

RECEIVED BY
2015 MAY 21 PM 12: 58
OFFICE OF
HEARING EXAMINER

BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

FOSS MARITIME COMPANY, a Washington
Corporation,

Foss,

vs.

CITY OF SEATTLE, DEPARTMENT OF
PLANNING AND DEVELOPMENT, a
Municipal Corporation,

Respondent,

Hearing Examiner File No. _____

AMENDED AND RESTATED
NOTICE OF APPEAL
(Code Interpretation No. 15-001)

I. APPELLANT INFORMATION

A. Foss

Appellant is Foss Maritime Company ("Foss"). Foss's address is 1151 Fairview Avenue N., Seattle, WA 98109; 206-281-3800 (telephone); email: pstevens@foss.com.

B. Respondent

Respondent City of Seattle, Department of Planning and Development, is the municipal corporation and department that made the decision that is subject to this appeal.

MCCULLOUGH HILL LEARY, P.S.

701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

1 **C. Authorized Representatives**

2 Foss's authorized representatives are John C. McCullough, McCullough Hill Leary P.S.,
3 701 Fifth Avenue, Suite 6600, Seattle, WA 98104, 206-812-3388 (telephone), 206-812-3389
4 (facsimile), jack@mhseattle.com; and David R. West, Garvey Schubert Barer, 1191 2nd Avenue,
5 18th Floor, Seattle, WA 98101, 206-464-3939 (telephone), 206-464-0125 (facsimile),
6 DrWest@gsblaw.com.

8 **II. DECISION BEING APPEALED**

9 The decision being appealed is the issuance of an interpretation by the Director
10 ("Director") of the Department of Planning and Development ("DPD" or "Department") "in
11 response to general questions it has received regarding a proposal to moor an exploratory drilling
12 rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility" (DPD
13 Interpretation No. 15-001, herein the "Interpretation"). The Interpretation purports to interpret
14 certain rights of use under Projects 9404118 and 9404124 (among others) issued to the Port of
15 Seattle, as applicant, for the property located at Terminal 5 (2701 26th Avenue SW) in Seattle
16 (the "Permit"). The Interpretation is attached as Exhibit 1.

17
18
19 This Amended and Restated Notice of Appeal is filed in addition to the Notice of Appeal
20 filed in this matter by Foss on May 13, 2015.

22 **III. APPEAL INFORMATION**

24 **A. Foss's Interest in Interpretation**

25 Foss is a company engaged in maritime logistics and transportation, including movement
26 of cargo, in Puget Sound, the west coast of the United States, Alaska and Hawaii, the United
27

1 States east and Gulf coasts, and nations on the Pacific Rim. Foss is headquartered in Seattle. On
2 February 9, 2015, Foss entered into a lease with the Port of Seattle to utilize Terminal 5 as a
3 marine cargo terminal (the "Lease"). The Lease is in effect; Foss is currently occupying
4 Terminal 5 and is paying rent to the Port in accordance with the Lease. Pursuant to the Lease,
5 Foss intends to provide a variety of services (the "Operations") to Shell Offshore, Inc. ("Shell")
6 and its contractors in support of the Arctic drilling program of Shell and its relevant affiliates.
7
8 The Operations intended to occur at Terminal 5 pursuant to the Lease are more fully described in
9 Foss's submission to DPD dated April 8, 2015, which is attached hereto as Exhibit 2, and the
10 Port's submissions to DPD dated April 3, 2015 and April 6, 2015, which are attached hereto as
11 Exhibit 3. In summary, those services will include receiving and storing goods, cargo,
12 equipment, supplies, stores, provisions and other materials at Terminal 5; loading and unloading
13 goods, cargo, equipment, supplies, stores, provisions and other materials on to and off of vessels
14 associated with the Operations, for those vessels to use and to transport to other locations;
15 temporary moorage of vessels; and other related activities, including standard routine "run and
16 maintain" activities.
17
18

19 In reliance on the Lease, the existing permits for Terminal 5 and the City's historic
20 interpretation of cargo terminal uses, Foss has invested substantial amounts of money in
21 improvements to Terminal 5; has incurred substantial costs to prepare for the Operations; and has
22 contracted with third parties (including labor unions) to provide support. The Interpretation
23 adversely affects Foss because it is intended to interfere impermissibly with Foss's use of
24 Terminal 5 for the Operations and pursuant to the rights of Foss under its Lease and established
25 uses at Terminal 5 and because Foss will suffer substantial economic losses if it is prevented
26
27
28

1 from performing the Operations. Foss is therefore significantly affected by and interested in the
2 matter appealed.

3 **B. Factual Background**

4 Certain factual allegations are set forth in the Interpretation. Foss contends many of those
5 allegations are inaccurate, incomplete and/or misleading, and disputes them. Foss will present
6 testimony and evidence in the appeal regarding the actual facts associated with the matters that
7 are the subject of this appeal. These facts will include, but are not limited to, the following:
8

- 9 • When the opportunity to host the Operations for Shell at Terminal 5 appeared, Foss met
10 with the City to review the proposal in advance of any legal commitments. The City
11 expressed no legal issues with the Operations being conducted at Terminal 5.
- 12 • Thereafter, the Port and Foss entered into the Lease for cargo terminal use at Terminal 5.
13 The Port's and Foss's understanding of the scope of that specific use is summarized in
14 detailed submissions that the Port and Foss provided to the City in response to the City's
15 inquiry. See Exhibits 2 & 3. The City has historically shared the same interpretation of
16 the scope of a cargo terminal use, as reflected in permitting decisions on Port projects
17 presented in the Port's submission. The intended Operations are entirely consistent with
18 the City's historical interpretation and implementation of a "cargo terminal" use.
- 19 • In addition to its historical implementation of the "Cargo Terminal" use, DPD had
20 previously agreed that the specific intended Operations are consistent with the permitted
21 use in the context of a land use decision. To prepare the site for the Operations, the Port
22 was required to replace bollards to which vessels used in the Operations would be
23 moored. The Port applied for a shoreline exemption for that bollard work. As part of the
24
25
26
27
28

1 City's consideration of that request, the City investigated the proposed use. The Port
2 provided information describing the intended activities (i.e., the Operations) and the City
3 approved the shoreline exemption. Neither the City nor any other party appealed that
4 decision or challenged DPD's conclusion in that decision that the Operations were
5 consistent with the permitted use.
6

- 7 • In apparent response to political controversy about the Operations, the City undertook yet
8 a third review regarding whether the Operations are consistent with the approved cargo
9 terminal use. In this connection, DPD initiated the inquiry that culminated in the
10 challenged Interpretation.
11
- 12 • The Interpretation specifically objects to the moorage of one of two drilling rigs and two
13 tug boats "during winter months." The Interpretation concludes that the Operations are
14 consistent with the category of "transportation use," but concludes that the Operations are
15 not consistent with the cargo terminal use, contrary to DPD's historical implementation
16 of the Land Use Code and its past decisions related to this specific matter.
17

18 **C. Issues and Objections**

19 The Interpretation erroneously concludes that certain uses of Terminal 5 do not constitute
20 permissible "cargo terminal uses" under the Land Use Code. Specific objections to the
21 Interpretation include but are not limited to the following:
22

- 23 • The Interpretation misconstrues the allowable scope of principal and accessory uses
24 associated with a "cargo terminal," as that term is defined in SMC 23.84A.046, SMC
25 23.60.906 and SMC 23.60A.906.
26
27
28

