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

PUGET SOUNDKEEPER ALLIANCE, a) NO.
Washington corporation; SIERRA CLUB, a)
California corporation; and WASHINGTON) COMPLAINT FOR WRIT OF
ENVIRONMENTAL COUNCIL,) REVIEW SEEKING VACATUR OF
a Washington corporation; and SEATTLE) PORT OF SEATTLE LEASE FOR A
AUDUBON SOCIETY, a Washington corporation,) HOMEPORT AT TERMINAL 5 AND
) FOR DECLARATORY JUDGMENT

Plaintiffs,)

vs.)

PORT OF SEATTLE, a special purpose municipal)
corporation; TOM ALBRO, in his official capacity)
as a Port of Seattle Commissioner; STEPHANIE)
BOWMAN, in her official capacity as a Port of)
Seattle Commissioner; BILL BRYANT, in his)
official capacity as a Port of Seattle Commissioner;)
JOHN CREIGHTON, in his official capacity as a)
Port of Seattle Commissioner; COURTNEY)
GREGOIRE, in her official capacity as a Port of)
Seattle Commissioner,)

Defendants,)

and)

FOSS MARITIME COMPANY, a Washington)
corporation,)

Joined Party-Defendant.)

COMPLAINT FOR WRIT OF REVIEW SEEKING
VACATUR OF PORT OF SEATTLE LEASE FOR
A HOMEPORT AT TERMINAL 5 AND FOR
DECLARATORY JUDGMENT

1 INTRODUCTION

2 1. This case challenges the Port of Seattle’s entry into a lease with Foss Maritime
3 Company to serve as a homeport for Royal Dutch Shell’s Arctic drilling fleet. The lease is
4 attached to this Complaint as Exhibit 1. The Port entered into this lease without complying with
5 the State Environmental Policy Act (SEPA). The Port invoked a categorical exemption to SEPA
6 that applies to leases of real property only when the use will remain essentially the same as the
7 prior use, even though Terminal 5 previously housed a container terminal and the new use would
8 be a homeport for Shell’s Arctic drilling fleet, a substantively different use with distinct
9 environmental impacts. The Port also entered into a lease knowing that the use of Terminal 5
10 would be inconsistent with the cargo terminal use authorized under the Port’s Shoreline
11 Substantial Development Permit. By circumventing SEPA and acting in violation of its
12 shoreline permit, the Port made this controversial decision without the public process, candid
13 disclosure, objective assessment and mitigation of environmental and community impacts, and
14 public participation that the law requires. Plaintiffs ask the Court to declare that the lease
15 between the Port and Foss is null and void, to declare that the Port violated SEPA, the Port’s
16 SEPA Resolution, the Port’s Shoreline Substantial Development Permit, the Shoreline
17 Management Act and the City of Seattle’s shoreline rules, and to issue an order vacating the
18 lease.

19 NAMES AND ADDRESSES OF PLAINTIFFS

20 2. The names and mailing addresses of the plaintiffs are as follows:

21 Puget Soundkeeper Alliance
22 130 Nickerson St.
23 Seattle, WA 98109

1 Seattle Audubon Society
8050 35th Avenue NE
2 Seattle, Washington 98115

3 Sierra Club
85 Second Street, Second Floor,
4 San Francisco, California 94105

5 Washington Environmental Council
1402 Third Avenue, Suite 1400,
6 Seattle, Washington 98101

7 NAMES AND ADDRESS OF THE COUNSEL FOR PLAINTIFFS

8 Plaintiffs are represented by:

9 Patti Goldman, WSBA No. 24426
Amanda Goodin, WSBA No. 41312
10 Matthew Baca, WSBA No. 45676
Earthjustice
11 705 Second Avenue, Suite 203
Seattle, WA 98104-1711

12 NAME AND ADDRESS OF PUBLIC ENTITY WHOSE ACTIONS ARE AT ISSUE

13 Port of Seattle
14 2711 Alaskan Way
Seattle, WA 98121

15 NAME AND ADDRESS OF JOINED INTERESTED PARTY

16 Foss Maritime Company
17 1151 Fairview Avenue N.
Seattle, WA 98109

18 IDENTIFICATION OF AGENCY ACTION AT ISSUE

19 3. This case seeks review of the Port of Seattle's entry into a lease with Foss
20 Maritime Company for use of Terminal 5, the Port's failure to comply with SEPA before
21 entering into this lease, and the Port's authorization of a use of Terminal 5 that is not permitted
22 under the Port's Shoreline Substantial Development Permit. The lease is attached as Exhibit 1.
23 The Port's documentation of the Port's decision not to comply with SEPA and the relevant
24

25 COMPLAINT FOR WRIT OF REVIEW SEEKING
VACATUR OF PORT OF SEATTLE LEASE FOR
A HOMEPORT AT TERMINAL 5 AND FOR
26 DECLARATORY JUDGMENT

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax

1 portions of its Shoreline Substantial Development Permit are contained in Exhibit 2, which
2 consists of the Port's memorialization of its SEPA determination and associated records
3 produced by the Port under the Public Records Act, RCW 42.46. Citations to records produced
4 under the Public Records Act are to the page preceded by "PRA."

5 THE PARTIES

6 4. Puget Soundkeeper Alliance (Soundkeeper) is a non-profit corporation registered
7 in the State of Washington and based in Seattle. Soundkeeper is dedicated to protecting and
8 preserving Puget Sound, including by tracking down and stopping toxic pollution entering its
9 waters. Soundkeeper has been actively engaged in a variety of educational and advocacy efforts
10 to improve water quality and to address sources of water quality degradation in the waters of
11 Puget Sound and its tributaries, including significant efforts specific to the Duwamish Waterway
12 and Elliott Bay. As a critical part of its citizen and watch-dog monitoring program, it operates
13 weekly on-water pollution patrols around Puget Sound. Soundkeeper's boat patrols most
14 regularly depart from Elliott Bay Marina and patrol Elliott Bay and the Duwamish River,
15 including the immediate vicinity of Terminal 5 and other properties owned by the Port of Seattle.
16 Uses of Terminal 5 as a homeport for Shell's Arctic drilling fleet will directly impact
17 Soundkeeper and its members' aesthetic enjoyment of local waterways and their ability to view
18 wildlife and enjoy recreational interests in the vicinity of Terminal 5. In particular,
19 Soundkeeper's members have reasonable concerns about the effects of pollution from vessels
20 moored at Terminal 5 on aquatic species and wildlife that Plaintiff's members observe and enjoy.
21 Pollution from vessels moored at Terminal 5 and from vessel repair and maintenance activities
22 taking place at Terminal 5 will lessen Soundkeeper's members' recreational and aesthetic
23 enjoyment of nearby waters. Soundkeeper would also likely be harmed by the lease due to the

