



January 28, 2015

Port of Seattle Commissioners
PO Box 1209
Seattle, WA 98111

RE: Request for Reconsideration Regarding Terminal 5 Interim Lease

Dear Commissioners Albro, Bowman, Bryant, Creighton and Gregoire:

The undersigned ask the Port of Seattle to reconsider its decision to proceed with an interim lease for use of Terminal 5 by Foss Maritime without complying with the State Environmental Policy Act (SEPA). This matter moved at such a fast pace that we are concerned the Port did not give the applicability of SEPA and the environmental implications of this lease full consideration.

On January 13, 2015, the Port of Seattle voted 3-2 not to prohibit Port staff from signing a lease with Foss Maritime for use of Terminal 5 on an interim basis during the modernization project. While the interim lease might further the Commissioners' goal of bringing in revenues and creating some jobs during the early stages of the modernization project, it might also have environmental impacts that counsel in favor of rejecting the lease or including lease conditions to prevent environmental harm. It is our understanding that the lease term would begin in March 2015 for a two-year term, with the possibility of extensions for up to four years if the project would avoid interfering with the modernization activities.

The Port appears poised to enter into a lease with Foss without undertaking any environmental review under SEPA. The Commission has invoked a SEPA categorical exemption that applies to leasing real property. That exemption applies only "when the property use will remain essentially the same as the existing use for the term of the agreement." WAC 197-11-800(5)(c). Previously, the Port had leased Terminal 5 to Eagle Marine Services, Ltd. for use as a container terminal. In July 2014, the Port terminated that lease because the container terminal operations were incompatible with the activities required to modernize the terminal.

The critical question, for purposes of the SEPA categorical exemption, is whether Foss's proposed uses of Terminal 5 are "essentially the same" as the prior container terminal operations. Foss is proposing two uses with possible additional ones during the lease term. Our concern is with the proposal by Foss, in partnership with Royal Dutch Shell, to use approximately 50 acres of Terminal 5 as a home port for offshore exploration drilling and support vessels.

The proposal remains vague. Disclosed materials indicate at times that 24 vessels would berth at Terminal 5 and at other times 8 vessels. The vessels have been described as exploration

drill rigs, ice breakers, provisioning vessels, environmental response vessels, tugs and barges. They would be moored at Terminal 5 from October through May; in June, the vessels would make the journey to the Arctic for the drilling season. Foss Maritime provides vessel repairs, major conversions, vessel construction, and routine maintenance, and the Shell drilling fleet has needed extensive repairs, maintenance and conversions in the past. If such activities would be conducted at Terminal 5, the lease would change the use of the terminal from a container terminal to a shipyard, which discharge runoff laden with toxic chemicals.

While the current proposal is to enter into an interim lease with Foss, the Port must consider how the use of Terminal 5 as a homeport for Shell's Arctic fleet might evolve over time. Legally, if the Port renews the lease for a second or third term, the uses would likely remain essentially the same as those under the initial interim lease. Accordingly, the SEPA categorical exemption would likely apply to a lease renewal. The Port must, therefore, consider not only the uses currently identified by Foss, but also the possibility that the Port could become the permanent homeport for Shell's Arctic fleet with expanded vessel repair and servicing activities in the event the modernization plans fail to move forward and obtain public financing.

The Port invoked the leasing categorical exemption without any analysis of the activities that would be conducted by Foss under the lease. In particular, other categorical exemptions reveal the need for heightened scrutiny of activities that occur wholly or partially on lands covered by water or where water pollution will result from the land use. *See* WAC 197-11-800(1)(a) & (2)(a) (categorical exemption for minor construction inapplicable in these circumstances); 6(d) (exemption for certain subdivision and play approvals inapplicable to lands covered by water). Where a project would involve overwater structures or water pollution, the categorical exemptions envision that SEPA should apply and the state or local agency should review the environmental impacts under ordinary SEPA procedures.

Turning Terminal 5 into an interim home port for Shell's Arctic drilling could have a range of environmental impacts, including toxic runoff from vessel reconstruction and maintenance and water pollution from the vessels at port and during transit. Shell's Arctic drilling fleet has an abysmal track record when it comes to water pollution and compliance with environmental laws. The *New York Times Magazine* published an article on December 30, 2014, *The Wreck of the Kulluk*, which recounts the myriad ways in which Shell cut corners on safety in its Arctic drilling operations. Many of these shortcomings are relevant to the proposed activities in Puget Sound. For example, the Department of Interior conducted a review after Shell's 2012 Arctic offshore drilling program "raised serious questions regarding its ability to operate safely and responsibly." *Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program* at 1 (March 8, 2013). The Review "confirmed that Shell entered the drilling season not fully prepared in terms of fabricating and testing certain critical systems and establishing the scope of its operational plans" and identified "shortcomings in Shell's management and oversight of key contractors" operating, servicing and refurbishing vessels. *Id.* More specifically, the Review "identified a number of weaknesses indicating that Shell's management systems were insufficiently robust, particularly in the area of contractor oversight, to successfully manage and

minimize overall operational risks” and found that “[t]he most significant shortcomings in Shell’s management systems were in the area of contractor management and oversight,” pointing to air permit violations and deficiencies in the *Noble Discoverer*, as examples. *Id.* at 30, 31. Shell fell short in managing and monitoring risks identified during operational planning. *Id.* at 30. And the systems that Shell did employ failed to oversee the risks associated with ancillary maritime transportation or logistics activities, *id.* at 31, precisely the types of activities that the Terminal 5 lease would bring to Puget Sound.