- 1 • The Operations, properly defined, fall within the definition of “cargo terminal,” as
2 that term is defined in SMC 23.84A.046, SMC 23.60.906 and SMC 23.60A.906.
- 3 • The Interpretation misconstrues the allowable scope of principal and accessory uses
4 associated with a “cargo terminal,” as that term has been implemented and enforced
5 by the Department in the past. Among other things, the Interpretation fails to
6 acknowledge that the Operations will necessarily involve the storage of quantities of
7 goods without undergoing any manufacturing process, followed by the transfer of
8 those goods to carriers in order to transfer them to other locations. Additionally, the
9 Department has historically interpreted the “cargo terminal” use to include:
10 layberthing; provisioning, equipping and outfitting of vessels; and standard routine
11 run and maintenance activities.
- 12 • In the alternative, the Operations constitute moorage, which is a legally permissible
13 use at Terminal 5 under current Code and existing approvals.
- 14 • The Interpretation misconstrues the allowable scope and nature of accessory uses
15 under SMC 23.84A.040, SMC 23.60.940 and SMC 23.42.020, as well as the Code
16 generally.
- 17 • The Interpretation improperly determines that the Operations do not, in the
18 alternative, constitute an allowable accessory use at Terminal 5.
- 19 • The Interpretation fails to recognize that the City previously approved by permit the
20 use under which the Operations will be conducted, which permits were not timely
21 appealed or reversed. To the extent the Interpretation seeks to modify rights granted
22 under such permits, the Interpretation is barred as untimely. Such permits include the
23 use under which the Operations will be conducted, which permits were not timely
24 appealed or reversed. To the extent the Interpretation seeks to modify rights granted
25 under such permits, the Interpretation is barred as untimely. Such permits include the
26 use under which the Operations will be conducted, which permits were not timely
27 appealed or reversed. To the extent the Interpretation seeks to modify rights granted
28 under such permits, the Interpretation is barred as untimely. Such permits include the

1 shoreline exemption approved by the City for the replacement of mooring bollards at
2 Terminal 5 necessary to accommodate the Operations. The City failed to appeal this
3 and other permits authorizing the Operations as a permitted use and is now legally
4 time-barred from challenging the legality of the Operations under the Land Use Code.
5

- 6 • Even if the Operations are not consistent with the permitted principal use, then the
7 Operations are a legally permissible non-conforming use under Chapter 23.42 SMC.
- 8 • The right to proceed with the Operations is a right vested under the Land Use Code
9 and state law under prior permits issued relating to Terminal 5.
- 10 • The Interpretation is based on a set of factual assumptions that are variously
11 inaccurate and/or incomplete.
- 12 • The Department failed to comply with the procedural requirements of law, including
13 the requirements of SMC 23.88.020, in issuing the Interpretation.
- 14 • The Interpretation is based only on the hypothetical set of “facts” assumed in the
15 Interpretation. However, these “facts” are only assumptions and conjecture. As such,
16 the validity of the Interpretation is limited by those facts as may be proven at hearing.
17 In addition, the Director lacks authority under SMC 23.88.020 to construe or apply
18 the Interpretation so that it would be applicable to a set of facts materially different
19 from those assumed in the Interpretation, as is the case here.
- 20 • Since the issuance of the Interpretation, the Director has issued further amendments
21 and/or modifications of the Interpretation without complying with the procedural
22 requirements of SMC 23.88.020.
- 23
- 24
- 25
- 26
- 27
- 28

- 1 • Upon information and belief, the Department intends to expand the scope or meaning
2 of the Interpretation to cover uses and activities at Terminal 5 not addressed in the
3 Interpretation, without the issuance of a new interpretation. The Interpretation is
4 limited to its express terms. Any effort by the Department to expand *ex post facto* the
5 scope of the Interpretation is improper and illegal. For example, the Interpretation
6 only applies to over-wintering activities at Terminal 5 (as described in the
7 Interpretation) and not to other activities to be undertaken by Foss pursuant to the
8 Lease.
9
10
11 • The Interpretation erroneously determines that the Director does not have authority to
12 interpret or define unlisted principal and accessory uses under the Shoreline Master
13 Program, Chapter 23.60 SMC.
14
15 • The Interpretation represents a case of arbitrary, selective, discriminatory and
16 inconsistent interpretation and enforcement of the Land Use Code. Even though the
17 Operations are consistent with other activities that the City has historically allowed as
18 a cargo terminal use, the Interpretation singles out the specific activities of a specific
19 customer for different and discriminatory treatment without any basis in the Land Use
20 Code.
21
22 • The Interpretation is erroneous, improper and illegal because it is based not on the
23 Land Use Code and applicable facts, but on political and policy considerations lying
24 outside the Land Use Code. Such policy considerations lie properly within the
25 legislative process conducted by City elected officials, but are improper
26 considerations for the Interpretation. As such, the Interpretation represents an attempt
27
28

McCULLOUGH HILL LEARY, P.S.

701 Fifth Avenue, Suite 6600

Seattle, WA 98104

206.812.3388

206.812.3389 fax

1 by the City's administrative authority to "legislate" new policy and regulations, in
2 violation of Chapter 23.88 SMC, the City Charter and state law.

- 3 • To the extent that the Interpretation purports to regulate activities occurring on
4 vessels, the Interpretation exceeds the Department's authority and jurisdiction. For
5 example, and not in limitation, the Interpretation improperly suggests that the scope
6 of permitted uses at Terminal 5 under the Land Use Code should be determined by the
7 use and/or activities of the vessels when at sea.
- 8 • The Interpretation improperly attempts to interfere in the discharge by the Port of its
9 rights and duties to operate such maritime facilities under the Shoreline Management
10 Act, the Seattle Shoreline Master Program, state law and the Washington State
11 Constitution.
- 12 • Foss hereby incorporates by reference as if set forth in full herein the issues and
13 objections on appeal set forth in the Notice of Appeal filed by the Port of Seattle in
14 this matter on May 15, 2015.

15 **IV. RELIEF REQUESTED**

16 Foss requests that the Hearing Examiner provide the following relief:

- 17 a. Reverse the Interpretation and determine that the Operations are a permitted
18 principal and/or accessory use under the Land Use Code and/or existing permit approvals at
19 Terminal 5;
- 20 b. Reverse the Interpretation and determine that the Operations are a permitted
21 principal and/or accessory use at Terminal 5 otherwise pursuant to applicable law;

1 c. Require that modifications or amendments to the Interpretation comply with the
2 procedural requirements of SMC 23.88.020;

3 d. In the alternative, remand the Interpretation with direction to the Department to
4 reconsider the Interpretation in light of facts proven at hearing relating to the Operations;
5

6 e. In the alternative, remand the Interpretation with direction to the Department to
7 reconsider the Interpretation based solely on the Code and the applicable facts proven at hearing,
8 and without reference to improper policy or other considerations not relevant under SMC
9 23.88.020;

10 f. In the alternative, remand the Interpretation for the purpose of issuing a new
11 interpretation in a manner consistent with the procedural requirements of the law, including
12 without limitation SMC 23.88.020;
13

14 g. Permit discovery regarding the issues in this appeal; and

15 h. Grant such other relief as the Hearing Examiner deems just and proper.
16

17 (
18 (
19 (
20 (
21 (
22 (
23 (
24 (
25 (
26 (
27 (
28

1 DATED this 21~~st~~ day of May, 2015.

2 FOSS MARITIME

3
4 By: 

Paul E. Stevens

5
6 MCCULLOUGH HILL LEARY, P.S.