1 loss of access to public waters in the immediate vicinity of Terminal 5, where Soundkeeper
2 makes regular stops during its weekly boat patrols. At the immediate south end of the facility is
3 the mouth of Longfellow Creek - an iconic creek for monitoring and researching the effects of
4 urban stormwater on juvenile and adult salmon, including through studies conducted by NOAA,
5 the City of Seattle, Washington State University, and Soundkeeper. For at least ten years,
6 Soundkeeper has routinely pulled its patrol boat close the terminus of the creek, which is located
7 mere feet from Terminal 5, in order to monitor for salmon and discuss the implications of the
8 research with volunteers, the media and guests. If Shell's drilling fleet is moored regularly at
9 this location, it is likely that the Coast Guard will establish an exclusion zone around the vessels,
10 similar to what was established around one of Shell's Arctic exploration vessels when it was in
11 dry dock at Vigor Shipyard. Such an exclusion zone would deprive Soundkeeper of access to
12 Longfellow Creek.

13 5. Sierra Club, a national environmental organization founded in 1892, is devoted to
14 the study and protection of the earth's scenic and ecological resources, including wild shores and
15 rivers, estuaries, wetlands, and their wild flora and fauna. Sierra Club is incorporated under the
16 laws of California and has its principal place of business in San Francisco, California. It has
17 many dozens of chapters throughout the United States and Canada, including the Cascade
18 Chapter, which encompasses Seattle and Puget Sound. The Sierra Club has more than 1 million
19 members and supporters nationwide, including 24,137 members in Washington State. Sierra
20 Club's members have recreational, aesthetic, and other interests in the preservation of Puget
21 Sound, Elliott Bay, and the Duwamish River. Sierra Club members use these waters for
22 recreational and aesthetic purposes. Their use and enjoyment of these waters will be harmed by
23 the Port's decision to allow Terminal 5 to be used as a homeport, which may result in water

1 pollution from the vessels that call at the terminal and from repair and maintenance activities.

2 6. Washington Environmental Council (“WEC”) is a non-profit, statewide advocacy
3 organization, incorporated in the State of Washington and with its principal place of business in
4 Seattle. WEC’s mission is to protect, restore, and sustain Washington’s environment. It has
5 been driving positive change to solve Washington’s most critical environmental challenges since
6 1967. WEC was instrumental in passing (and is now enforcing) the foundational laws that help
7 keep Washington’s environment healthy: the State Environmental Policy Act, the State
8 Superfund Law, the Growth Management Act, and the Shoreline Management Act. WEC has
9 approximately 20,000 members statewide. WEC’s People for Puget Sound Program is focused
10 on ensuring that Puget Sound is an economic driver and a resource that enhances the quality of
11 life in the region. WEC works to engage citizens to advocate for restoration of Puget Sound and
12 its efforts have driven hundreds of millions of dollars for Puget Sound restoration. WEC’s
13 members include individuals who engage in recreational, aesthetic, and economic pursuits in
14 Puget Sound, Elliott Bay, and the Duwamish River. Their enjoyment of these waterways will be
15 undermined by additional polluting activities like what is likely to occur if Terminal 5 serves as a
16 homeport for Shell’s Arctic drilling fleet.

17 7. Seattle Audubon Society was founded in 1916 and is the oldest conservation
18 organization in the State of Washington. It is incorporated in Washington and has its place of
19 business in Seattle. The mission of Seattle Audubon is to cultivate and lead a community that
20 values and protects birds and the natural environment. With approximately 5000 members,
21 Seattle Audubon is one of the largest and most active Audubon chapters in the country. Staff
22 and volunteers effect change throughout western Washington through a variety of strategies,
23 including close engagement with our members, elected officials, agency staff, and the public.

1 Seattle Audubon has a history of promoting strong, science-based advocacy that is supported by
2 nearly a century of bird survey work. The Seattle Audubon Puget Sound Recovery Program
3 focuses on improving the health of this large estuary, which supports over 100 seabird species,
4 211 fish species, and 13 marine mammal species. Seattle Audubon is focused on promoting an
5 ecologically healthy Puget Sound by advocating for oil and chemical spill contamination
6 prevention, objecting to increased oil transport and terminal development, promoting watershed
7 protection, and implementing proactive seabird monitoring to create baseline data for the region.
8 Members of Seattle Audubon engage in bird watching and other recreational and aesthetic
9 pursuits in and around Puget Sound. Allowing Terminal 5 to serve as a homeport for Shell's
10 Arctic drilling fleet may result in oil and chemical pollution due to the transit, transport, berthing,
11 and maintenance of weathered, damaged, and contaminated oil industry vessels and equipment.
12 Many migratory and breeding bird species that are already in decline use our waters as their
13 homes and are at great risk from oil and other pollutants. By proceeding with this lease without
14 environmental review and public engagement, the Port denied Seattle Audubon and its members
15 the ability to help shape this decision. This is extremely troubling given how much work has
16 been done to improve the health of Puget Sound and of the Duwamish Waterway.

17 8. Plaintiffs are environmental and conservation organizations with longstanding
18 interests in preserving water quality in Puget Sound, including Elliott Bay and the Duwamish
19 River. Terminal 5 is located at the mouth of a salmon stream and a Superfund site undergoing
20 remediation. It is in Elliott Bay, which is a hub for water-based recreation. New uses of
21 Terminal 5 that increase pollution and runoff into these sensitive environments used extensively
22 by the public, including members of the plaintiff organizations, will harm plaintiffs' interests.

