

RESOLUTION NO. 3539

A RESOLUTION of the Port Commission of the Port of Seattle, King County, Washington, adopting amendments to sections 5.2 and 5.4 of Port Commission Resolution 3028 and repealing section 1.2, subsections 1.5(2)(a)(i-ii) and (b), amending sections 1.1, 1.4, 1.5, subsections 1.3(1) and (2), 1.5 (3-5) adopting a new section 1.2, 1.3, 1.4, 1.5(2) (a-b), (3-8) of Port Commission Resolution 3211 and amending the basic procedural framework governing State Environmental Policy Act (SEPA) administrative appeal rules and procedures and adopting new Port SEPA appeal procedures.

WHEREAS, the State Environmental Policy Act (SEPA), ch. 43.21C Revised Code of Washington (RCW), and implementing rules in chapter 197-11 Washington Administrative Code (WAC) require the Port to enact a resolution integrating SEPA into the Port's procedures, and

WHEREAS, on December 17, 1987, the Port adopted Resolution 3028 in accordance with chapter 43.21C RCW and chapter 197-11 WAC, containing sections 15.4 and 21 and subsections 21.1, 21.2, 21.3, 21.4 and 21.5 providing for optional SEPA reconsideration procedures, and

WHEREAS, on February 8, 1996 the Port Commission adopted Resolution 3211 to repeal the reconsideration procedures in sections 15.4 and 21 and subsections 21.1, 21.2, 21.3, 21.4 and 21.5 and to establish a new SEPA administrative appeal process to provide the public and interested parties with a consistent, predictable and timely administrative review process for certain determinations it makes under SEPA, and

WHEREAS, consistent with WAC 197-11-680(3)(a)(iii) and (iv) which was revised after the adoption of Resolution 3211 to limit the SEPA administrative appeal process to 1) an administrative appeal of certain SEPA appeal procedural determination made by the Port on a nonproject action, or 2) an administrative appeal of certain SEPA procedural determinations

made by the Port when the Port is a project proponent, of is funding a project, and chooses to conduct its review under SEPA, prior to seeking an application for a project permit, and

WHEREAS, under WAC 197-11-800 (20), the adoption of SEPA procedures by local governments are categorically exempt from SEPA review, and

WHEREAS, the Port has provided public notice regarding this resolution and an opportunity for public comment on the resolution,

NOW THEREFORE BE IT RESOLVED, by the Port Commission of the Port of Seattle, Washington, that Resolution 3028 is amended as follows:

Section 5.2 Responsible Official. The person or office at the lead agency in charge of SEPA compliance is called the responsible official. The Port's responsible official for the Seaport and the Economic Development Divisions is: Charles Sheldon, Managing Director, Seaport Division, Port of Seattle, P.O. Box 1209, Seattle, WA 98111 and the responsible official for the Aviation Divisions is: Michael Feldman, Deputy Managing Director Aviation Facilities and Environment, Port of Seattle, P.O. Box 68727, Seattle, WA 98168 The Chief Executive Officer is authorized to designate new responsible officials for the Seaport, Economic Development and Aviation Divisions.

Section 5.4. SEPA Public Information The office that routinely handles SEPA matters at the Seaport and Economic Development Divisions of the Port is:

Environmental Services

P.O. Box 1209

Seattle, WA 98111

(206) 728 -3190

sepa.p@portseattle.org

The office that routinely handles SEPA matters at the Aviations Division of the Port is:

Aviation Environmental Programs

P.O. Box 68727

Seattle, WA 98168

sepa.p@portseattle.org

Port Commission Resolution 3211 is amended as follows:

Section 1. Appeals. Port SEPA decisions may be appealed as provided in this section.

Section 1.1 SEPA Decisions Subject to Appeal. The following SEPA decisions of a Port responsible official are appealable under this section pursuant to WAC 197-11-680(3): (a) adequacy of a final environmental impact statement (FEIS), and (b) issuance of a mitigated determination of nonsignificance (MDNS). Other Port SEPA decisions and documents are not subject to administrative appeal

Section 1.2 Timing of Appeals.

1. Appeals may not be filed before the Port provides public notice of the issuance of the FEIS or MDNS.
2. Appeals must be filed by 5 p.m. of the 15th calendar day following the date the Port provides public notice of the issuance of the FEIS or MDNS. When the last day of the appeal period is a Saturday, Sunday, or a national, state, or Port holiday, the appeal period runs until 5 p.m. on the next business day.