7
8 By: 

John C. McCullough, WSBA #12740
Attorneys for Foss

9
10
11 GARVEY SCHUBERT BARER

12
13 By: 

David R. West, WSBA #13680
Donald B. Scaramastra, WSBA #21416
Daniel J. Vecchio, WSBA #44632

14
15
16 Attorneys for Foss Maritime Company
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

Interpretation of the Director Under Seattle Municipal Code Title 23

Regarding the Use of the

Property at

2701 - 26th Avenue SW (Terminal 5)

DPD Interpretation No. 15-001
(DPD Project No. 3020324)

Background

This interpretation was generated by the Department of Planning and Development (DPD) in response to general questions it has received regarding a proposal to moor an exploratory drilling rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility for periods of approximately six months per year when the drilling rig is not in use in the Arctic. The central issue is whether this proposed moorage is consistent with the legally established use of the property as a cargo terminal or whether a permit must be obtained to establish a different or additional use. The Port and its lessee, Foss Maritime (Foss), have been cooperative in providing information about proposed activities at Terminal 5.

Media reports indicate that two drilling rigs are destined for Seattle: the Polar Pioneer and the Noble Discoverer. The information provided by the Port indicates that only one of these, Polar Pioneer, would moor at Terminal 5. This interpretation is based on the Port's representations.

Findings of Fact

1. The Port's Terminal 5 facility is at the north end of the Duwamish River, near Harbor Island, and located in an IG1 U/85 (General Industrial-1) zone and a UI (Urban Industrial) shoreline environment.
2. Seattle Municipal Code (SMC) Section 23.40.002 requires a permit in order to establish or change the use of a property. The recognized existing use of the Terminal 5 facility, as reflected in decisions including Projects 9404118 and 9404124, is as a cargo terminal.
3. Foss entered into a two-year lease of Terminal 5 with the Port on February 9, 2015. By the terms of the lease, Foss is to use the facility as a marine cargo terminal. In an April 8 letter to DPD, Foss expressed its intent to load and unload its own vessels as well as those

of other customers at Terminal 5 during the lease. The Foss representative said Foss intended to receive and move goods, cargo, equipment, supplies, stores, provisions and other materials into the vessels associated with the drilling rig, for transportation to other locations. The letter indicates that the services they intend to provide for Shell Offshore would be a fraction of the activity they hope to conduct at Terminal 5.

4. As reported in the Seattle P-I, the Polar Pioneer is a 400-foot tall, 292-foot drilling rig. The Peninsula Daily News describes it as a 400-foot-long, 355-foot-tall rig. Based on the media reports, the Polar Pioneer was delivered to Port Angeles aboard a heavy-lift ship, to be unloaded and towed to Seattle. Based on information provided by the Port and Foss, the drilling rig and two tugboats would be moored at Terminal 5 for several months out of the year.
5. The Port has indicated that a variety of types of vessels use its facilities. The Port documented that its fee schedules include specific fees for “lay berthing” of vessels that are not actively being loaded or unloaded. The Port has asserted that this is common and necessary, as much cargo activity is seasonal, and some vessels used to transport cargo sit idle during the off-season.
6. Seattle’s current Shoreline Master Program is codified at SMC Chapter 23.60, which is a part of Subtitle III, Division 3 of Title 23. An updated shoreline master program has been approved by the City and is awaiting final approval by the Washington State Department of Ecology. DPD anticipates that the new provisions will take effect later in May.
7. “Cargo terminal” is defined at SMC 23.60.906 as:

[A] transportation facility in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.
8. The definition of “cargo terminal” under the new provisions, to be codified at SMC 23.60A.906, remains the same as the current definition, apart from minor punctuation changes, such as addition of a comma after “carriers.”
9. SMC 23.42.010 provides in part:

Principal uses not listed in the respective zones of Subtitle III, Division 2 of SMC Title 23, Land Use Code shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.

10. SMC 23.42.020.A provides in part:

Any accessory use not permitted by Title 23, either expressly or by the Director, shall be prohibited. The Director shall determine whether any accessory use on the lot is incidental to the principal use on the same lot, and shall also determine whether uses not listed as accessory uses are customarily incidental to a principal use.

11. For purposes of the Land Use Code generally, “accessory use” is defined at SMC 23.84A.040 as “a use that is incidental to a principal use.” A more specific and limiting definition of “accessory use” is provided for purposes of the current shoreline code at SMC 23.60.940: “a use which is incidental and intrinsic to the function of a principal use and is not a separate business establishment unless a home occupation.” This definition remains the same under the new shoreline provisions, at SMC 23.60A.940.

12. “Good” is defined, in relevant part, by Webster’s New Collegiate Dictionary (based on Webster’s third new international dictionary) as:

3 . . . *b pl* : personal property having intrinsic value but usu. excluding money, securities and negotiable instruments . . . *d pl* : WARES, COMMODITIES, MERCHANDISE <canned ~s>

Conclusions

1. The activity that is the subject of this interpretation is the proposed moorage of an oil-drilling rig and two accompanying tugboats that would be located at the Port’s Terminal 5 facility during winter months when this equipment is not being used for exploratory drilling in the Arctic. In recent years permits for this property have characterized the use as a “cargo terminal.”
2. The question raised is whether the proposed activity requires a permit to legally establish a use that allows this moorage. The analysis may be broken down into two sub-questions:
 - Is the proposed activity properly characterized as a “cargo terminal” use based on the definitions in the current code, and in the updated shoreline master program the City is in the process of adopting; and
 - If the proposed activity does not specifically match the activities described in the cargo terminal definition, may the proposed activity nevertheless be allowed as an accessory use, without obtaining a separate use permit?

Consistency with current and future use definitions

3. Under the current and the proposed new shoreline standards, a cargo terminal is a **transportation facility in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers or**

stored outdoors in order to transfer them to other locations. (The proposed new definition adds a comma after “carriers.”)

4. **Is Terminal 5, if used for the proposed activity, a “transportation facility”?** This term is not defined within the shoreline code, but is generally defined in the Land Use Code, at Section 23.84A.038 as “a use that supports or provides the means of transporting people and/or goods from one location to another.” One of the subcategories in the general definition is parking and moorage. The proposed activity would support the transportation of the equipment to and from the Arctic, and falls within the range of uses listed under the broad category of “transportation facility.”
5. **Does the proposed activity involve “quantities of goods or container cargo”?** Neither the drilling rig nor the tugboats would carry container cargo. The definition of cargo terminal is broad enough to include transportation of many different types of goods, in greatly differing quantities. The exploratory drilling equipment affixed to the drilling rig, however, would not fall under the definition of “goods” as it is used under the code, nor could the drilling rig itself be considered “quantities of goods or container cargo.”
6. **If the equipment on the drilling rig could be considered goods, would they be “stored without undergoing any manufacturing processes, transferred to other carriers, or stored outdoors in order to transfer them to other locations”?** This provides three options for activities that might occur at a cargo terminal: storage without manufacturing, transfer to other carriers, or outdoor storage. The unifying theme is that the goods are at the cargo terminal **in order to be transferred to other locations**. The drilling rig would be at Terminal 5 only for purposes of seasonal storage. Terminal 5 would not serve as stop where the rig or the equipment on it would be stored or transferred in the course of transit from a starting location to an ultimate destination.
7. The two tugboats that would accompany the drilling rig with the equipment likewise would not bear quantities of goods in the process of being transferred to other locations, apart from provisioning that might be anticipated for vessels at moorages generally.
8. It has been argued that even if the proposed use does not meet the definition of cargo terminal, it should be regulated as a cargo terminal use, as this is the most similar use category regulated under the code. In general, under SMC 23.42.010, if a principal use does not fit in any of the regulated use categories, as defined, there is authority to regulate that use according to the standards for the most similar defined use. That provision, however, specifically extends to the standards in Subtitle III, Division 2 of the Land Use Code. Seattle’s Shoreline Master Program, which includes the use regulations specific to the Shoreline Overlay District, is in Subtitle III, Division 3 of the code, and is outside of the scope of Section 23.42.010. The authority to regulate an undefined use according to the standards for the most similar defined use does not extend to the use provisions in the shoreline code.