The travails of the *Noble Discoverer* raise particular concerns about allowing Terminal 5 to serve as the home port for Shell Arctic drilling vessels. After the ship completed drilling operations, its main engine and other equipment failed. As a result of deficiencies in its safety management system, the Coast Guard placed the vessel under a Port State detention pending corrective measures, which the Coast Guard does in only approximately 1% of its vessel safety examinations. Ultimately, the *Noble Discoverer* had to be loaded onto a vessel and dry-towed to Asia for repairs. The federal government indicted Noble Drilling (US) LLC for environmental and maritime crimes in operating the *Noble Discoverer*. On December 8, 2014, Noble pled guilty to eight felony offenses, agreed to pay \$12.2 million dollars in fines and community service payments, and was placed on probation for four years. Among its offenses, Noble failed to have operational pollution control equipment, developed make-shift systems that discharged bilge and wastewater directly overboard, pumped oil-contaminated water into the ballast water tanks and discharged the contents overboard instead of through pollution control equipment, failed to notify the Coast Guard of hazardous conditions with the vessel’s equipment, which led to an explosion and engine fire, and falsified records pertaining to its collection, transfer, storage and disposal of oil and the inoperability of pollution control equipment. Noble’s actions led to the discharge of oil-contaminated water, which in one instance created an oily sheen in Broad Bay, Unalaska.

The *Noble Discoverer*, still operated by *Noble*, would be one of the drill ships stationed at Terminal 5, along with another drill ship, the *Polar Pioneer*, owned by Transocean, the owner of the *Deepwater Horizon*, which paid more than \$1.4 billion in criminal and civil fines for its role in the 2010 Macondo oil spill. After a summer drilling season in the harsh conditions of the Arctic, the *Noble Discoverer* and other vessels have needed extensive repairs. Making such repairs at Terminal 5 would differ from the normal fare of a container terminal and would produce the type of contaminated runoff associated with shipyards.

The discharge of oil from the vessels and toxic pollution from vessel maintenance and reconstruction can be particularly harmful to salmon. Terminal 5 is located near the mouth of the Duwamish River, which is habitat to Puget Sound Chinook salmon that are listed as threatened under the federal Endangered Species Act. Water pollution from the proposed homeport may harm threatened salmon, as well as their prey.

The serious deficiencies in the Shell Arctic drilling fleet stem from its rush to conduct exploratory drilling in the Arctic, a pristine ocean frontier known for its harsh climate and

remoteness. The nation watched in horror as *Deepwater Horizon* exploded, burned, and sank, spewing an estimated 210 million gallons of oil into the Gulf of Mexico. If the unthinkable were to occur in the Arctic, it would be catastrophic, perhaps even more so than in the relatively accessible and placid Gulf of Mexico. The Arctic lacks the infrastructure to respond to an oil spill—the nearest Coast Guard station is 1,000 miles away, and there are no roads, deep-water ports, hotels, or major airports to facilitate response efforts—and there are no proven means of containing or removing spilled oil in the Arctic’s seasonally ice-covered and stormy seas. An oil spill would devastate the region’s irreplaceable wildlife and the vibrant indigenous culture that has thrived there for millennia. Even without a spill, Shell’s drilling would introduce noise, disturbance, and air and water pollution into the fragile region already suffering immense stress from climate change that is occurring at twice the rate as the rest of the world, melting the sea ice upon which species such as polar bears, walrus, and seals depend on for their survival. Shell’s drill ships, ice-breakers, helicopters, and supply ships would descend and operate in vital habitat for already-stressed Arctic species during the critical few summer months these species use the Arctic Ocean to feed, give birth, and rear their young. Shell proposes to drill in the heart of the bowhead whale migration corridor, potentially disturbing mothers and calves in critical feeding and resting areas. It also proposes to operate in an important walrus habitat, potentially chasing walruses and their young from vital feeding grounds and adding to the species’ woes as the animals try to adapt to the loss of sea ice by congregating in massive onshore haul outs where they are vulnerable to trampling from disturbance and must swim long distances, sometimes over a hundred miles, to find food. Shell’s operations will also kill birds such as threatened eiders, disturb seals and other species of whales, and discharge harmful air and water pollution. What’s more, any oil Shell finds and develops will only exacerbate climate change and undermine internationally agreed climate goals. Indeed, a recent scientific study in the journal *Nature* specifically concludes that Arctic oil and gas should be left in the ground if we are to limit warming to 2 degrees Celsius and avoid the worst effects of climate change. See McGlade, Christophe and Paul Ekins, “The geographical distribution of fossil fuels unused when limiting global warming to 2°C”, *Nature* 517(187) (2015).

Shell’s quest to drill in the Arctic has been a dirty business, exposing people and natural resources to harm along the way. Before bringing the Shell drilling fleet to Terminal 5, the Port should, and legally must, assess the environmental harm that could befall the Puget Sound.

For these reasons, we ask that you reconsider invoking a categorical exemption to preclude SEPA compliance for allowing Terminal 5 to serve as a home port for Shell’s Arctic drilling fleet. We ask that the Port apply greater scrutiny to the proposed lease, including through additional public hearings and public disclosure of the full extent of the operations that would be permitted at Terminal 5 under the proposed lease and all documents revealing such information. Should the Port persist in entering into the lease and in invoking a categorical exemption from SEPA, it must provide a full written justification for doing so. Port of Seattle Resolution 3650, § 9.3, at <http://www.portseattle.org/Environmental/Environmental-Documents/SEPA-NEPA/Pages/default.aspx>. Moreover, in light of the public controversy over this lease, it would be prudent for the Port to structure any lease to insulate the Port from

contractual or financial liability should the lease be invalid due to violations of SEPA or other laws.

We ask that you respond to this letter by February 9, 2015, to let us know how the Port intends to proceed. Please respond by contacting Patti Goldman at (206) 343-7340 extension 1032 or pgoldman@earthjustice.org.

Sincerely,



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