1 9. Plaintiffs’ interests are within the zone of interests of both SEPA and the
2 Shoreline Management Act. In enacting SEPA, the legislature declared “that each person has a
3 fundamental and inalienable right to a healthful environment,” and it established environmental
4 review requirements as a means to enable Washington citizens to know about and influence
5 governmental decisions that can affect that right. RCW 43.21C.020(3). The SEPA process of
6 disclosing the environmental and community impacts of proposed governmental actions and
7 allowing public participation in the review of such impacts provides a mechanism for the
8 plaintiff organizations to further their missions and protect their members’ enjoyment of the
9 natural environment. SEPA is a critical tool for educating the public about the risks facing Puget
10 Sound and engaging them in advocacy for solutions, including by promoting a green and
11 sustainable Port of Seattle. The Shoreline Management Act is designed to protect the shorelines
12 of the state and preserve and enhance public access to the shorelines by establishing a planning
13 and permitting system “to prevent the inherent harm in an uncoordinated and piecemeal
14 development of the state’s shorelines.” RCW 90.58.020. The permitting process affords
15 opportunities for public review and appeals. Plaintiffs participate in both SEPA and permitting
16 processes to further their missions and protect their members’ interests. By failing to comply
17 with SEPA, the Port deprived plaintiffs of the statutory mechanism to participate and seek to
18 influence the Port’s assessment of environmental impacts and its ultimate decision. By allowing
19 a use of Terminal 5 that violates its Shoreline Substantial Development Permit without obtaining
20 a revision of that permit, the Port deprived plaintiffs of the statutory mechanism designed for
21 them to protect shorelines of the state and their members’ interests in such shorelines and
22 connected waters.

1 acted illegally or has engaged in arbitrary or capricious actions in violation of fundamental
2 rights. The Washington Supreme Court has held that the right to a healthful environment is a
3 fundamental and inalienable right protectable through the Constitutional Writ of Review. *Leschi*
4 *Improvement Council v. Washington State Highway Commission*, 84 Wn.2d 271 (1974). This Court
5 has the inherent power to decide whether the Port violated plaintiffs’ fundamental rights to a
6 healthful environment as embodied in SEPA and the Shoreline Management Act in entering into the
7 challenged lease without complying with those statutes.

8 14. Plaintiffs have no adequate remedy at law. The Port’s SEPA Resolution provides
9 for an administrative appeal of final environmental impact statements and mitigated
10 determinations of non-significance, but not of a failure to comply with SEPA through invocation
11 of a categorical exemption. Resolution 3650, as amended, §§ 21.1 & 21.10(1). SEPA provides a
12 basis for challenging governmental action that is out of compliance with SEPA’s procedural and
13 substantive requirements, but requires that challenges be of the governmental action together
14 with the associated environmental determinations. RCW 43.21C.075(1), (2)(a) & (6)(c).
15 Neither the Port nor leases are subject to judicial review under the Administrative Procedure Act,
16 34.05.010(2) (agency does not include municipal corporations); RCW 34.05.010(3) (agency
17 action does not include leases of real estate). The Shoreline Management Act, RCW
18 90.58.180(1), provides for an appeal of decisions to grant, deny, or rescind a permit, but not
19 where a permittee, here the Port, fails to obtain a permit or permit revision.

20 15. The Port’s SEPA Resolution provides that “Port SEPA decisions not subject to
21 administrative appeal under Section 21 may be appealed to the King County Superior Court by
22 application for writ of review” within 21 days of the date the decision is issued. Port Resolution
23 3650, as amended, § 21.10(2). The lease was signed on February 9, 2015. This complaint is

1 being filed with 21 days and therefore is timely.

2 16. This Court also has jurisdiction to issue declaratory relief under the Uniform
3 Declaratory Judgments Act, RCW 7.24, under which this Court has the power to issue
4 declaratory relief whether or not further relief is or could be claimed.

5 17. Venue is proper in King County pursuant to RCW 4.92.010 because the real
6 property that is the subject of the action is situated in King County, the cause of action arose in
7 King County, and plaintiffs Puget Soundkeeper, Washington Environmental Council, and Seattle
8 Audubon Society have their principal places of business in King County. Venue is also proper in
9 King County pursuant to RCW 4.12.025 because the Port of Seattle resides in King County.

10 STATEMENT OF FACTS

11 18. This case concerns Terminal 5, a container terminal located on the West
12 Waterway at the entrance to the Duwamish River. Terminal 5 has long been a container
13 terminal. The Port's long-range plan adopted through extensive public process in 1985 screened
14 and reserved Terminal 5 and several other port sites for upgraded container cargo facilities. PRA
15 227. In 1991, the Port prepared an environmental impact statement and adopted a Container
16 Plan that "determined the Port should increase the efficiency of its container terminals" and
17 identified areas in the southwest portion of Elliott Bay, including Terminal 5, as needed to meet
18 existing and projected container cargo service demands. PRA 228. The Port conducted a major
19 redevelopment and cleanup of Terminal 5 as part of the Southwest Harbor Cleanup and
20 Redevelopment Project, based on a 1994 environmental impact statement, to accommodate
21 expanded container handling and marshaling of cargo at Terminal 5. PRA 231. In November
22 1997, the Port entered into a 30-year Port Management Agreement with the Washington
23 Department of Natural Resources for management of aquatic lands owned by the State of

1 Washington. PRA 38. That agreement identifies the current and planned uses of the terminals
2 operated by the Port. It designates Terminal 5 as an existing marine container terminal. PRA 56.

3 19. In keeping with these plans, the Port’s Shoreline Substantial Development Permit
4 received from the City of Seattle in 1996 (project number 94004118, 1996) “[c]onfirmed and
5 established Terminal 5 as “cargo terminal.” PRA 136. Eagle Marine Services operated the
6 marine container terminal at Terminal 5 under a 1985 lease with the Port. The Port terminated
7 that lease in July 2014, upon determining that major cargo terminal operations would interfere
8 with the Port’s planned modernization project designed to enable larger containerships to call at
9 Terminal 5.

10 20. Port staff began looking for a new tenant to use Terminal 5 and bring in revenues
11 during the modernization process. The Port established several parameters for the new tenancy,
12 primarily that the use be consistent with the Port’s permits and covenants, that it involve minimal
13 financial outlay by the Port, and that it not interfere with the modernization project.

14 21. By May 2014, Port staff began discussing leasing part of Terminal 5 to Foss
15 Maritime Company. Initially Foss proposed to use Terminal 5 to receive components by truck,
16 rail and breakbulk ship to be assembled into modules for a Liquid Natural Gas (LNG) plant that
17 would be transported by barge to Canada for final assembly. In June 2014, Foss expressed
18 interest in leasing an additional 50 acres of berth and yard area to serve as a homeport for the
19 Shell Arctic drilling fleet. Foss also identified other prospects for uses of Terminal 5 as part of
20 its tenancy.