Moorage as an accessory use

9. Even if we were to determine that the proposed seasonal moorage of the drilling rig and tugboats did not meet the definition of cargo terminal, it might be permissible if that sort of moorage activity is accessory to a cargo terminal. The definition of cargo terminal says that cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices. It does not state that other accessory uses are not allowed. We do not conclude that other accessory uses are precluded merely because they are not specifically listed.
10. Based on information received from the Port, "lay berthing," or moorage of vessels that are not actively loading or unloading materials, is a normal, customary and essential practice at marine cargo terminals. The Port has specific dockage fees for lay berthing in the fee schedule for its facilities. According to the Port, lay berthing occurs at marine cargo terminals throughout the coastal and inland waterways of the country and the world, specifically at marine cargo terminals in Seattle, Bellingham, Everett, Port Angeles, Tacoma, Olympia, San Diego, Los Angeles, Long Beach, Sacramento, San Francisco, Oakland and Portland. According to the Port, temporary, seasonal and sometimes indefinite berthing of vessels must be provided by ports until duty calls those vessels back to the sea. The Port indicates that cargo, emergency response, military, and research vessels, as well as barges and tugboats, commonly lay berth at the Port of Seattle's cargo terminals.
11. For purposes of the shoreline code, "accessory use" is defined as "a use which is incidental **and intrinsic to the function** of a principal use, and is not a separate business establishment unless a home occupation." SMC 23.60.940. This differs, and is more stringent than, the definition that generally applies under the Land Use Code: "a use that is incidental to a principal use." SMC 23.84A.040. We accept that lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal. This recognizes that shipment of some sorts of goods is seasonal, and that vessels involved in that sort of trade are necessarily idle for periods during the year. We do not, however, find that provision of moorage to other vessels and equipment, not used for transfer of goods to other locations, is intrinsic to the function of a cargo terminal. Such moorage would be regarded as a separate principal use, defined as "any use, whether a separate business establishment or not, which has a separate and distinct purpose and function from other uses on the lot." SMC 23.60.940.
12. Even if we were to agree that moorage of the drilling rig and tugboats could be allowed as an accessory use at a cargo terminal, some question also is raised as to whether sufficient levels of activity relating to the principal cargo terminal use, transfer of quantities of goods or container cargo, would continue while the drilling rig and tugboats are moored there. The factual component of that question is unresolved. On the one hand, the drilling rig and tugboats would occupy much of the site's frontage available for moorage along the Duwamish, and upgrades and repairs to that frontage are also contemplated which would possibly limit its use for loading and unloading of cargo

during the same period. On the other hand, both the Port and Foss have advised us that it is their intent that other cargo terminal use of the property will continue.

13. The legal component of that question obviates the factual question because, even if cargo terminal activity is the predominant use, moorage of vessels not used for transport of cargo in the process of being transferred to other locations is not intrinsic to the function as a cargo terminal, and thus would not qualify as a legitimate accessory use.

Conclusion

An additional use permit is required for the proposed seasonal moorage at the Port of Seattle's Terminal 5 facility of a drilling rig and accompanying tugboats.

Entered May 7, 2015



Andrew S. McKim
Land Use Planner – Supervisor



Andy McKim
Land Use Planner – Supervisor
City of Seattle
Department of Planning and Development
700 5th Ave., Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019

8 April 2015

Re: Lease of Terminal 5 from Port of Seattle

Dear Mr. McKim:

We are writing in response to your email of March 24, 2015 to our counsel, asking about the activities that Foss Maritime plans at Terminal 5 during the pendency of its lease of the property. We are happy to provide information to the City as requested, while keeping in mind that the specific business plans of Foss, its customers and its potential customers are often confidential and cannot be disclosed without competitive harm.

As you know, Foss has a written lease of Terminal 5 with the Port of Seattle dated February 9, 2015. That Lease is for a term of two years and is designed to provide an interim use of Terminal 5 while the Port undertakes a project to improve the property. The leased premises include over 50 acres of space, including 1,370 lineal feet of berth area. The Lease provides that Foss may use Terminal 5 only “for a cargo terminal, which means a transportation facility in which quantities of goods or container cargo area stored without undergoing any manufacturing process, transferred to other carriers or stored outdoors in order to transfer them to other locations.” Lease, § 5.1. The Lease further states that “Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.” Lease, § 5.1. Foss “shall not use the Premises for any other purpose without the written consent of the Port.” *Id.*

Foss in fact plans and intends to use Terminal 5 as a cargo terminal, in accordance with the Lease provisions and consistent with the Port’s explanation of the anticipated marine cargo terminal activities in its memo dated February 5, 2015, which the Port provided to facilitate the City’s prior evaluation of the use issue during the City’s shoreline exemption process. Foss intends to receive goods, cargo, equipment, supplies, stores, provisions and other materials from third parties who deliver those items to Terminal 5 by rail or truck. Such materials will be staged, arranged and stored on the terminal to facilitate loading onto vessels. Foss intends to load such items onto vessels that are owned or chartered by Foss’s customers, as well as vessels that Foss owns itself or will charter, including sea-fastening loaded materials as necessary, for transportation of those items to other locations. Foss further expects to unload vessels that call at Terminal 5, including vessels owned or chartered by third party customers as well as vessels owned by or chartered by

Foss. Foss will provide interim storage and/or disposal of unloaded items at Terminal 5 for its customers; and will transfer items to third parties who will transport them from Terminal 5 by truck or rail. Foss does not intend to conduct any manufacturing process at Terminal 5.

As noted above, Foss intends to load and unload its own vessels as well as vessels of numerous other customers at Terminal 5 during the Lease. Foss is currently engaged in the assembly of materials and the planning of loading of two of its own barges at Terminal 5; this loading is expected to occur over the next few months. Foss and Jones Stevedoring Company are also actively soliciting customers for terminal handling and loading/unloading services at Terminal 5, and are negotiating with and/or exploring several projects with prospective clients. Our proposals to customers, and the identity of those customers, are confidential and proprietary, and we cannot disclose them at this time without substantial competitive harm. Nonetheless, we can confirm that Foss and Jones made a firm contract proposal to a potential customer last week, and that two other potential customers have discussed business opportunities with Foss and have toured Terminal 5 with us. All prospective customers are aware of the use limitations noted above.

We know that attention has been focused on services that Foss will provide at Terminal 5 to vessels that are contracted to Shell Offshore. We expect two vessels as well as ancillary support fleet to call at Terminal 5 in April, and Foss expects that it will provide the services described above to those vessels. Specifically, Foss intends to receive goods, cargo, equipment, supplies, stores, provisions and other materials from third parties who will deliver those items to Terminal 5 by rail or truck. The materials will be staged on the terminal for loading, and Foss intends to load those items onto those vessels, for transportation to other locations. The loading activity is anticipated to take several weeks, and the vessels are expected to depart in late May or early June 2015. We anticipate that the vessels will return to Terminal 5 at some point in November 2015, at which time we expect to begin unloading the vessels. We expect unloading activity to take more time to complete than loading, perhaps as much as two months. We understand that the vessels will spend the next few months preparing themselves for the following season, and that Foss will be loading and unloading the vessels periodically during that time period. So far as we are able to say at this point, we anticipate the same cycle of activity and the same types of activity in 2016.

We believe it is important to understand that the services we intend to provide to these vessels will be a fraction of the activity Foss expects and hopes to conduct at Terminal 5. Foss leased Terminal 5 with the desire and intent to load and unload vessels year round, and it further intends to use the entire facility to do so. The drilling rigs / ships will be physically present at Terminal 5 for only six months each year, and while here, will use less than half of the berthing area leased to Foss. We expect and intend to load and unload cargo to and from other vessels even when the vessels contracted to Shell are present.