Section 1.3 Public Notice. When required pursuant to WAC 197-11-510, the Port shall provide public notice, in accordance with this subsection. The Port shall provide public notice of the issuance of the FEIS or MDNS. Failure to provide such notice does not waive the appeal deadline or otherwise affect the timing within which the appeal must be filed, if the Port has substantially complied with such notice requirements. The Port must:

1. Publish notice in a newspaper of general circulation in the county, city, or general area where the proposal is located (if there is more than one newspaper, the responsible official may select one newspaper for publication);
2. Furnish notice to anyone or any group who has specifically requested in writing to be notified about the particular proposal.

3. At its discretion, the Port may use any of the optional notice methods set forth in Section 15.2 of Port Resolution No. 3028.

Section 1.4 Notice of Action. At its discretion, the Port may publish notice of action taken pursuant to this Resolution and pursuant to RCW 43.21C.080. The form of any such notice of action shall be substantially in the form provided by WAC 197-11-990.

Section 1.5 Filing Appeals. Appeals must:

1. Be in writing;
2. Contain a statement that identifies the FEIS or MDNS being challenged and the alleged errors in the FEIS or MDNS which make the document legally inadequate;
3. State the specific reasons why Petitioner believes the FEIS or MDNS to be legally inadequate;
4. State the harm suffered or anticipated to be suffered by Petitioner and the relief requested by Petitioner;
5. Include the signature, address, and phone number of Petitioner and the name and address of Petitioner's legal representative, if any;
6. Be accompanied by an appeal fee of \$300;
7. List as respondents all necessary parties set forth herein. In any administrative appeal brought under this section, the following are necessary parties to any appeal under this section and must be served by Petitioner within 7 days after the filing of an appeal with a copy of the appeal document: the applicant of the underlying action that is the subject of SEPA review and the Port's responsible official. Intervention during the course of an administrative appeal under this section shall not be permitted; and
8. Be mailed or delivered to the General Counsel, Port of Seattle, Pier 69, P.O. Box 1209, Seattle, WA 98111.

Failure to comply with the procedural requirements of this section is grounds for dismissal of an appeal.

Section 1.6 Hearing Notice. Notice of the appeal hearing must be mailed to parties of record at least 15 days before the scheduled hearing date.

Section 1.7 Hearing Examiner. The Port Commission will appoint an individual familiar with SEPA and hearing procedures as Hearing Examiner (Examiner) for the Port. The Examiner will hear and decide SEPA appeals in accordance with this Section 1.

Section 1.8 Appeal Procedures.

1. Rules and procedures. The Examiner shall follow the procedures set forth in this Section 1, including Attachment A to this resolution, unless the Examiner and parties agree to modify them in any particular case. Attachment A to this resolution contains the basic procedural framework that shall govern any appeals brought under this section. Port staff will prepare a more detailed set of rules and procedures, consistent with the basic procedures set forth herein and in Attachment A.
2. Consolidation of appeals. All procedural SEPA appeal challenges will be heard by the Examiner in one single simultaneous appeal hearing.
3. Burden of proof. The burden of proof is on the Petitioner to show that the Port responsible official's decision does not comply with SEPA.
4. Standard of review. The determination of the Port responsible official shall be accorded substantial weight by the Examiner in accordance with RCW 43.21C.075(3)(d). An MDNS shall be overturned only if found to be clearly erroneous. An EIS shall be overturned only if found to not be adequate under the rule of reason.
5. Scope of review. Review by the Examiner is limited to the validity of the challenged MDNS (i.e., whether an EIS is required) or the adequacy of the challenged EIS. The issues shall also be limited to the specific reasons for legal inadequacy stated in the appeal.
6. Examiner's decision. The Examiner shall enter a decision within 14 days of the close of record of the Appeal Hearing. The Examiner shall enter written findings of fact and conclusions of law, and an Order determining whether the challenged FEIS or MDNS is legally adequate. The Examiner is not empowered to enter injunctive relief.
7. Notice of decision. Copies of the Examiner's decision shall be mailed to parties of record and those requesting notice.

Section 1.9 Exhaustion of Administrative Appeal Procedures. A party seeking judicial review of a Port SEPA decision subject to appeal under this Section 1 must, before seeking any judicial review, exhaust the appeal procedure of this Section 1.

Section 2. Severability. If any provision of this resolution is held invalid, the remainder of this resolution remains in effect.

