

1 INTRODUCTION

2 On March 20, 2015, this Court granted Plaintiffs’ Motion for Writ of Review and
3 directed counsel to confer about and file the appropriate record. Order Granting Plaintiffs’
4 Motion for Writ of Review at 5. The parties engaged in extensive discussions, but were unable
5 to agree on the scope of the record. On June 2, 2015, the Port of Seattle filed what it asserts is
6 the record in this case (“Purported Record”), but that record does not contain all relevant
7 documents that were before the Port when it invoked a State Environmental Policy Act
8 (“SEPA”) exemption for its lease with Foss Maritime Company (“Foss”). In fact, the Purported
9 Record excludes important and relevant documents that the Port referred to in reaching its SEPA
10 exemption decision and that this Court cited in granting the writ of review. Plaintiffs Puget
11 Soundkeeper Alliance *et al.* (“Soundkeeper”) move this Court to complete the record by adding
12 relevant documents that were before the Port when it made the challenged decision, which are
13 attached to the Declaration of Matthew R. Baca (June 10, 2015).¹

14 SUMMARY AND RELIEF REQUESTED

15 This constitutional writ case challenges the Port’s failure to comply with SEPA when it
16 entered into a lease with Foss for Terminal 5 to serve as a homeport for Royal Dutch Shell’s
17 Arctic drilling fleet. The Port invoked a SEPA categorical exemption that allows it to forgo
18 environmental review for uses of property that will remain essentially the same as the prior use
19 of a given site, even though Terminal 5 previously housed a container terminal and the new use
20 would be a homeport for Shell’s Arctic drilling fleet.

21 In granting the writ of review, the Court observed that “[t]he scope of review is limited to

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23 ¹ These documents are Bates-stamped and cited herein in the form “CW-[page numbers]” for
24 “Completed Writ.” Citations herein to the portion of the record already filed by the Port follows
the Port’s numbering convention of “W-[page numbers].”

1 whether the agency's actions were arbitrary, capricious, or illegal, thus violating a claimant's
2 fundamental right to be free from such action." Order at 2. The Court further noted that
3 arbitrary and capricious action is action "taken without regard to or consideration of the facts and
4 circumstances surrounding the action," and "if there is no support in the record for the action."
5 Order at 3 (citing and quoting *Federal Way School Dist. v. Vinson*, 172 Wn.2d 756, 769 (2011)).

6 On the merits, Soundkeeper claims that the Port improperly deemed the Shell homeport
7 use of Terminal 5 to be a cargo terminal without factual support in the record and contrary to the
8 facts and circumstances surrounding the lease. In order to decide that claim, the Court must be
9 able to review the full body of information before the Port describing the activities that would be
10 conducted under the lease and the prior, decades-long use of Terminal 5 as a container terminal.
11 The Port, however, seeks to exclude from the record many relevant documents that are contrary
12 to its position on the merits, including information the Port considered in making its SEPA
13 exemption determination and documents cited by this Court in granting the writ for review. To
14 ensure the Court has an adequate record before it, the Court should grant this motion to complete
15 the record and add the following three types of documents: (1) information before the Port about
16 Shell's planned and likely uses of Terminal 5; (2) the Port's long-range plans, projects, and
17 environmental reviews that designated Terminal 5 as a container terminal and laid out factors to
18 be considered in changing the terminal's use; and (3) two findings the City of Seattle made in
19 response to the position advocated by the Port in submissions included in the Purported Record.

20 STATEMENT OF FACTS

21 On February 9, 2015, the Port entered into a lease with Foss to use Terminal 5 as a
22 homeport for Shell's Arctic drilling fleet. W-396 to -437. The Port conducted no environmental
23 review under SEPA. Instead, it invoked a categorical exemption from SEPA review that applies
24 to leases of real property "when the property use will remain essentially the same as the existing
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1 use for the term of the agreement . . .” WAC 197-11-800(5). This constitutional writ case
2 challenges the Port’s failure to conduct SEPA review for the Terminal 5 lease.