Your letter also asked about the nature of activities commonly found at other facilities that are established as cargo terminals. To our knowledge, all of the activities planned by Foss at Terminal 5 are commonly done at cargo terminals throughout the City, and indeed throughout the state. Loading and unloading of vessels, of course, is a core activity at all cargo terminals. We are aware of numerous vessels of various types which spend a portion of the year in Alaska and return to Seattle for the off-season and/or winter months, moored at facilities that are permitted as cargo terminals. These include fishing vessels; deck barges; factory trawlers; recreational vessels; and tugboats.

In addition, maintenance and repair work is a fundamental core element of the operation of a marine cargo terminal. As part of normal vessel functions, crews of all commercial vessels are continuously using, monitoring and testing their systems to be sure that they are fully operational. This includes, for example, ongoing testing of navigational and mechanical systems. If any system is not fully operational, then crew members acting under the direction of vessel officers will respond appropriately, which may include additional testing to locate machinery or ship's equipment that is not functioning properly or needs replacement; hiring of consultants or contractors to assist in that effort; and routine servicing, replacement and/or repair of deck and other ship's equipment on and within the vessel (which may include regular replacement on a normal cycle, or may include replacement because of a malfunction or defect). Similarly, vessels routinely perform minor welding, spot painting, electrical and piping repairs, or other minor work on or within the vessel, because loading and unloading of the vessel as well as normal navigational operations create wear and tear on a vessel and its equipment. Whether characterized as "*maintenance*" or "*repair*," the replacement (for example) of equipment on or within the vessel is work that is done either by the ship's crew or by a contractor with expertise in the particular machinery involved, and takes place on the vessel itself.

Because of the 24/7 nature of commercial vessel operations, this type of activity regularly takes place while vessels are at a cargo terminal, precisely because such activity can most easily be performed when the vessel is not sailing, or when a component supplier is available. We are very sure that these types of activities occur on a daily basis on vessels at every single cargo terminal in the Port of Seattle as well as the rest of the world.

It is Foss's expectation that its own tugs and barges will perform this type of routine maintenance and repair work while Foss's vessels are berthed at Terminal 5. It is also Foss's expectation that the vessels of its customers will also perform this type of routine maintenance and repair work while those vessels are berthed at Terminal 5. These are core functions of a cargo terminal. If vessels are not allowed to do this work at a cargo terminal in the City of Seattle, then the City's cargo terminals simply cannot function, as vessels will be unable to keep themselves operational.

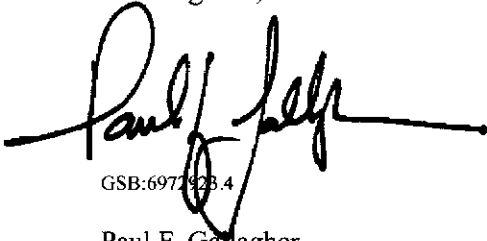
There are certain types of vessel repair work that can be substantially more onerous than the routine work described above, and may require a vessel to visit a shipyard for the work to be done.

The most obvious are dry dockings; sandblasting; spray painting of substantial external areas; replacement and/or overhaul of substantive mechanical systems such as large engines; and the like. Foss does not intend to operate a shipyard at Terminal 5 and will not perform this type of large scale repair work for its customers, or on its vessels, at that facility. Foss has its own shipyard to perform this type of work on its vessels and there are several others in Puget Sound. Foss has informed its Terminal 5 customers that major shipyard repairs will need to be conducted at other locations. Foss's customers have agreed to abide by these restrictions.

For these reasons, our lease of Terminal 5 and our planned activities at that location are all consistent with the law, with all applicable permits, and with the policies of the Shoreline Management Act. We understand that the use of Terminal 5 for loading and unloading of the Shell Offshore ships has generated public attention; but the uses and activities intended to be undertaken for the Shell Offshore ships at Terminal 5 are not different from the uses and activities intended to be undertaken for other clients ships at Terminal 5, nor from the uses and activities historically conducted at other cargo terminals in the City of Seattle, including at Terminal 5. Precluding the use of Terminal 5 for the Shell Offshore ships as described in this letter would effectively preclude the use of Terminal 5 as a cargo terminal and, we assume, would have similar adverse consequences for the use of other Port maritime sites designated for use as cargo terminals in the City of Seattle.

Thank you for your careful consideration of this matter.

Best regards,



GSB:6972923.4

Paul F. Ganagher
Vice President
Terminal Services

EXHIBIT 3



FOSTER PEPPER

Direct Phone (206) 447-2905
Direct Facsimile (206) 749-1915
E-Mail schnp@foster.com

April 3, 2015

BY EMAIL AND HAND DELIVERY

Diane Sugimura, Director
Department of Planning & Development
City of Seattle
700 5th Avenue, Suite 2000
P. O. Box 34019
Seattle, WA 98124-4019

Re: Port of Seattle's response to DPD's questions about Terminal 5

Dear Ms. Sugimura:

The Mayor and City Council directed DPD to determine whether Foss Maritime's proposed uses under a two year lease with the Port of Seattle for a portion of Terminal 5 are consistent with Terminal 5's permitted use as a cargo terminal. In response, DPD asked for information from Foss about the activities that it expects to take place pursuant to the lease, and DPD asked the Port for information about the activities that occur at the Port's cargo terminals.

The Port's response comprises this letter and the accompanying memo entitled Description of Diversified Cargo Activity at Port of Seattle ("Port's Memo") from Linda Styrk, Managing Director, Seaport. Foss is separately submitting its own letter describing the services it intends to provide at Terminal 5.

In the paragraphs that follow we discuss the applicable provisions of the City's Shoreline Master Program (SMP), Title 23.60 SMC, and apply these provisions to the facts set forth in the Port's Memo and to the facts already documented in DPD's files.

As explained below, and as demonstrated in the Port's Memo, the activities contemplated by the Port's lease of Terminal 5 to Foss are consistent with cargo terminal use, and in fact can only occur at a site permitted for cargo terminal use.

ANALYSIS

Terminal 5 is permitted by the City as a "cargo terminal" as defined in SMC 23.60.906:

"Cargo terminal" means a transportation facility in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers or stored outdoors in order to transfer them to other

locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.

Terminal 5 is one of nine cargo terminals currently owned by the Port, and most of the maritime commerce in the City takes place at these cargo terminals. The “cargo terminal” use is the only use allowed by the City’s SMP that is suitable for the diversity of water-dependent and water-related industrial and commercial activity that takes place at maritime ports. As described in the Port’s Memo, “cargo terminal” use is the City’s only shoreline use that allows the uplands to be intensively used to support vessels engaged in maritime commerce. In other words, the “cargo terminal” use is the only use in the City’s SMP that authorizes the necessary facilities that allow the Port of Seattle to function as a cargo port.

As the definition of “cargo terminal” demonstrates, the uplands of a cargo terminal are typically used to store cargo and “goods” either outdoors or in warehouses. Cargo terminals must also provide facilities to transfer these goods to or from ships or between ships and other modes of transportation such as railroads or trucks. Moorage of a great variety of vessels, including barges, is an inherent part of cargo terminal use, and the uplands are used to support the businesses that the vessels are engaged in.

Both moorage and the associated use of the uplands are equally important in cargo terminal use. For example, the definition of “Tugboat services” in SMC 23.60.938 says that when tugboat services “include barge moorage and loading and unloading facilities for barges,” they are no longer tugboat services and must be permitted as cargo terminals.

The Port’s cargo terminals also provide stringent security protections for both people and cargo that are required by federal law. These security protections are considerably more stringent than the type of security measures provided for other water-dependent uses such as commercial moorage. The City’s SMP does not include another shoreline use that permits these kinds of upland activities and protections that are essential to the operation of a port that handles cargo.