ADOPTED by the Port Commission of the Port of Seattle this 24th day of May, 2005, and duly authenticated in open session by the signatures of the Commissioners voting in favor thereof and the seal of the commission.

Bob Edwards

Lawrence T. Molloy

Patricia Davis

Paige Miller
Port Commissioners

ATTACHMENT A TO PORT RESOLUTION NO. 3539

***BASIC PROCEDURAL FRAMEWORK GOVERNING
SEPA ADMINISTRATIVE APPEAL RULES AND PROCEDURES.***

1. Prehearing Conference. Once an appeal has been timely filed, the Examiner shall schedule a Prehearing Conference within 14 days. Each party shall bring to the Prehearing Conference a written list preliminarily designating witnesses (both expert and lay witnesses) and exhibits they intend to use in the appeal. For each witness identified, a short written summary of the witness' testimony and, in the case of expert witnesses, opinions, shall be provided. At the Prehearing Conference, the Examiner shall include discussion of the following, in addition to other items he or she deems appropriate:

- a. Review of the Petitioner's legal issues to, if possible, simplify them for the hearing; and
- b. Procedures for the appeal, hearing date, and schedules for prehearing submissions.

2. Administrative Record. Within one week after the Prehearing Conference, the Port shall issue the index to the administrative record of the SEPA determination under appeal. The Petitioner may file proposed supplementation of the record within seven days after the Port's index has been filed. The Examiner shall expeditiously rule on any objections relevant to the record.

3. Final Witness and Exhibit Lists.

3.1 Within two weeks after the Prehearing Conference, the Petitioner shall file its final witness and exhibit list. The witness list must include a summary of each witness's testimony.

3.2 Within three weeks after the Prehearing Conference, the Respondent shall file its final witness and exhibit list. The witness list must include a summary of each witness's testimony.

4. Hearing Memorandum/Expert Testimony.

4.1 Within five weeks after the Prehearing Conference, the Petitioner shall file its hearing memorandum. The Petitioner shall file in writing, at the same time as the hearing memorandum, all direct expert testimony from Petitioner's expert witnesses, along with copies of any exhibits introduced through or relied upon by the expert witnesses. To the extent any of the exhibits relied upon by Petitioner's expert witnesses are already contained in the Administrative Record, these exhibits may be referred to and not attached.

4.2 Within seven weeks after the Prehearing Conference, the Respondent shall file its hearing memorandum. The Respondent shall also file in writing, at the same time as its hearing memorandum, all direct expert testimony from Respondent's Expert witnesses, along with copies of any exhibits introduced through or relied upon by the expert witnesses. To the extent any of the exhibits relied upon by Petitioner's expert witnesses are already contained in the Administrative Record, these exhibits may be referred to and not attached.

5. Production of Exhibits. Seven weeks after the Prehearing Conference, the parties shall file with the Examiner and exchange a complete set of the exhibits they intend to use at the hearing. Absent a showing of good cause, no further exhibits shall be permitted at the hearing.

6. Prehearing Evidentiary Motions. Prehearing Evidentiary motions must be filed at least ten days before the hearing date. Responding memoranda to any motion may be submitted at least five calendar days before the hearing date. The Examiner will issue a decision on any prehearing evidentiary motions two days before the hearing date.

7. Appeal Hearing. The appeal hearing shall be conducted nine weeks after the Prehearing Conference. The hearing shall consist of the following:

7.1 Opening Statements.

7.2 Petitioner's Case. The Petitioner's case at the hearing shall be limited to the presentation of lay testimony, to cross-examination by Respondent of any witness whose testimony has been offered by Appellant, including expert witnesses whose testimony has been offered in writing pursuant to this rule, and to Appellant's redirect of any witness from which cross-examination testimony is taken.

7.3 Respondent's Case. The Respondent's case at the hearing shall be limited to the presentation of lay testimony, to cross-examination by Petitioner of any witness whose testimony has been offered by Respondent, including expert witnesses whose testimony has been offered in writing pursuant to this rule, and to Respondent's redirect of any witness from which cross-examination testimony is taken.

8. Closing Argument. The Examiner shall determine whether closing argument will be delivered orally or in writing. The parties will have the option of submitting proposed findings and conclusions along with their closing argument.

9. Decision. The Examiner shall enter a decision within 14 days after the close of record of the Appeal Hearing consistent with Section 1.8(6) of Resolution 3211, as amended.