21 22. These negotiations were shrouded in secrecy with the deliberations among the
22 Port staff and Commissioner over the Foss lease taking place in executive sessions. The Port
23 Commissioners entered into a verbal nondisclosure agreement not to reveal the facts or any

1 details of the negotiations to lease Terminal 5 to be a homeport for Shell’s Arctic fleet. “How
2 Seattle Agreed to Stash a Climate Bomb in its Seaport: To Make Shell’s Arctic Drilling Dreams
3 Come True, the Port of Seattle Held Secret Negotiations and Entered into a ‘Verbal
4 Nondisclosure’ Agreement to Help an Oil Company,” *The Stranger*, Feb. 25, 2015, available at
5 [http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-](http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-climate-bomb-in-its-seaport)
6 [climate-bomb-in-its-seaport](http://www.thestranger.com/news/feature/2015/02/25/21780074/how-seattle-agreed-to-stash-a-climate-bomb-in-its-seaport). That secrecy ended when the press reported that “Terminal 5 is
7 being proposed as a repair and service center for vessels engaged in Shell Oil’s troubled, delayed
8 program to drill for oil in Arctic waters of the Chukchi and Beaufort Seas off Alaska.” “Will
9 Port of Seattle Be Repair Center for Shell’s Arctic Vessels,” *Seattle PI*, Jan. 7, 2015, available at
10 [http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-](http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-oils-arctic-vessels/)
11 [oils-arctic-vessels/](http://blog.seattlepi.com/seattlepolitics/2015/01/07/will-port-of-seattle-be-repair-center-for-shell-oils-arctic-vessels/); see also “Foss Maritime Floats Plan to Use Port’s Terminal 5,” *Seattle*
12 *Times*, Jan. 8, 2015, available at [http://o.seattletimes.nwsourc.com/html/business/technology/](http://o.seattletimes.nwsourc.com/html/business/technology/2025417726_portterminal5xml.html)
13 [2025417726_portterminal5xml.html](http://o.seattletimes.nwsourc.com/html/business/technology/2025417726_portterminal5xml.html).

14 23. The sole public process consisted of discussion of the lease at a routine public
15 meeting of the Port Commission held in a conference room at Sea-Tac Airport on the afternoon
16 of January 13, 2015. For the first time, the Port released information about the “proposed” lease
17 in the form of a staff briefing memorandum and a PowerPoint presentation (attached as Exhibit
18 3). The staff briefing memorandum depicts the homeport use as “vessel berth moorage and
19 provisioning” and indicates that Terminal 5 would receive equipment and supplies that would be
20 loaded onto the fleet. Briefing Mem. at 6. The briefing memorandum and presentation indicated
21 that the full panoply of Arctic drilling vessels from drill rigs, ice-breakers and environmental
22 response vessels to tugs and barges would berth and undergo maintenance at Terminal 5. The
23 vessels would over-winter at Terminal 5 from late summer through May and the lease would

1 generate jobs and funds that could defray ongoing Port expenses and help fund aspects of the
2 modernization project. *Id.* The briefing memorandum describes the LNG terminal assembly
3 operation and other prospective breakbulk and bulk business uses that would complement the
4 homeport and LNG assembly projects. *Id.* at 5-7.

5 24. While some businesses voiced support for the lease, several civic leaders and
6 conservation organizations expressed opposition. The Commissioners individually voiced
7 opposition to drilling for oil in America’s Arctic, and two of the Commissioner indicated that
8 they opposed entering into the lease. Commissioner Courtney Gregoire supported delaying a
9 vote in order to allow more public debate and at least one more public meeting, but a majority of
10 the Commissioners did not support such a delay. Another Commissioner, Tom Albro, moved to
11 strip the Port staff of the authority to enter into short-term leases like this one, but no other
12 Commissioner seconded that motion. In the end, it emerged that two of the five Commissioners
13 opposed entering into the lease and a majority opposed taking steps to enable Arctic drilling, but
14 the Commission took no action to revoke the Port Chief Executive Officer’s authority to execute
15 the lease or to block the lease in any other manner. In a matter of a few short hours, that single
16 public meeting began and ended the public process surrounding this decision.

17 25. What was not disclosed in the public meeting was the fact that Port staff had
18 already taken two significant steps toward sealing the deal. First, Port staff and Foss had drafted
19 a letter of understanding, or term sheet, laying out key elements that would be incorporated into a
20 two-year lease that could be extended. PRA 1. Those terms envisioned use of only 50 acres of
21 Terminal 5 and the berth area “as a Vessel Supply Base and Storage Depot.” In other words, the
22 lease would be for the homeport use only and not for the LNG plant assembly, despite the
23 emphasis on both uses in the public meeting. PRA 2. The President and CEO of Foss signed the

1 letter of understanding on January 9, 2015, and the Port CEO Theodore Fick signed it the day of
2 the public meeting. Second, on January 9, 2015, Port staff had issued a license to Foss for
3 temporary use of Terminal 5 until February 28, 2015 for the purpose of making repairs,
4 refurbishments, replacements and upgrades. The refurbishments included replacing bollards
5 with heavier capacity bollards. The heavier capacity bollards modify Terminal 5 for mooring
6 Shell’s Arctic drilling fleet. PRA 9-13. Foss agreed to the terms of the license on the day of the
7 public meeting. PRA 12-13.

8 26. Rather than quell the public’s interest, the January 13 meeting triggered an
9 outpouring of criticism of the Port for embarking on such a significant change in direction
10 without public process. On January 28, 2015, a group of 15 conservation organizations and civic
11 leaders sent a letter to the Port Commissioners asking them to reconsider the decision to allow
12 the lease to go forward (attached as Exhibit 4). The letter took issue with the Port’s plan to
13 circumvent SEPA review of the lease and complained that the public disclosures about the
14 proposed homeport had been exceedingly vague, revealing little about the actual activities that
15 would be allowed at Terminal 5.

