not issue a broad order excluding them. The motion as to these categories of exhibits is denied for now. It will be considered at the outset of the Appellants' case.

8. Finally, DPD also seeks to exclude the testimony of Mr. Tanaka as to federal regulations; the motion is granted, as that consideration was not considered as part of the basis for DPD's Interpretation. To the extent the Port seeks to argue legal authorities that it believes should be considered as part of its appeal, that is most appropriately done in the closing statement.

9. The Examiner notes that Appellant Foss's witness and exhibit list includes 22 witnesses and does not describe duration of testimony. The Port's direct testimony is estimated to take 5 hours. Intervenor T-5 did not estimate the duration of testimony from its witness. Three days have been allocated for this hearing. It is assumed that Appellants and Intervenor T-5's presentations (except for the testimony of Mr. Perkowski) will be completed on or before the end of the second day of hearing. If possible, DPD and Intervenor Soundkeeper will commence their portion of the hearing on the second day. The rest of their presentations will be taken on the third day, along with any rebuttal presentation. The order of presentation and duration of the hearing will be discussed with the parties at the outset of hearing.

Entered this 11th day of August, 2015.



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CITY OF SEATTLE**

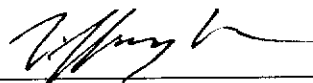
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order** to each person listed below, or on the attached mailing list, in the matter of **Foss Maritime Company and Port of Seattle**, Hearing Examiner Files: **S-15-001 & S-15-002**, in the manner indicated.

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Dated: August 11, 2015



Tiffany Ku
Legal Assistant