3 When this Court granted the writ of review, it stated that review is limited to the record to
4 determine if the action was arbitrary and capricious or illegal. Order at 3. In contrast to most
5 record-review cases, no administrative or quasi-judicial proceeding generated such a record
6 before the Port. Recognizing that the record had not already been created in such a proceeding,
7 the Court directed the parties to confer “to determine the appropriate ‘record’ in this matter.”
8 Order at 5. The parties conferred, but could not reach agreement on the scope of the record.

9 The Port has filed the Purported Record, which is limited to the following:

W Pages	Document
W-1 to W-144	Shoreline Master Use permit for Southwest Harbor Redevelopment Project (1995)
W-145 to W-182	Port SEPA Resolution No. 3650, as amended (2011)
W-183 to W-190	Letter of Understanding between the Port and Foss (Jan. 9, 2015)
W-191 to W-193	Declaration of Paul Meyer (Apr. 23, 2015)
W-194 to W-215	Memo from Linda Styrk to City of Seattle (Apr. 6, 2015)
W-216 to W-310	Layberthing Letter from Linda Styrk to City of Seattle (Apr. 15, 2015)
W-311 to W-312	SEPA Exemption for Lease (Feb. 5, 2015)
W-313 to W-317	Port’s SEPA Memorandum re: WAC 197-11-070 (Feb. 11, 2015)
W-318 to W-320	Declaration of George Blomberg (Apr. 23, 2015)
W-321 to W-326	Port’s SEPA Memorandum re: bollards replacement (revised) (Feb. 4, 2015)
W-327 to W-340	Request for Shoreline Exemption (Jan. 21, 2015)
W-341 to W-363	Description of Foss Activities for Shoreline Exemption (Jan.-Feb. 2015)
W-364 to W-395	City of Seattle Shoreline Exemption (Feb. 15, 2015)
W-396 to W-437	Lease between the Port and Foss (Feb. 9, 2015)
W-438 to W-459	Port Management Agreement (1998)

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20 This record tells only part of the story. It consists primarily of documents supporting the
21 Port’s legal position in the form of its SEPA exemption determination and its characterization of
22 the planned use of Terminal 5 in proceedings conducted by the City of Seattle related to the
23 Port’s shoreline permit for Terminal 5. The Purported Record omits other information that was
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1 before the Port, which describes the activities Foss will conduct under the lease, as well as
2 planning and environmental review documents that designated Terminal 5 as a marine container
3 terminal decades ago. The Purported Record is also incomplete. It includes the Port's
4 characterization of the new use of Terminal 5 as a cargo terminal in submissions to the City, but
5 excludes the City's full responses, which disagree with the Port's characterization.

6 STATEMENT OF ISSUES

7 In this constitutional writ case, Soundkeeper alleges that the Port acted arbitrarily,
8 capriciously, and contrary to SEPA by claiming that Terminal 5 would continue to be used as a
9 cargo terminal and therefore exempt from SEPA because that conclusion is unsupported by and
10 contrary to the information before the Port when it entered into the lease. To present this claim,
11 Soundkeeper should be able to point the Court to evidence in the record that is at odds with or
12 undercuts the Port's characterizations. Given the nature of this claim, the issue on this motion is
13 whether the record must include: (1) evidence that was before the Port pertaining to the planned
14 use of Terminal 5; (2) long-term plans and environmental reviews designating Terminal 5 as a
15 marine container terminal; and (3) government findings issued in response to assertions made by
16 the Port in submissions it has included in the Purported Record.

17 ARGUMENT AND LEGAL AUTHORITY

18 I. THE COURT'S REVIEW MUST BE BASED ON THE FULL BODY OF RELEVANT
19 INFORMATION BEFORE THE PORT WHEN IT MADE THE CHALLENGED
20 DECISION.