16 27. The letter presented serious concerns about allowing Terminal 5 to serve as a
17 homeport for Shell’s Arctic drilling fleet, such as toxic runoff from vessel repairs and
18 maintenance and water pollution from the vessels at port and during transit. After a season in the
19 Arctic, Shell’s vessels have returned battered and have needed extensive repairs and
20 maintenance. The letter pointed to Shell’s abysmal track record in complying with water
21 pollution laws, highlighting the exposé in a recent New York Times Magazine article, called
22 “The Wreck of the Kulluk,” which recounted the myriad ways in which Shell cut corners on
23 safety in its Arctic drilling operations, as well as a Department of Interior review in which it

1 found that Shell’s 2012 Arctic offshore drilling program “raised serious questions regarding its
2 ability to operate safely and responsibly” and its weak oversight of its contractors and of the risks
3 associated with maritime transportation and logistics activities. “The Wreck of the Kulluk,” *New*
4 *York Times Magazine*, Dec. 30, 2014, available at [www.nytimes.com/2015/01/04/magazine/the-](http://www.nytimes.com/2015/01/04/magazine/the-wreck-of-the-kulluk.html)
5 [wreck-of-the-kulluk.html](http://www.nytimes.com/2015/01/04/magazine/the-wreck-of-the-kulluk.html); Review of Shell’s 2012 Alaska Offshore Oil and Gas Exploration
6 Program at 1, 30-31 (March 8, 2013), available at
7 www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf. The letter raised specific
8 concerns about allowing the *Noble Discoverer* to homeport in Elliott Bay in light of its violations
9 of water pollution and other laws, which led its operator, Noble Drilling (US) LLC to plead
10 guilty in December 2014 to eight felony offenses and agree to pay \$12.2 million dollars in fines
11 and community service payments. U.S. Department of Justice, *Drilling Company Charged with*
12 *Environmental and Maritime Crimes in Alaska* (Dec. 8, 2014), available at
13 [http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-](http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska)
14 [alaska](http://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska). As the letter (at 3) explained:

15 Among its offenses, Noble failed to have operational pollution control equipment,
16 developed make-shift systems that discharged bilge and wastewater directly
17 overboard, pumped oil-contaminated water into the ballast water tanks and
18 discharged the contents overboard instead of through pollution control equipment,
19 failed to notify the Coast Guard of hazardous conditions with the vessel’s
20 equipment, which led to an explosion and engine fire, and falsified records
21 pertaining to its collection, transfer, storage and disposal of oil and the
22 inoperability of pollution control equipment. Noble’s actions led to the discharge
23 of oil-contaminated water, which in one instance created an oily sheen in Broad
24 Bay, Unalaska.

25 28. On February 11, 2015, the Port CEO, Theodore Fick, responded (attached as
26 Exhibit 5). In the response, CEO Fick disclosed that he had already signed a lease with Foss,
two days earlier on February 9th, and that the lease had become effective immediately. The
response calls the use of Terminal 5 a cargo terminal, but also describes the use as “moorage for

1 vessels” and compares it to an existing homeport for large at-sea processor fishing vessels. It
2 makes no mention of the type of maintenance and repair activities that would be permitted at
3 Terminal 5, except to say that major repairs would occur only at a permitted shipyard. It
4 imposes no limits on the types of vessels that can be moored at Terminal 5. In fact, the CEO
5 letter instructs that “Should you have questions about the vessels to be moored under the
6 proposed lease, we encourage you to consult Foss Maritime directly.” *Id.* at 2.

7 29. The response indicates that the Port invoked categorical exemptions from SEPA
8 review for both the lease and replacement of the bollards, although the response did not provide
9 the rationale. The Port did not release the SEPA documentation until February 19, 2015 under
10 the Public Records Act. It released the lease on February 13, 2015.

11 30. By its terms, the lease authorizes Foss to use Terminal 5 “for a cargo terminal
12 which means a transportation facility in which quantities of goods or container cargo are stored
13 without undergoing and manufacturing process, transferred to other carriers or stored outdoors in
14 order to transfer them to other locations.” Lease § 5.1. The term is for two years with the
15 possibility of two one-year extensions. Lease §§ 2.1 & 2.4. Under the lease, Foss would pay
16 \$550,000 per month for a total of \$13.17 million in rent over the lease term. Port CEO Response
17 at 1.

18 31. Pursuant to the Port’s SEPA Resolution, which requires the Port to document its
19 analysis of how a project meets the requirements of a categorical exemption, SEPA Resolution
20 3650 § 9.3, Port staff wrote multiple memos to the file invoking SEPA categorical exemptions
21 for both the short-term license and the lease. The Port initially invoked several categorical
22 exemptions for the short-term license, but eventually settled on WAC 197-11-800(3), which
23 covers repair, remodeling and maintenance activities “involving no material expansions or
24

1 changes in use beyond that previously existing.” PRA 130-34; *see also* 151; 163-167 (original
2 SEPA exemptions claimed). The SEPA documentation states that a previous tenant removed
3 heavy-capacity bollards, but there is no indication when or why the bollard removal occurred or
4 that it occurred during Eagle Marine’s 29-year tenancy. PRA 130.

5 32. For the lease, the Port invoked a categorical exemption that applies to leases of
6 real property but only “when the property use will remain essentially the same as the existing use
7 for the term of the agreement. . .” PRA 140-42 (quoting WAC 197-11-800(5)). To justify
8 invocation of this exemption, the SEPA documentation asserts that “Terminal 5 will continue to
9 be used as a cargo terminal by the new tenant.” PRA 139. The SEPA documentation recites the
10 definitions in the Seattle Municipal Code of “cargo terminal” as “a transportation facility in
11 which quantities of goods or container cargo are stored without undergoing any manufacturing
12 processes, transferred to other carriers or stored outdoors in order to transfer them to other
13 locations.” PRA 140 (quoting Seattle Municipal Code 23.60.840). The SEPA documentation
14 never addresses the fact that the Shell homeport will not be in the business of storing and
15 transferring goods or cargo in order to ship it to other locations. Nor did the Port evaluate the
16 types of vessel maintenance and repair activities that would take place at Terminal 5 under the
17 lease. In fact, the Port’s SEPA documentation states that “[i]t is not possible to describe the
18 specific types of vessels that will be served” or “or to anticipate the specific types of cargo
19 activities that will take place at Terminal 5 in the next months and years.” PRA 143, 145.

20 33. The Port’s Shoreline Substantial Development Permit establishes the designated
21 use of Terminal 5 as a “cargo terminal.” PRA 136, 140, 156. The Port’s SEPA documentation
22 acknowledged that a cargo terminal is a use that “supports or provides a means of transporting
23 people and/or goods from one location to another.” PRA 136, 140, 156, 222. The SEPA

1 documentation also recognized that the designation of Terminal 5 as a cargo terminal was based
2 on environmental reviews and public processes that committed to “[m]aintaining marine
3 industrial cargo transshipment uses and activities at Terminal 5.” PRA 135-36, 139-140, 155-56.

4 34. The Port obtained an exemption from its Shoreline Substantial Development
5 Permit from the City of Seattle for the bollards replacement upon representing that Terminal 5
6 would continue to be used as a cargo terminal and characterizing the replacement as
7 “[r]estoration of heavy-capacity bollard capability at Terminal 5.” PRA 151-53, 160, 188, 190.
8 The exemption is subject to conditions, including that “[n]o change in use at Terminal 5 is
9 approved as part of this exemption.” PRA 153.

