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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  
) (DPD Project No. 3020324)  
In the Matter of the Appeal of the: )  
)  
PORT OF SEATTLE, )  
) MOTION TO INTERVENE  
from Interpretation No. 15-001 of the Director of )  
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 Intervenors 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/  
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 Intervenors’ interests, Proposed  
2 Intervenors 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 Intervenors 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 Intervenors advocate for protection of the Sound and the Duwamish River and their recovery in  
11 numerous forums and public processes. Proposed Intervenors have 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 Intervenors seek 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  
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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 Intervenors’ 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 Intervenors’ 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 Intervenors 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 Intervenors’ interests because  
7 it is a government entity with varied and broad interests. Proposed Intervenors’ 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 Intervenors’ missions and members. Rather, the City of  
12 Seattle would defend such a ruling on appeal. Proposed Intervenors, 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 Intervenors 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 Intervenors will offer evidence in defense of the City’s  
22 interpretation. Since well before the arrival of the first Shell vessels, Proposed Intervenors 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 Intervenors can offer this relevant  
2 evidence in this proceeding.

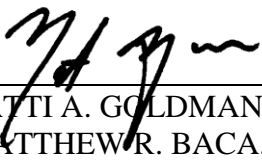
3 III. PROPOSED INTERVENORS' APPLICATION FOR INTERVENTION IS TIMELY  
4 AND WILL NOT ADD ADDITIONAL ISSUES.

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 Intervenors'  
9 intervention, and Soundkeeper agrees to comply with all deadlines set by the Hearing Examiner.  
10 Further, Proposed Intervenors have no plans to file a cross-appeal or otherwise raise new issues.

11 CONCLUSION

12 For all these reasons, Proposed Intervenors request that the Hearing Examiner grant  
13 intervention.

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

15   
16 \_\_\_\_\_  
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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:

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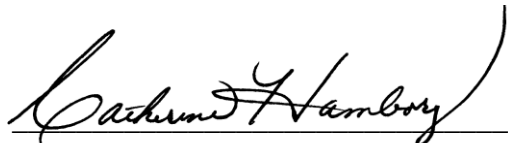
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11 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and  
12 correct. Executed this 27th day of May, 2015, at Seattle, Washington.

13  
14   
15 Catherine Hamborg