21 It is well settled that the standard of review in a constitutional writ case is "limited to a
22 review of the record below to determine whether the decision or act complained of was or
23 involved arbitrary and capricious or illegal actions . . ." *Bridle Trails Cmty. Club v. City of
24 Bellevue*, 45 Wash. App. 248, 252 (1986). In granting the writ, this Court explained that an
25 action is arbitrary, capricious, or illegal when it is "taken without regard to or consideration of

1 the facts and circumstances surrounding the action,” and “if there is no support in the record for
2 the action.” Order at 2-3.

3 In this case, Soundkeeper raises two claims. First, Soundkeeper alleges that the Port
4 failed to properly define the project, as required by its SEPA Resolution 3650, § 9 (W-157),
5 when it characterized Foss’s use of Terminal 5 as a cargo terminal. Soundkeeper asserts that this
6 characterization is contrary to the evidence before the Port, which describes the intended use as a
7 homeport, over-wintering moorage, and vessel berth moorage and provisioning. Second,
8 Soundkeeper alleges that the Port erroneously invoked the lease categorical exemption, which
9 applies only “when the property use will remain essentially the same as the existing use for the
10 term of the agreement,” WAC 197-11-800(5). Soundkeeper intends to show that extensive
11 evidence before the Port from its negotiations with Foss revealed that the new homeport use
12 would be different from the prior use of Terminal 5 as a container terminal. The Port’s
13 declarant, Paul Meyer, agrees that the key question is “whether the proposed activities that would
14 occur under the lease” would qualify for a SEPA exemption. W-192.

15 In order to assess whether the Port properly defined the proposed use of Terminal 5, the
16 Court should be privy to all the pertinent information before the Port. Similarly, in order to
17 determine whether the Port erred in invoking a SEPA exemption that applies only when the use
18 of property will remain the same, the Court should be privy to the full record identifying both the
19 previous and new uses.

20 In analogous federal jurisprudence governing the appropriate scope of the record, courts
21 have held that the record “includes everything that was before the agency pertaining to the merits
22 of its decision. . . . If the record is not complete, then the requirement that the agency decision
23 be supported by ‘the record’ becomes almost meaningless.” *Portland Audubon Soc’y v.*

1 *Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (“Here, however, the material
2 the environmental groups seek to have included in the record is material that allegedly was
3 before the agency. Therefore, supplementation is proper.”); *Thompson v. U.S. Dep’t of Labor*,
4 885 F.2d 551, 556 (9th Cir. 1989) (“Consequently, the critical inquiry is whether these letters
5 were before the Secretary at the time of the decision.”).² Holding otherwise would allow the
6 agency to pick and choose from the evidence to create its preferred record. An incomplete
7 record is a “fictional account of the actual decision-making process.” *Portland Audubon Soc’y v.*
8 *Endangered Species Comm.*, 984 F.2d at 1548 (quoting *Home Box Office, Inc. v. Federal*
9 *Communications Comm’n*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

10 II. THE PORT HAS FILED ONLY A FRACTION OF THE RECORD.

11 The Port has improperly narrowed the record in ways that make full and fair review by
12 this Court impossible. First, the Port has excluded records of public Port Commission meetings
13 at which the Commissioners addressed the Shell homeport lease and the container terminal
14 designation of Terminal 5. Second, the Purported Record contains the Port’s official
15 documentation of its SEPA exemption determination, but excludes other records that reveal what
16 the Port knew about Foss’s proposed use of Terminal 5 and undercut the Port’s position. Third,
17 in its SEPA analysis, the Port discussed a 1990s upgrade of Terminal 5 and associated
18 environmental reviews, which designated Terminal 5 as a container terminal and identified
19 environmental and public interests that must be addressed in changing that use. W-314 to -315
20 The Port’s declarant, George Blomberg, states that he reviewed the 1994 environmental impact
21 statement in deciding whether SEPA review was required, yet the Port has resisted including this
22 review and associated long-range plans in the record. W-319. Fourth, the Port has included in

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24 ² See generally *Leschi Improvement Council v. Wash. State Hwy Comm’n*, 84 Wn.2d 271 (1974)
(in deciding constitutional writ cases, courts borrow from federal administrative law cases).

