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4 SUPERIOR COURT OF THE STATE OF WASHINGTON  
5 IN AND FOR KING COUNTY

6 PUGET SOUNDKEEPER ALLIANCE, et al.

7 Plaintiffs,

8 v.

9 PORT OF SEATTLE, et al.

10 Defendants.  
11

NO. 15-2-05143-1 SEA

ORDER GRANTING PLAINTIFFS'  
MOTION FOR WRIT OF REVIEW

12 THIS MATTER came before the Court on Plaintiffs' Motion for Expedited Writ of  
13 Review. The Court has considered all of the records and files including:

- 14 1. Plaintiffs' Complaint and Exhibits 1-5;  
15 2. Plaintiffs' Motion;  
16 3. The Port of Seattle's Response;  
17 4. Foss Maritime Company's Opposition;  
18 5. Plaintiffs' Reply.

19 The Plaintiffs challenge the Port of Seattle's entry into a lease with the Foss Maritime  
20 Company which would allow Terminal 5 to serve as a homeport for Shell's Arctic Drilling  
21 fleet. The Plaintiffs contend that the Port entered into the lease without first conducting a  
22 State Environmental Policy Act (SEPA) review. They also allege that the Port entered into the  
23

1 lease without first obtaining amendments to its Shoreline Substantial Development Permit in  
2 violation of the Shoreline Management Act (SMA).

3 It is the Plaintiffs' position that the Port acted arbitrarily, capriciously or illegally  
4 when it entered into the lease with Foss Maritime because it relied on an exemption to bypass  
5 SEPA review, specifically, that the use of Terminal 5 will remain the same under the new  
6 lease. WAC 197-11-800(5)(c). Plaintiffs claim that the Port purportedly leased Terminal 5 for  
7 use as a cargo terminal but that its actual use will be as a homeport for an Arctic drilling fleet.  
8 The Plaintiffs are concerned about toxic runoff from vessel repairs and maintenance as well as  
9 water pollution from the vessels while at the Port and during transit.

10 The Plaintiffs also argue that the Port acted arbitrarily, capriciously and illegally when  
11 it failed to obtain a permit prior to allowing Terminal 5 to be used as a vessel and moorage  
12 facility in violation of the SMA. The existing permit only allows Terminal 5 to be used as a  
13 cargo terminal. WAC 173-27-100.

14 The Washington State Constitution recognizes the right to seek discretionary review of  
15 an administrative agency decision under the court's inherent constitutional power. Const. art.  
16 IV, §§ 4, 6. The scope of review is limited to whether the agency's actions were arbitrary,  
17 capricious, or illegal, thus violating a claimant's fundamental right to be free from such action.  
18 "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review  
19 to determine whether the proceedings below were within the lower tribunal's jurisdiction and  
20 authority." *Saldin Secs., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370  
21 (1998). The right to be free from arbitrary, capricious and illegal action is itself a fundamental  
22 right that is subject to review. *Pierce County Sheriff v. Civil Service Commission*, 98 Wn.2d  
23 690, 693-94, 659 P.2d 648 (1983). However, the court should only accept review if the

1 appellant can allege facts that, if verified, would establish that the lower tribunal's decision  
2 was illegal or arbitrary and capricious. *Federal Way School Dist. v. Vinson*, 172 Wn.2d 756,  
3 769, 261 P.3d 145 (2011). Arbitrary and capricious action is “willful and unreasoning action,  
4 taken without regard to or consideration of the facts and circumstances surrounding the  
5 action.” *Id.* (citing *Foster v. King County*, 83 Wn. App. 339, 347, 921 P.2d 552 (1996)).  
6 Agency action is arbitrary and capricious if there is no support in the record for the action. *Id.*  
7 at 669 n.14. In the constitutional certiorari context, illegality refers to an agency's jurisdiction  
8 and authority to perform an act. *Id.* at 770. The review by constitutional writ is not a full  
9 appellate review on the merits. *Bridle Trails Community Club v. City of Bellevue*, 45 Wn.  
10 App. 248, 251-52, 724 P.2d 1110 (1986). It is limited to a review of the record to determine  
11 if the action was arbitrary and capricious or illegal. *Id.* at 252.