The Plaintiffs in *Puget Soundkeeper et al v. Port of Seattle, et al* argue that Foss intends to operate a commercial moorage instead of a cargo terminal, and that therefore Foss’s use of Terminal 5 will be unlawful. This argument is not correct for multiple reasons, including the straightforward language of the City’s SMP. At a commercial moorage, for example, there is no such authorization for storage of cargo or goods, either outdoors or in warehouses, and barges are prohibited:

“Commercial moorage” means a parking and moorage use in which a system of piers, buoys, or floats is used to provide moorage, primarily for commercial vessels, except barges, for sale or rent, usually on a monthly or yearly basis. Minor vessel repair, haulout, dry boat storage, tugboat dispatch offices, and other services are also often accessory to or associated with the use.

A commercial moorage is a “parking and moorage use” and the focus is on the sale or rental of the moorage itself: upland uses are limited, outdoor storage is limited, and barges are expressly prohibited. Commercial moorages also typically provide for the sale of vessels and thus allow

members of the public to visit vessels that are for sale. Given these purposes, commercial moorage facilities cannot provide for the federally-mandated security provisions that are required at marine cargo terminals. The security protections required for cargo terminals are particularly important in this instance since protesters have threatened to block the ability of Foss' customer Shell from mooring its vessels at Terminal 5.

DPD's Director's Rule 51-88, entitled "Requirement For A Master Use Permit When There Is An Establishment, Expansion Or Change Of Use," confirms the limited purpose of commercial moorage by classifying it as a "Marine *Retail* Sales and Services" use: it is not intended to, and does not, allow the commercial and industrial activity that is essential to the operation of a major maritime port.

The practical differences between a commercial moorage and a cargo terminal are illustrated by the differences between the activities at the Port's nine cargo terminals that are described in the Port's Memo, and the primary business of mooring boats that takes place at the Port's four commercial marinas: Shilshole Bay Marina, Harbor Island Marina, Bell Harbor Marina, and Fisherman's Terminal, with their systems of piers and with the limited accessory activities that occur on the uplands.

All of the industrial and commercial activities that take place at the Port's cargo terminals, as described in the attached Port Memo, are inherent in cargo terminal use, and a major maritime port engaged in international trade cannot function without such uses occurring at its cargo terminals. Even if DPD were to take the view that the activities described in the Port's Memo are somehow not inherent in cargo terminal use, moreover, the issue would be whether the "use" created by those activities is "substantially similar" to the cargo terminal use.

In other words, if the activities are not inherent, then the issue under the code would not be whether the maritime businesses carried on by the Port and its tenants at cargo terminals, and by the vessels that call at the cargo terminals, are exactly anticipated and described in the SMP's definition of "cargo terminal." There are many thousands of different businesses conducted in the City, but only a few score uses described in the land use code, and only a handful of uses described in the Shoreline Master Program. The issue is whether, pursuant to SMC 23.42.010, a specific use is "substantially similar" to a use described in the code:

Principal uses not listed in the respective zones of Subtitle III, Division 2 of SMC Title 23, Land Use Code shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.

The Port's lease with Foss allows an existing cargo terminal to continue to be used as a cargo terminal, and Foss's proposed activities are well within the scope of the wide variety of commercial and industrial maritime activities that take place at cargo terminals, as described in the Port's Memo. At a minimum, such activities are substantially similar to the activities described in the definition of cargo terminal, and there is no other shoreline use that better describes such predominantly industrial activities, which simply reflect the business of maritime ports.

And finally, even if one assumes that the activities described in the Port's Memo are not inherent in the use of a cargo terminal, and not substantially similar to a cargo terminal use, they are "incidental and intrinsic" to the function of a cargo terminal and therefore are permitted accessory uses as defined in SMC 23.60.940:

"Use, accessory" means a use which is incidental and intrinsic to the function of a principal use and is not a separate business establishment unless a home occupation.

Ports are a "priority" use under the Shoreline Management Act, RCW 90.58.020, and port activities must be accommodated by the City's SMP. There is no other use defined in the City's SMP that better describes these port activities.

The Plaintiffs in *Puget Soundkeeper et al v. Port of Seattle, et al* also argue that there has been a change of use at Terminal 5 because the prior tenant used it primarily for container cargo and the new tenant, Foss, is using it for other kinds of cargo. This is like arguing that a collie is not a dog. There are many breeds of dogs and many types of cargo, and a change of cargo activity is not a change of use.

When the Port applied to DPD for a shoreline exemption for the replacement of some of the bollards at Terminal 5, DPD asked for a description of the activities that the bollard replacement would allow. The Port responded as follows:

Terminal 5 will continue to be used as a cargo terminal by the new tenant. Cargo will be transferred to vessels, and/or transferred from vessels. Cargo will be arranged, marshaled, and organized on the upland and pier portions of the terminal to facilitate appropriate loading and unloading. Cargo may be temporarily held on the terminal for future re-loading to vessels moored at the cargo pier. New provisions and equipment, necessary for vessel outfitting, will be transferred to the site from other carriers and used for vessel supply. These activities are usual and customary for this type of facility and are consistent with the historical use of Terminal 5, the Shoreline Substantial Development Permit MUP files 9404118 and 9404124, and the Seattle Municipal Code.

The Port believes this is an accurate overview of the activity that will take place pursuant to the lease with Foss, and DPD approved the shoreline exemption on February 5, 2015 to authorize this activity to go forward. Pursuant to SMC 23.60.020(B)(2), DPD could not have approved this exemption without determining that the use the exemption made possible would be consistent with the SMP and the SMA. The City approved the exemption on February 5, 2015, and the 21-day period to withdraw or challenge this exemption pursuant to the Land Use Petition Act ("LUPA") expired on February 26, 2015.

CONCLUSION

This letter, and the accompanying Port Memo, respond to DPD's request for information. The Mayor and City Council asked DPD to conduct this inquiry into Port activities because of

Diane Sugimura
April 3, 2015
Page 5

their concern with the fact that one of Foss's customers, Shell Oil, will use Terminal 5 to provision vessels that explore for oil in Alaska. The provisioning of Shell's vessels at Terminal 5 for use in Alaska will be no different from the provisioning of fishing vessels that takes place every year at Terminal 91, to prepare those vessels for use in the same Alaskan waters. The use that these vessels are put to when they are at sea has no bearing on whether these vessels are permitted at the Port's cargo terminals. If the vessels that Foss intends to moor and provision at Terminal 5 were fishing vessels, or Greenpeace vessels, there would be no concern about the use of the terminal under the lease. Everyone would recognize that the use is consistent with the cargo terminal designation.

This issue is of paramount importance to the Port. A determination by DPD that the Foss activities are not consistent with cargo uses would cast in doubt the legal standing of dozens of marine business operations throughout the Seattle harbor area. Such a determination will set a precedent that will affect far more than what happens at Terminal 5 pursuant to the Port's short-term lease with Foss because most of the maritime industrial activity in the City is conducted at cargo terminals.

Thank you for considering these concerns. On behalf of the Port, and for all the reasons discussed above, we ask that DPD confirm the decision about Foss's intended use that DPD made in February when it issued the shoreline exemption for the bollard replacement at Terminal 5.