1 the Purported Record its rationale for claiming before the City of Seattle planning department
2 that the Shell homeport is not a change of use of Terminal 5. The City, however, has made a
3 contrary finding, which the Port omitted from the Purported Record. An administrative record
4 cannot be self-serving and tell only the governmental party's side of the story. To ensure that the
5 Court has before it the full record, we ask the Court to grant this motion.

6 A. The Record Should Include Relevant Records of Public Port Commission
7 Meetings.

8 As an elected body, the Port is subject to open meeting laws, which call for open
9 meetings, agendas available online before meetings, and audio or video recordings of public
10 meetings. RCW 42.30. The Port Commissioners held only one public meeting before entering
11 into the Foss lease on January 13, 2015. This meeting marked the first and only public
12 disclosure about the lease before it was signed.³ In connection with the meeting, the Port
13 released a staff briefing memorandum and PowerPoint presentation about the lease, and the
14 meeting itself entailed staff presentations, a presentation by the CEO of Foss, and questions by
15 and discussions among the Commissioners. CW-99 to -117 (Port Staff Briefing Mem. (Jan. 8,
16 2015)); CW-21 to -98 (Transcript of Jan. 13, 2015 Port Comm'n Meeting). The staff briefing
17 depicts the use of Terminal 5 as "vessel berth moorage and provisioning," "a short-term berth for
18 vessels used in oil and gas exploration in Alaska," "[o]ver-wintering moorage," "berth and
19 provisioning activity," and "homeport." CW-104. It describes the activities as follows: "T-5
20 would receive, inventory, and stage equipment and supplies that would be loaded to a fleet of

21 ³ The negotiations with Foss, which spanned more than six months, were conducted under a
22 verbal nondisclosure agreement with extensive input from Foss, Shell, and the maritime industry,
23 but no SEPA or other public review. CW-173 to -174 (Email from John Creighton to Larry Ehl
24 (Dec. 12, 2014)). The Port has released talking points, public relations plans, and other
documents under the Public Records Act, which reveal efforts to justify the leasing decision and
lack of environmental review, even before the final leasing and SEPA decisions were made.
CW-171 to -172; CW-197 to -210.

1 vessels, including exploration drill rigs, ice-breakers, provisioning vessels, environmental
2 response vessels, tugs and barges for seasonal operations in Alaska.” *Id.*

3 In granting the writ, this Court conducted a preliminary review of Soundkeeper’s claims
4 by relying on information released at this public meeting. Referring to the lease depiction of the
5 use of Terminal 5 as a cargo terminal, the Court stated that:

6 [t]he permitted uses under the terms of the lease seem to contradict the expected
7 uses outlined in the Port of Seattle’s staff briefing memo. The staff memo goes
8 on to state that the ‘fleet of vessels’ (8) would depart for exploration in June and
9 return to ‘homeport’ at Terminal 5 late summer for over-wintering October
through May. These activities appear to be qualitatively different than Eagle
Marine Services’ previous use of Terminal 5 as a marine container terminal.

10 Order at 4. Given the prominent role records from this public meeting played in this Court’s
11 analysis, it is indefensible for the record to exclude documents memorializing this meeting.

12 At other public meetings earlier in 2014, the Port had decided to embark on a
13 modernization project to make Terminal 5 a state-of-the-art marine container terminal able to
14 handle the huge container ships coming to dominate the field. This decision led to the desire to
15 find an interim tenant to occupy Terminal 5 during the modernization project. It also confirms
16 the Port’s long-term plans for Terminal 5 to remain a container terminal. Soundkeeper asks the
17 Court to include in the record two staff presentations describing the modernization project.
18 *See, e.g.,* CW-1 to -20 (May 13 & 23, 2014 Memoranda re: Terminal 5 Modernization).

19 B. The Record Should Include All Information about the Proposed Use of Terminal
20 5 That Was Before the Port When it Entered into the Lease.