10 35. The Port did not seek a revision of its Shoreline Substantial Development Permit
11 for the lease. Its SEPA documentation claims that use of Terminal 5 under the lease would be
12 consistent with the previously approved use and would not be a change in use. PRA 137, 141,
13 143, 157. In support of this conclusion, the SEPA documentation states that the shoreline permit
14 and shoreline master plan “are silent concerning the types of vessels serving the sites” and that
15 they allow vessels calling at Terminal 5 to receive specialized equipment and cargo for use on
16 the vessel. PRA 137, 139, 141, 155. Nothing in the Port’s SEPA documentation addresses the
17 fact that Foss is not proposing to use Terminal 5 to transport goods or cargo from one location to
18 another, which is the essential and defining characteristic of a cargo terminal.

19 LEGAL BACKGROUND

20 I. PERTINENT SEPA REQUIREMENTS

21 36. SEPA was enacted in 1971 to infuse objective information about environmental
22 impacts into government decision-making at all levels in the state and to provide express
23 authority to base decision on environmental values. RCW 43.21C.010-020. Toward this end,

1 SEPA creates a process for identifying possible environmental impacts that may result from
2 proposed governmental decisions. RCW 43.21C.030(2)(c). SEPA review helps government
3 decision-makers, applicants, and the public understand how a proposal will affect the
4 environment. The information generated through the SEPA process can be used to change a
5 proposal to reduce likely impacts or to condition or deny a proposal when adverse environmental
6 impacts are identified. RCW 43.21C.060.

7 37. SEPA requires municipal corporations, along with state and local agencies, to
8 prepare a detailed environmental impact statement on their proposals for major actions that may
9 have significant adverse environmental impacts. RCW 43.21C.030(2)(c). Draft environmental
10 impact statements are made available to the public for comment and often for public hearings.
11 WAC 197-11-455. The initial step is for the public entity to make a threshold determination as
12 to whether an environmental impact statement is required. RCW 43.21C.033. To make such a
13 determination, the responsible official must review the project's effects and document his or her
14 decision in the form of an environmental checklist. An environmental impact statement is not
15 required if the official makes a determination of non-significance. WAC-11-360. The official
16 also may mitigate adverse environmental impacts to reduce them to insignificance in which case
17 no environmental impact statement is required. WAC 197-11-350. A mitigated determination of
18 non-significance can produce conditions that limit the types of activities that can occur or impose
19 safeguards on them. A determination of non-significance cannot rely on other laws to prevent
20 environmental impacts without assessing whether that will in fact be the case. The fact that a
21 project will need to obtain and comply with other laws or permits is not a sufficient basis to
22 avoid detailed review of the project's effects under SEPA.

1 38. SEPA authorizes the Department of Ecology to promulgate regulations that
2 include categorical exemptions from SEPA for “[c]ategories of governmental actions which are
3 not to be considered as potential major actions significantly affecting the quality of the
4 environment.” Such exemptions must be limited to actions that do not have significant
5 environmental impacts. RCW 43.21C. 110(1)(a). This limitation is pivotal since invocation of a
6 categorical exemption eliminates SEPA review and deprives the public of an objective
7 assessment of the project’s environmental effects.

8 39. The Department of Ecology has promulgated categorical exemptions, including
9 for minor new construction and for leasing of real property. WAC 197-11-800(3) & (5). The
10 leasing exemption applies only “when the property use will remain essentially the same as the
11 existing use for the term of the agreement. . .” WAC 197-11-800(5). The Port has adopted
12 Resolution 3650 governing its compliance with SEPA, which adopts the categorical exemptions
13 in the Ecology rules. SEPA Resolution 3650, § 23.

14 II. PERTINENT SHORELINE MANAGEMENT ACT REQUIREMENTS

15 40. Washington’s Shoreline Management Act (SMA) was passed by the State
16 Legislature in 1971 and adopted by voters in 1972. The overarching goal of the Act is to
17 establish coordinated planning by state and local governments “to prevent the inherent harm in
18 an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020. The
19 Act is designed to foster reasonable and appropriate uses of shorelines and to protect “against
20 adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the
21 state and their aquatic life.” *Id.*

1 41. The SMA establishes a collaborative system between the Washington Department
2 of Ecology and local jurisdictions. Local jurisdictions have primary responsibility for the SMA
3 regulatory program, are charged with issuing shoreline permits, and must adopt rules for the
4 administration and enforcement of the Act. RCW 90.58.050. The City of Seattle has adopted
5 rules implementing its responsibilities under the SMA.

6 42. The SMA prohibits substantial development activities without a permit from the
7 appropriate local jurisdiction. RCW 90.58.140. A substantial development is any development
8 whose total cost or fair market value exceeds \$5000, adjusted for inflation. RCW
9 90.58.030(3)(e).

10 43. Under Seattle’s Shoreline rules, it is unlawful to maintain or use any property
11 without an appropriate shoreline permit. Seattle Municipal Code 23.60.082, 23.90.002. It also is
12 unlawful to use a property “in any manner that is not permitted by the terms” of the governing
13 shoreline permit. Seattle Municipal Code 23.90.002.

14 44. Under both the state and Seattle SMA rules, a permit revision is required
15 whenever substantive changes are made to the design, terms or conditions of a project from that
16 approved in the permit. WAC 173-27-100; Seattle Municipal Code 23.60.076. If the change is
17 within the scope of the original permit and no adverse environmental impact will be caused by
18 the project revision, the local jurisdiction may approve a permit revision. WAC 173-27-100(1)-
19 (2). If the changes are not within the scope of the original permit, the local jurisdiction cannot
20 approve a permit revision. WAC 173-27-100(4). A change in the use authorized pursuant to the
21 original permit is not within the scope of the original permit and cannot be approved through a
22 permit revision. WAC 173-27-100(2)(e). In this situation, the applicant may seek a new permit.
23 WAC 173-27-100(4).

1 45. The Port is a person subject to the SMA. RCW 90.58.030(1)(e) (“person”
2 includes municipal corporations). Port operations at Terminal 5 are part of a substantial
3 development operating under a permit under the SMA.

4 CLAIMS FOR RELIEF

5 I. THE PORT ACTED ILLEGALLY AND ARBITRARILY AND CAPRICIOUSLY BY
6 NOT PROPERLY DEFINING THE PROPOSED USE OF TERMINAL 5.