Sincerely,



Traci Goodwin
Senior Port Counsel



Patrick J. Schneider
Foster Pepper PLLC

cc: Andy McKim, DPD
Ben Perkowski, DPD
Roger Wynne, Land Use Director, Seattle City Attorney's Office
Eleanore Baxendale, Seattle City Attorney's Office
Ted J. Fick, Chief Executive Officer, Port of Seattle
Linda Styrk, Managing Director, Seaport Division, Port of Seattle
Port of Seattle Commissioners
David West, Garvey Schubert Barer (by email only)



P.O. Box 1209
Seattle, WA 98111-1209
Tel: (206) 787-3000

www.portseattle.org

April 6, 2015

Diane Sugimura
Andy McKim
Ben Perkowski
700 Fifth Avenue, Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019

Re: request for information concerning cargo uses at Port of Seattle properties

Dear Ms. Sugimura, Mr. McKim, and Mr. Perkowski:

Attached please find a memo that responds to Mr. McKim's email of March 23, 2015 to Port staff seeking additional information about nature and range of activities commonly found at Port facilities established as cargo terminals.

If the City has more questions about the cargo uses and activities described in this memo, please contact Paul Meyer, Manager Environmental Programs, Seaport Environmental and Planning.

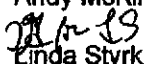
Yours truly,

A handwritten signature in black ink, appearing to read "Linda Styrk".

Linda Styrk
Managing Director, Maritime Division

PORT OF SEATTLE
MEMORANDUM

TO: Diane Sigumura, Director of Planning and Development
Andy McKim, Ben Perkowski

FROM: 
Linda Styck, Managing Director, Maritime Division

DATE: April 6, 2015

SUBJECT: Cargo uses and activities at Port of Seattle cargo terminals

Introduction

Below is an overview of the types of vessels, activities, and uses that have occurred or still do occur at marine cargo terminals owned by the Port of Seattle that handle non-containerized cargo. The description below focuses on the variety of non-containerized cargo uses at Terminals 5, 18 (including Piers 16 and 17), 86, 91, and 115, but many of these uses have also occurred, and are still occurring at Terminals 18, 25, 30, and 46. A more detailed description is provided of the cargo activities that have historically occurred at the Terminal 5 property. Aerial photos of the Port's terminals that are discussed in this memo are attached. The aerial photos also depict many of the uses and activities described in this memo.

Non-containerized cargo uses at Port of Seattle marine cargo terminals

Over the years, the following types of non-containerized cargo uses have been undertaken, or are still occurring, at Port of Seattle marine cargo terminals:

1. Bulk Cargos – Dry Bulk and Liquid Bulk
2. Breakbulk and Unitized Cargos – Break bulk and unitized cargo are described in more detail below.
3. Roll-On and Roll-off (RoRo) and Neobulk Cargos – Automobiles, off-road machinery, construction equipment

Breakbulk cargo can be described as units of cargo which must be individually loaded because of the way the cargo is packaged. There are many different types of breakbulk cargo, including cargo stored in boxes or packages, cargo stored in drums or barrels, baled cargo, cargo stored in bags, and cargo stored in crates. Each of these types of cargo is delivered to a cargo terminal for loading onto a vessel, often in a warehouse, but sometimes in the open. The loading process (or unloading, as applicable) differs depending on the type of cargo. For example, boxes are individually loaded onto a cargo pallet, lifted by a crane or ship's gear into the ship's hold. The boxes are lifted off the pallet, one box at a time, and stacked in the ship by hand, one box upon the next, tight from one bulkhead to the other. Bags may be loaded by nets. Barrels and drums require specialized dunnage (material to secure and support the cargo in the hold or on the pallet). Boxes, bags, barrels and drums can also be "unitized" by securing them to a cargo pallet to more efficiently lift and stow breakbulk cargo into the ship's hold one pallet unit at a time.

Provisions for a ship, are similar to breakbulk cargo, but handled differently. The provisions and supplies for the ship's crew and the vessel's work can be loaded onto pallets for storage, usually into a dedicated ship stores hold on the vessel. Vessels take on stores, fuel, and other needed supplies after being at sea.

Overview of non-containerized cargo operations and uses at Terminal 91 ("T91")

T91 contains 8,502 feet of moorage on a 152-acre (62 hectare) site. A map of the terminal is attached. There are two piers. The piers contain concrete aprons, large laydown/staging areas and rail at the terminal. Marine repair services are not present at T91, but are available at other Port facilities at the Maritime Industrial Center. T91 has forklifts, heavy-lift trucks and other equipment to facilitate the

movement of cargo to and from vessels. On-terminal rail access is adjacent to the Burlington Northern Santa Fe mainline and classification yard. The diversity of marine cargo activities that occur at T91 is not unique; the Ports of Everett and Port Angeles have similar operations and activities at their marine cargo facilities. The Port remains the terminal operator at T91, but leases other marine cargo terminals to private terminal operators.

T91 is the largest non-containerized marine cargo facility owned by the Port and hosts the broadest diversity of non-containerized cargo uses. T91 supports vessels and uses that are identical or similar to those that will be undertaken by Foss Maritime at Terminal 5 pursuant to its February 2015 lease with the Port.

T91 is designed and operated to accommodate a broad diversity of cargo uses. Port staff executes leases, assigns moorage space and storage facilities to maximize the use of the terminal in the safest and most efficient manner. For example, some of the vessels that homeport at T91 during the winter months may utilize moorage space that is utilized by cruise ships during the cruise season. Barges are frequently moored at T91 since the facility is large enough to accommodate them. Also, barges are not allowed at commercial moorage facilities located in the city.

Types of vessels and uses at T91

Many classes of cargo vessels utilize T91 as a homeport for various lengths of time. Some vessels moor at T91 year round, while other vessels moor there seasonally. Approximately 2,000 vessel calls occurred at T91 in 2014. Three facility leases, Independent Packers, City of Seattle (Seattle Fire Dept.), and Foss Maritime allow the lessees to moor any number of vessels at T91 within the area covered by their leases. Seventeen vessels are subject to moorage agreements. The length of time that vessels typically are active or idle depends on the season and the particular business needs of the vessel's owner. Vessels that support operations in Alaska and overwinter in Seattle typically remain moored during the off season.

The Port's cargo terminals, when working off the Port's tariff, are more profitable when cargo is being offloaded and loaded because the shippers must pay wharfage fees in addition to other costs and tariffs. The Port also earns income from the rental of equipment to shippers to offload cargo. Moorage of cargo vessels and barges at a cargo terminal is a less profitable use of the terminal. Vessel owners typically seek to maximize profitability of their business operations by utilizing their cargo vessels as much as possible.

Fishing industry vessels

Among the classes of vessels that homeport at T91 are vessels involved in the fishing industry in both Washington State and Alaska. These vessels include fishing vessels, factory trawlers, seafood processors, independent seafood packers and long liners. T91 offers the proper cold storage, rail, and truck access for loading and offloading of cargo. Vessels involved in the fishing industry offload seafood products to either the cold storage facilities at the pier, or transfer the seafood products to rail cars or containers on chassis for movement by trucks. Among the seafood products that are offloaded at T91 are frozen seafood products, fishmeal, and fish oil. Approximately 50,000 metric tons of seafood products were offloaded at T91 in 2014. While at moorage, these vessels take on provisions, crew members, and other associated cargo. Trident Seafood, Lineage Logistics (formerly CityIce), and Independent Packers are important local seafood companies that lease warehouse, manufacturing, and office facilities as well as moor vessels at T91.

Diversity of vessels and uses

Other vessels also homeport at T91 to utilize the facilities it offers for their cargo operations. Marine construction vessels, cruise vessels, state ferry and government vessels, tug & barges, icebreakers, offshore oil supply vessels, ships of state, research vessels, diving vessels, oil spill response vessels, pilot vessels, and seismic vessels are among the wide variety of vessels that moor at T-91. Among the entities

Diane Sigumura, Andy McKim, Ben Perkowski

April 3, 2015

Page 3 of 6

that currently moor vessels at T91 are National Geographic and the Suquamish Tribe. Another vessel hosted by the Port is the "Rainbow Warrior" which is a 340 ton, 190 foot vessel sailing vessel operated by Greenpeace International. The Rainbow Warrior is the type of vessel that could be moored at T91, but was moored at Pier 66 during its most recent visit in 2013.