#### 12 The Shoreline Management Act

13 The Port argues that there is no private right of action to enforce the SMA. This court  
14 agrees. The provision in RCW 90.58.230 that private persons may sue on behalf of  
15 themselves and others similarly situated is subject to the requirements of CR 23 relating to  
16 class actions. *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wn.2d 203, 214–15, 571  
17 P.2d 196 (1977).

#### 18 The State Environmental Policy Act

19 A review of the record indicates that a staff briefing memo to Commission members  
20 dated January 8, 2015, indicated that “Vessel Berth Moorage and Provisioning” would take  
21 place at Terminal 5. This would include receiving, inventorying and staging equipment and  
22 supplies that would be loaded to a fleet of vessels, including exploration drill rigs, ice-  
23 breakers, provisioning vessels, environmental response vessels, tugs and barges for seasonal

1 operations in Alaska. Compl. Ex 3, p. 6. Under the Seattle Municipal Code, minor vessel  
2 repair is often associated with commercial moorage. SMC 23.60.906. In his February 11,  
3 2015, letter, Theodore Fick, Port CEO, stated that major repairs would only occur at permitted  
4 shipyards. At the Commission meeting on January 13, 2015, the Port Commissioners voted to  
5 allow the Port to enter into a lease with Foss. The lease was signed on February 9, 2015, and  
6 effective immediately. Under the terms of the lease, lessee (Foss) shall use the premises for a  
7 cargo terminal which means a transportation facility in which quantities of goods or container  
8 cargo are stored without undergoing any manufacturing process, transferred to other carriers  
9 or stored outdoors in order to transfer them to other locations. Lease, sec. 5.1. The permitted  
10 uses under the terms of the lease seem to contradict the expected uses outlined in the Port of  
11 Seattle's staff briefing memo. The staff memo goes on to state that the "fleet of vessels" (8)  
12 would depart for exploration in June and return to "homeport" at Terminal 5 late summer for  
13 over-wintering October through May. These activities appear to be qualitatively different than  
14 Eagle Marine Services' previous use of Terminal 5 as a marine container terminal.

#### 15 Alternative Remedy

16 The Port argues that the constitutional writ of review is legally unavailable to the  
17 Plaintiffs because they have the alternative remedy of seeking Declaratory Judgment. There  
18 are three methods to seek judicial review of an administrative decision: (1) direct appeal, (2)  
19 statutory writ of review, and (3) constitutional writ of review. *Bridle Trails Community Club*  
20 45 Wn. App. at 253. It is only when a statutory writ of review or direct appeal is available that  
21 the court has no discretion to issue a constitutional writ. *Torrance v King County*, 136 Wn.2d  
22 783, 793, 966 P.2d 891 (1998). In this case, there is no ordinance or statute that gives  
23 Plaintiffs the right to appeal the Port's decision to enter into the lease. Nor do they have a

1 statutory writ of review as this was not a quasi-judicial action. The option to seek Declaratory  
2 Judgment does not preclude the issuance of a constitutional writ.

3 Therefore, the Court orders that Plaintiffs' motion for a writ of review is GRANTED.  
4 Counsel are directed to confer to determine the appropriate "record" in this matter and arrange  
5 to have it filed with the court for review.

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7 DATED this \_\_\_\_ day of March, 2015.

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The Honorable Mariane C. Spearman  
Chief Civil Judge  
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King County Superior Court  
Judicial Electronic Signature Page

Case Number: 15-2-05143-1  
Case Title: PUGET SOUNDKEEPER ALLIANCE ET AL VS SEATTLE  
PORT OF ET AL  
Document Title: ORDER

Signed by: Mariane Spearman  
Date: 3/20/2015 10:11:57 AM



Judge/Commissioner: Mariane Spearman

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