21 The use of Terminal 5 under the Foss lease is at the heart of this case. The Purported
22 Record includes the Port’s characterization of that use in the form of its SEPA exemption
23 determination, its request for a shoreline exemption for replacement of bollards to enable
24 mooring of Shell’s Arctic drill rigs, and its arguments to the City that the Shell homeport use
25 does not violate the shoreline permit for Terminal 5. Yet the Port has failed to include extensive

1 evidence that was before it about the planned use of Terminal 5 as a homeport.

2 Consistent with the analysis employed by this Court in granting the writ for review, such
3 evidence is not only relevant, but is pivotal. After all, Soundkeeper is claiming that the record
4 before the Port undercuts its SEPA determination that the Shell homeport use is essentially the
5 same as the prior container terminal use. To decide this claim, the Court must be able to review
6 the full body of information before the Port regarding the homeport use.

7 In addition to the public meeting records discussed above, the Port met with both Foss
8 and Shell to discuss activities that would occur under the lease. For example, Shell gave a
9 PowerPoint presentation at a meeting with Port officials, which described the homeport
10 activities. CW-211 to -233 (Email Attach. from Michael McLaughlin to Linda Styrk (Aug. 29,
11 2015)). Internal Port memoranda describe homeport moorage activities, provide timelines for
12 such activities, and contain maps showing where and how many Shell vessels would be moored
13 at Terminal 5. CW-193 to -196 (Email from Kurt Beckett to Beth Osborne (Dec. 24, 2014));
14 CW-188 to -192 (Memorandum from Lindsey Wolpa (Dec. 15, 2014)); CW-127 to -143 (Email
15 from Paul Meyer (Jan. 5, 2015). Conservation groups and civil leaders sought SEPA review to
16 ensure full consideration of the environmental impacts of housing a drilling fleet that, when it
17 last made a journey to the Arctic, leaked oil and violated environmental and safety laws, leading
18 to felony convictions, but the Port denied that request. CW-180 to -185. Such information is
19 highly relevant to Soundkeeper's claim that a Shell homeport differs from a container terminal in
20 the types of maintenance activities undertaken, water pollution from such activities, and
21 blockage of on-water navigation from the long-term moorage of large drill rigs.

22 The Port has included some records pertaining to replacement of bollards to enable
23 Terminal 5 to moor Shell's enormous drill rigs. W-321 to -365. However, it failed to include
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1 other documents pertaining to that same preparatory activity. For example, it omitted: (1) the
2 short-term license issued to allow Foss to modify Terminal 5 before the lease was finalized; (2)
3 the drawings from the original removal of comparable bollards as part of the 1990s
4 redevelopment and upgrading of Terminal 5 to a then state-of-the-art container terminal; and (3)
5 the cover sheet from the City's shoreline exemption, which indicates that the City did not
6 approve any change of use at Terminal 5. CW-118 to -126 (License); CW-146 to -150 (1985
7 1985 Bollards Schematics); CW-144 to -145 (City of Seattle Shoreline Exemption Cover).
8 While Soundkeeper does not challenge the shoreline or SEPA exemptions for the bollards
9 replacement, these records are relevant because the need for new bollards to moor the drill rigs
10 shows that the homeport use was not essentially the same as the prior container terminal use.

11 C. The Record Should Include Long-Range Plans and Environmental Reviews That
12 Designate Terminal 5 as a Container Terminal.

13 In the late 1990s, Terminal 5 underwent a large-scale expansion through the Southwest
14 Harbor Cleanup and Redevelopment Project to become a state-of-the-art container terminal.
15 George Blomberg's Declaration states that he reviewed the environmental impact statement
16 ("EIS") underlying the expansion in making the SEPA exemption determination for the lease.
17 W-319. The Port, however, refused to include pertinent portions of that EIS in the record.