Grain terminal vessels

Bulk cargo ships often anchor near T91 because of the close proximity to the grain terminal and because of the marine cargo support facilities offered at T91. Bulk cargo ships rest at anchor in Elliot Bay while waiting to onload grain from the grain storage facilities at Terminal 86. These bulk cargo ships must sometimes await the arrival of grain by rail from Eastern Washington and the Midwest. While the grain vessel remains at anchor, its crew does not leave the vessel. The crew depends upon supply ships from T91 to shuttle supplies and crew provisions between shore and the grain vessel. The grain terminal support vessels also bring crew provisions for the vessel's next voyage.

City of Seattle Fire Department vessels

T91 is currently the homeport for Seattle Fire Department vessels. The Fire Department vessels remain idle at moorage for various lengths of time until they are called into service. In addition to providing fire suppression services, the Fire Department provides emergency medical service throughout the harbor, rescue and salvage in toxic environments, and assists with land-based firefighting if water mains break during earthquakes or other disasters. As with the other vessels that homeport at T91, the fire department vessels offload and take on supplies, undertake minor, routine maintenance, and store equipment at terminal facilities.

Tugs and barges

Tugs and barges are integral to the safe and efficient operation of a marine cargo terminal. Tugs push or tow other cargo vessels, such as container, cruise, fishing, or grain ships, to safely moor without endangering crew or damaging property. Tugs assist vessels in distress, move barges from one location to another, and facilitate a wide variety of shoreline construction activities. Barges provide storage for a wide variety of materials that are necessary for fuel transport and provisioning, construction and other marine industrial activities. Pursuant to its lease with the Port, Foss Maritime moors tugs and barges at T91.

Routine maintenance of vessels

Routine maintenance and minor repairs of vessels are also undertaken while vessels homeport or call at T-91. Major repairs are not undertaken at T91; major repairs are undertaken at nearby ship yards. Routine maintenance includes work on the vessel engines, cargo hold, wheelhouse, and deck equipment. Vessels that support industries with operations in Alaska typically undertake these routine maintenance activities during the off season in Seattle.

Security for vessels

Portions of T91 are required to comply with the requirements of the Marine Trade and Security Act (MTSA) because it receives calls from vessels that engage in foreign trade. As required by the MTSA, the Port has submitted a Facility Security Plan that identifies the security measures at the terminal. MTSA also requires stringent security procedures for all Coast Guard regulated facilities and vessels and for all mariners holding Coast Guard-issued credentials. Coast Guard credentialed persons include merchant mariners, port facility employees, longshore workers, truck drivers, and others requiring unescorted access to secure areas of maritime facilities and vessels. These workers must have a Transportation Worker Identification Credential (TWIC) in order to gain access to the secured portions of the facility. Portions of the facility that support the cruise ship functions have less stringent security requirements.

Other cargo terminal functions and facilities

- Customs examinations stations – These stations are located in warehouses where inspections of cargo are undertaken for contraband and for compliance to customs tariffs and duties.
- Foreign trade zones (FTZs) – FTZs are designated zones considered “outside the USA” that allow cargo to be received, manipulated and stored, and defer customs clearance and corresponding duties, tariffs or quotas until the goods are ready for entry into the USA for consumption.
- Provisioning - Vessels calling at marine terminals need to be provisioned with food, machinery, equipment, electronics, household goods, medical supplies and other goods to prepare to return to sea with everything required to ensure the vessel and its crew are sustained to the next port of call.
- Cargo Assembly – Some cargo undergoes assembly on marine cargo terminals before shipment such as heavy construction equipment, modular HVAC systems, generators, camp units and industrial plants.

Overview of non-containerized cargo operations and uses at Terminal 115 (“T115”)

Terminal 115 is located on the Duwamish Waterway and includes approximately 98 acres of marine cargo handling facilities. The attached aerial photo of the facility shows the terminal. Shoreline facilities extend about 2,050 linear feet along the bank. T115 is composed of three main service areas, which include: 1) a main concrete pier about 1,200 feet in length to serve ship and barge cargos; 2) a finger pier about 400 feet in length designed for barge cargo transshipment; and 3) a T-dock area used for transferring seafood products. T115 has rail access and utilizes handling equipment such as top lift trucks, heavy forklifts, smaller forklifts, and crawler cranes. T115 receives breakbulk and containerized cargo as well as Ro-Ro (roll on, roll off) cargo.

T115 is leased to terminal operator Northland Services. The attached aerial photograph of T115 shows a diversity of cargo vessels and barges moored at the main pier area. These vessels and barges are in the process of offloading and loading breakbulk and unitized cargo in a similar manner as described above for T91. T115 hosts a diverse variety of vessels and operations that are similar to those described above as occurring at T91.

Overview of non-containerized cargo operations and uses at Terminal 5 (“T5”)

T5 is a 185 acre facility with 2,900 feet of moorage capacity and three berths. T5 is the Port’s most modern cargo facility with a 30 acre intermodal yard and direct access to rail mainlines. Twelve truck queuing lanes and an 80,000 foot transit shed are among the cargo facilities it offers. T5 also has a 48,000 square foot maintenance shed to handle terminal and equipment repair and maintenance.

Historically, T5 has accommodated a diverse range of cargo uses and activities. Attached are photos from 1953 to 2003 that depict a broad diversity of cargo activities:

1. 1953—west shoreline, West Waterway

Illustrates numerous, diverse marine industrial moorage and shoreland uses, including, north to south West Waterway shoreline: shipyard dry dock and upland metal fabrication; radio transmission equipment and tower; pier and warehouse in use for lumber and break-bulk shipping; bulk steel shipping operations; and, bulk lumber cargo barge operations.

2. 1954—west shoreline, West Waterway

Marine industrial uses and activities include: ship building and dry dock moorage at north margin of waterway; radio transmitter and buildings (reference KJR property); bulk lumber and break-bulk shipping, with on-dock warehouses and cargo sheds (reference Ames Terminal property); bulk scrap metal receiving (reference Bethlehem Steel property); and, bulk lumber transshipment/barge cargo operations at southwest corner of West Waterway.

Diane Sigumura, Andy McKim, Ben Perkowski

April 3, 2015

Page 6 of 6

were covered by the shoreline master use permit ("SMUP") for the SWHRP. Crowley tug and barge operations at T5 are similar to the Foss tug and barge operations at T91 described above. Pier 2 provided rail spur access for cargo uses by Crowley.

Crowley is still a customer of the Port, but has relocated its tug and barge operations to Pier 16 and 17 on Harbor Island at Terminal 18. The attached aerial photo shows these piers and the Crowley vessels.

Non-containerized cargo uses of T5 since the SWHRP

T5 has been leased by several different entities since the City issued the SMUP for the SWHRP in 1996. The most recent tenant was Eagle Marine Services, whose lease was terminated last year. Eagle Marine Services assumed the lease between the Port and American President Lines that was executed in 1985. A customer of Eagle Marine Services was Westwood Shipping. Westwood Shipping utilized the south end of T-5 pier because the end of the pier was located near the cargo transit shed building. The attached photo shows the breakbulk vessels located near the transit shed. Westwood handled a variety of breakbulk cargo at T-5 including transshipment cargo. The photo described above from 2003 depicts T-5 from the eastern perspective. The photo shows a Westwood Shipping breakbulk vessel moored at the south end of the pier unloading breakbulk cargo for transfer to the transit shed, transshipment to another vessel, or transfer to another mode of transportation. The photo from 2005 depicts these same activities from the north perspective.