7 46. Plaintiffs reallege and incorporate ¶¶ 1-45.

8 47. The Port’s SEPA Resolution adopts the common sense requirement that “[i]n
9 determining whether a proposal is exempt, the Port shall make certain the proposal is properly
10 defined.” SEPA Resolution 3650, § 9. Without properly defining the proposal, the Port cannot
11 determine whether the proposal falls within a categorical exemption, nor can the Port accurately
12 and fully assess the project’s environmental impacts.

13 48. The letter of understanding between the Port and Foss identifies the use of
14 Terminal 5 as a “Vessel Supply Base and Storage Depot,” PRA 2, and the public disclosures at
15 the Port’s January 13, 2015 public meeting identify the use of Terminal 5 as “Vessel Berth
16 Moorage and Provisioning.” Staff Briefing at 6.

17 49. The lease abandons the prior description of the use. In its place, the lease
18 authorizes use of Terminal 5 “for a cargo terminal” and it recites the Seattle shoreline rule’s
19 definition of cargo terminal as “a transportation facility in which quantities of goods or container
20 cargo are stored without undergoing and manufacturing process, transferred to other carriers or
21 stored outdoors in order to transfer them to other locations.” Lease § 5.1.

22 50. The Port had no basis for characterizing the use of Terminal 5 planned by Foss as
23 a cargo terminal. Neither Foss nor Shell will be in the business of transporting goods from one
24 location to another. Terminal 5 may receive provisions or equipment that would be loaded onto

1 the drilling fleet vessels before they ship out to the Arctic, but the provisioning activity is not for
2 the purpose of transshipping the goods or cargo to another location.

3 51. At the public meeting, a representative of Foss indicated that maintenance
4 activities would be part of the homeport uses, yet the Port failed to identify what types of vessel
5 maintenance and repairs would take place under the lease. When pressed, it indicated that “[i]t is
6 not possible to anticipate the specific types of cargo activities that will take place at Terminal 5
7 in the next months and years.” PRA 145. This oversight is significant given the accidents and
8 near-disasters encountered by Shell’s Arctic fleet in 2012, felony violations of environmental
9 laws by the contractor that runs one of the two drill ships that could come to Terminal 5, and a
10 federal government report chastising Shell for failing to oversee its contractors effectively.

11 52. The description of the use of Terminal 5 in the lease and SEPA documentation
12 cannot be reconciled with the Port’s public disclosures about the nature of the activities likely to
13 take place at Terminal 5. By failing to make certain the proposal is properly defined, the Port
14 acted illegally, arbitrarily and capriciously and in violation of SEPA Resolution § 9.

15 **II. THE PORT ACTED ILLEGALLY, ARBITRARILY AND CAPRICIOUSLY, AND IN**
16 **VIOLATION OF SEPA BY INVOKING THE LEASING CATEGORICAL**
17 **EXEMPTION (WAC 197-11-800(5)) WHEN THE NEW USE AS A HOMEPORT IS**
18 **NOT ESSENTIALLY THE SAME USE AS THE PRIOR USE AS CARGO**
19 **TERMINAL.**

20 53. Plaintiffs reallege and incorporate ¶¶ 1-45.

21 54. The SEPA categorical exemption for leases applies only “when the property use
22 will remain essentially the same as the existing use for the term of the agreement. . .” WAC 197-
23 11-800(5).

24 55. Terminal 5 has been designated and used as a cargo terminal for many decades,
25 including in the Port’s Port Management Agreement with the Washington Department of Natural

1 Resources for management of state-owned aquatic lands, PRA 38, 56, in the Port’s 1985 long-
2 range plan, PRA 227, in the Port’s 1991 Container Plan, PRA 228, and in the Port’s Shoreline
3 Substantial Development Permit, PRA 136, 140, 156.

4 56. Under a 1985 lease, Eagle Marine Services operated a marine container terminal
5 at Terminal 5 for nearly three decades. Eagle Marine received and stored large quantities of
6 container cargo and then transferred the cargo to other carriers for shipment to other locations.

7 57. The Port is planning a modernization project to enable Terminal 5 to handle larger
8 container ships. The Port terminated the lease with Eagle Marine in July 2014, upon determining
9 that major cargo terminal operations would interfere with the Port’s planned modernization
10 project.

11 58. The Seattle Municipal Code defines “cargo terminal” as a “transportation facility
12 in which quantities of goods or container cargo are stored without undergoing any manufacturing
13 processes, transferred to other carriers or stored outdoors in order to transfer them to other
14 locations.” Seattle Municipal Code 23.60.906. To qualify as a cargo terminal, a transportation
15 facility must: (1) receive and store quantities of goods or cargo; (2) transfer the goods or cargo to
16 other carriers (3) that transport the goods or cargo to other locations. Transshipment is the key
17 requirement for a transportation facility to meet the City’s definition of “cargo terminal.”

18 59. Foss does not plan to operate Terminal 5 as a cargo terminal. Foss does not plan
19 to engage in the transshipment of quantities of goods or cargo to and from vessels in order that
20 they may be shipped to other locations. Foss has proposed to use Terminal 5 for activities that
21 include mooring, repairing, and servicing the vessels that are part of Shell’s Arctic drilling fleet.
22 Foss plans to receive some provisions and equipment that will be loaded onto vessels that are
23 part of the Shell drilling fleet and are moored at the pier.

1 60. The lease does not impose express limits on the activities that would be permitted
2 at Terminal 5. A Port document states “[i]t is not possible to anticipate the specific types of
3 cargo activities that will take place at Terminal 5 in the next months and years.” PRA 145.

4 61. The vessels in Shell’s Arctic drilling fleet have sustained extensive damage in
5 past years. The weather conditions in the Arctic can be severe. Heavy storms, with strong winds
6 and roaring waves, have damaged vessels. One of the drill ships that could call at Terminal 5
7 violated environmental laws, had serious water pollution equipment malfunctions, and
8 discharged oily water both in transit and at port. During the off-season, vessels in Shell’s Arctic
9 drilling fleet have needed extensive maintenance and repairs. Vessel repairs and maintenance
10 are likely to take place at Terminal 5 under the lease.