18 The City of Seattle issued a shoreline substantial development permit for the 1990s
19 Terminal 5 expansion, which "confirmed and established Terminal 5 as a 'cargo terminal'
20 consistent with City code and allowed for substantial expansion of container cargo transshipment
21 and cargo marshaling facilities." CW-162. The Port has appropriately included the shoreline
22 permit in the Purported Record. W-1.

23 Relevant portions of the environmental review and long-range plans that led to and
24 supported the 1990s expansion should also be included in the record for three reasons. First, Port

1 staff who made the SEPA exemptions determinations reviewed the EIS for the 1990s expansion.
2 W-314 to -315; CW-162. Second, that EIS, along with two comprehensive, long-range plans—
3 the Harbor Development Strategy and 1991 Container Plan—made it a priority for the Port to
4 develop state-of-the-art container terminals capable of handling large volumes efficiently and
5 identified Terminal 5 as the premier container terminal site. An email from the Port’s declarant,
6 Paul Meyer, recites this history, quoting extensively from the EIS. CW-159 to -162. Third, the
7 EIS identified the key environmental issues made relevant under state laws, regulations, and
8 policies that must be addressed under SEPA, including water pollution, public access to
9 shorelines, navigation, and protection of fish habitat and migratory fish routes. *See, e.g.*, CW-
10 279 to -280 (EIS Notice of Availability); CW-323, -325 to -328 (EIS App’x F-2).

11 The Purported Record excludes this rich and informative history and context. Instead, it
12 offers the opinions of Port staff—via declarations and memoranda prepared *after* the lease was
13 signed—as to whether mooring, maintaining, repairing, and outfitting drill rigs is the same as a
14 cargo terminal. The record must contain the Port’s long-range plans and EISs, prepared with full
15 public participation and extensive governmental engagement, which designate Terminal 5 as a
16 premier marine container terminal and define the goals and functions of that designation and the
17 redevelopment of Terminal 5.

18 D. The Full Record Should Include Government Findings Rejecting the Port’s
19 Contentions Made in Submissions Included in the Purported Record.

20 After this lawsuit was filed, the City of Seattle Department of Planning and Development
21 initiated an investigation to determine whether use of Terminal 5 as a homeport was consistent
22 with the shoreline permit. The Port included in the Purported Record submissions to the City
23 planning department presenting the Port’s claims that the homeport use comports with the City
24 Code and shoreline master program. W-191 to -193, -195 to -220, -318 to -319. On May 7,

1 2015, the Director of the planning department issued an interpretation concluding that moorage
2 of an oil drill rig and associated tugboats and vessels is not a cargo terminal use, and on May 18,
3 2015, the department issued a notice of violation of the shoreline permit to the Port and Foss.
4 CW-234 to -239 (Interpretation No. 15-001); CW-240 to -243 (Notice of Violation Case No.
5 1034649). To be complete, the record should include these determinations, which reject the
6 contentions made by the Port in its submissions.⁴

7 CONCLUSION

8 Soundkeeper respectfully asks the Court to include the attached documents in the record.

9 DATED this 10th day of June, 2015.

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12 PATTI A. GOLDMAN, WSBA No. 24426
13 AMANDA W. GOODIN, WSBA No. 41312
14 MATTHEW R. BACA, WSBA No. 45676
15 Earthjustice
16 705 Second Avenue, Suite 203
17 Seattle, WA 98104-1711
18 (206) 343-7340 | Phone
19 (206) 343-1526 | Fax
20 pgoldman@earthjustice.org
21 agoodin@earthjustice.org
22 mbaca@earthjustice.org

23 *Attorneys for Plaintiffs Puget Soundkeeper*
24 *Alliance, Seattle Audubon Society, Sierra Club,*
25 *and Washington Environmental Council*

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⁴ Alternatively, the Court should either (1) strike the Port's extra-record representations and exclude the City's findings, or (2) retain the Port's representations and the City's findings as extra-record material. *See Responsible Urban Growth Grp. v. City of Kent*, 123 Wash. 2d 376, 384 (1994) ("When the petition involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions, the court may consider evidence outside the record.")