11 62. In the briefing at the January 13, 2015 public meeting, Port staff identified the
12 proposed use of Terminal 5 as “Vessel Berth Moorage and Provisioning.” Staff Briefing at 6.
13 The Seattle Municipal Code defines “commercial moorage” as “a parking and moorage use in
14 which a system of piers, buoys, or floats is used to provide moorage, primarily for commercial
15 vessels, except barges, for sale or rent, usually on a monthly or yearly basis.” Seattle Municipal
16 Code 23.60.906. The definition of commercial moorage in the Seattle Municipal Code specifies
17 that minor vessel repair “is often accessory to or associated with the use.” *Id.* The Seattle
18 Municipal Code’s definition of cargo terminal does not expressly authorize vessel repair and
19 maintenance activities. Seattle Municipal Code 23.60.906.

20 63. The Port’s CEO has stated that major vessel repairs would occur in a shipyard,
21 rather than at Terminal 5. The lease appears to allow other vessel repairs and maintenance to
22 take place at Terminal 5. Response at 2.

1 64. Foss obtained a short-term license from the Port to make repairs and changes to
2 Terminal 5. One such change consisted of replacing the prior bollards with heavy-capacity
3 bollards strong enough for the vessels that could call at Terminal 5 under the lease. This
4 modification is evidence that the use of Terminal 5 under the Foss lease differs from the use
5 under the prior lease.

6 65. SEPA categorical exemption WAC 197-11-800(5) applies to leases “only when
7 the property use will remain essentially the same as the existing use for the term of the
8 agreement.” The Port has entered into a lease for a use of Terminal 5 that is not essentially the
9 same as the prior use of Terminal 5. The use of Terminal 5 under the lease will not be
10 essentially the same as the cargo terminal use designated in the Port’s long-range plan, Container
11 Plan, the Port Management Agreement, and the Port’s Shoreline Substantial Development
12 Permit. By invoking the leasing categorical exemption contained in WAC 197-11-800(5), the
13 Port acted illegally, arbitrarily and capriciously and in violation of the terms of the SEPA
14 exemption.

15 **III. THE PORT ACTED ILLEGALLY, ARBITRARILY AND CAPRICIOUSLY, AND IN**
16 **VIOLATION OF THE SHORELINE MANAGEMENT ACT, THE CITY OF**
17 **SEATTLE’S SHORELINE RULES, AND ITS SHORELINE SUBSTANTIAL**
18 **DEVELOPMENT PERMIT BY FAILING TO OBTAIN A REVISION TO ITS**
19 **SUBSTANTIAL SHORELINE DEVELOPMENT PERMIT BEFORE ENTERING**
20 **INTO A LEASE FOR A USE OF TERMINAL 5 FOR PURPOSES OTHER THAN A**
21 **CARGO TERMINAL.**

22 66. Plaintiffs reallege and incorporate ¶¶ 1-45.

23 67. The SMA prohibits substantial development activities without a permit from the
24 appropriate local jurisdiction. RCW 90.58.140. Operation of Terminal 5 is a substantial
25 development requiring a permit under the SMA. The City of Seattle has the authority to permit
26 substantial shoreline development activities at the Port of Seattle. RCW 90.58.050. Under the

1 City of Seattle’s Shoreline rules, it is unlawful to use a property “in any manner that is not
2 permitted by the terms” of the governing shoreline permit. Seattle Municipal Code 23.90.002.

3 68. The City of Seattle has issued a Shoreline Substantial Development Permit to the
4 Port of Seattle (project number 94004118, 1996). Under this permit, the designated use of
5 Terminal 5 is use as a cargo terminal. PRA 136. This permit remains in effect.

6 69. The Seattle Municipal Code defines a “cargo terminal” as a “transportation
7 facility in which quantities of goods or container cargo are stored without undergoing any
8 manufacturing processes, transferred to other carriers or stored outdoors in order to transfer them
9 to other locations.” Seattle Municipal Code 23.60.906. Under this definition, goods and cargo
10 transferred to or stored at the terminal must be transferred to other carriers in order to be
11 transferred to other locations. Transshipment of good and cargo is a required activity in order for
12 a facility to be a cargo terminal.

13 70. Foss does not plan to operate Terminal 5 as a cargo terminal. Foss does not plan
14 to engage in the transshipment of quantities of goods or cargo to other locations. Foss plans to
15 use Terminal 5 for mooring vessels that are part of Shell’s Arctic drilling fleet. Foss plans to
16 receive some provisions and equipment that will be loaded on vessels moored at the pier. At the
17 January 13, 2015 public meeting, Port staff characterized the proposed use of Terminal 5 as
18 Vessel Berth Moorage and Provisioning.” Staff Briefing at 6.

19 71. The vessels in Shell’s Arctic drilling fleet have sustained extensive damage in
20 past years. During the off-season, vessels in Shell’s Arctic drilling fleet have needed extensive
21 maintenance and repairs. Vessel repair and maintenance activities are likely to take place at
22 Terminal 5.

1 72. The activities Foss plans to conduct at Terminal 5 meet the definition of
2 commercial moorage in Seattle’s shoreline rules. Seattle Municipal Code 23.60.906. The
3 Seattle Municipal Code allows minor vessel repair and maintenance to take place as part of
4 commercial moorage activities, but does not expressly allow such vessel repair and maintenance
5 activities to take place at cargo terminals.

6 73. The Port neither sought nor received a revision to the Shoreline Substantial
7 Development Permit covering Terminal 5 for the purpose of allowing the use to change from a
8 cargo terminal to a homeport and commercial moorage facility. In so failing, the Port deprived
9 the public of the review process required for permit revisions.

10 74. By failing to obtain a permit revision and subsequently entering into a lease for
11 use of Terminal 5 for purposes that do not meet the definition of “cargo terminal” in Seattle’s
12 shoreline rules, the Port has authorized use of Terminal 5 in a manner that is not permitted by the
13 terms of its Shoreline Substantial Development Permit in violation of Seattle Municipal Code
14 23.90.002. Authorizing a use that differs from that approved in a Shoreline Substantial
15 Development Permit is prohibited under the SMA without a permit revision or issuance of a new
16 permit, depending on the magnitude of the change in use. WAC 173-27-100. The Port did not
17 seek approval from the City of Seattle in the form of either a permit revision or issuance of a new
18 permit for a change in use for Terminal 5. The Port acted contrary to the Shoreline Management
19 Act, Ecology’s shoreline rules, and Seattle’s shoreline rules by not seeking and obtaining a
20 revision of its current Shoreline Substantial Development Permit before authorizing use of
21 Terminal 5 for purposes other than a cargo terminal that will engage in the transshipment of
22 goods and cargo. WAC 173-27-100; SMC 23.60.076.

