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HEARING EXAMINER

BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of:	)	Hearing Examiner File:
	)	<b>S-15-001 and S-15-002</b>
	)	
<b>FOSS MARITIME COMPANY</b>	)	DEPARTMENT OF PLANNING AND
	)	DEVELOPMENT'S REPLY
	)	ON ITS MOTION IN LIMINE
from an interpretation by the Director,	)	
Department of Planning and Development.	)	

DPD's Motion seeks an order putting into effect rulings in the Hearing Examiner's Order on DPD's Motion to Dismiss ("Order"), issued in July. Contrary to Appellant Foss's argument that DPD is seeking to re-litigate rulings or the Port's assertion that DPD is asking the Examiner to accept DPD's theory of the case in advance of the evidence, DPD's Motion in Limine identified four rulings the Hearing Examiner has already issued that DPD seeks to apply.

The Port and Foss argue that because this is not a jury trial there is no reason to exclude evidence in advance. But simplifying the case before hearing, consistent with the Examiner's Order, will benefit the process.

**I. FUTURE ACTIONS OF DPD**

The subject of the Interpretation and this appeal is the meaning of the term "cargo terminal." The Port has proposed exhibits showing vessels at sites that the evidence will show

ORIGINAL

1 do not have a permit for “cargo terminal” use. Clearly these photos have no relevance in  
2 showing what DPD has determined the term “cargo terminal” means. They should be excluded.

3 To avoid that result, the Port claimed the photographs show the impact on properties with  
4 other uses if DPD in the future applies the logic of the Interpretation on cargo terminals to other  
5 types of use permits. This is based on speculation and is clearly within the scope of the  
6 Examiner’s ruling on Foss Issue 14, where Foss alleged that DPD intends to expand the  
7 Interpretation to cover other uses and activities at Terminal 5. The Examiner ruled, “DPD’s  
8 future intentions are not within the Hearing Examiner’s jurisdiction to review in this appeal.”<sup>1</sup>  
9 Neither is DPD’s possible future application of the logic of the cargo terminal Interpretation to  
10 other uses. So DPD’s motion sought to exclude the photos on that ground, as well as relevance.

11 The Port’s Response argues that awareness of such impacts will prevent a ruling that has  
12 absurd results on the Port’s other activities. This argument is unfounded, unsupported and  
13 unworkable.

14 It is unfounded because if the logic of the Interpretation, as represented by the Port,<sup>2</sup> were  
15 extended to other properties with non-cargo terminal permits, the allegedly “absurd result”  
16 would be that the owner of a site that has only a “passenger terminal” permit could not allow a  
17 container cargo ship or an oil rig to moor and carry out its activities there, unless the property  
18 owner got an additional permit for that use at that site. This is not absurd, and is in fact the basis  
19 for the City’s requirement that uses be established by permit, for why the Shoreline Management  
20 Act requires regulating uses, and for the SMP’s definitions of different kinds of shoreline uses

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22 <sup>1</sup> Order, p. 3, paragraph 14.

23 <sup>2</sup> This is a simplification of what the Interpretation says and Mr. McKim’s deposition testimony. The Port, at p. 3, asserts that Mr. McKim testified that only vessels whose primary purpose was for transporting cargo is allowed at a cargo terminal, but in fact his testimony was more nuanced and included allowing tugs assisting such vessels to moor there, as well.

1 and standards that apply to them when the site is put to a particular kind of use. On the contrary,  
2 a result that means that a permit for one moorage-related use creates an “umbrella permit”  
3 authorizing every kind of moorage at a site would indeed be absurd.

4 The Port’s argument is unsupported. To show an adverse impact will arise if particular  
5 sites could not continue to operate as they currently do, the Port not only needs a picture of a  
6 vessel, the Port must adduce evidence that the permits for the site in that photo are inconsistent  
7 with the activity depicted in it under the extension of the Interpretation’s logic. Then the Port  
8 would have to show that it will be damaged by applying for the correct permit. The Port’s  
9 exhibit list<sup>3</sup> has no such evidence for the 15 photos in its exhibits.

10 This argument is unworkable. In addition to the showing required from the Port, DPD  
11 would need to have the opportunity to rebut the Port’s argument. Interpreting the meaning of  
12 various non-cargo terminal uses requires producing evidence far beyond the scope of this  
13 hearing. This appeal is not about DPD’s possible expansion of the Interpretation’s logic to other  
14 uses, but about the cargo terminal definition.

15 DPD respectfully requests an order that (1) excludes as irrelevant evidence of activities on  
16 sites that do not have cargo terminal permits, and (2) requires a foundation for the introduction of  
17 every photograph, berthing schematic and moorage log showing it is in fact from a site that does  
18 have a cargo terminal permit. And to be clear, DPD preserves its right to object to exhibits of sites  
19 with cargo terminal permits, as well, on the basis set out in Section III below and other grounds.

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<sup>3</sup> Ex. A to this Reply.

1 **II. NEW ISSUES AND TESTIMONY OUTSIDE THE EXAMINER'S**  
2 **JURISDICTION**

3 DPD's Motion asks the Examiner to exclude the testimony of Thomas Tanaka on federal  
4 regulations concerning non-discrimination in providing moorage to vessels, as being both an  
5 untimely new issue and outside the Examiner's jurisdiction, as set out in the Order.<sup>4</sup>

6 The Port's Response does not address this issue specifically. The Interpretation does not  
7 preclude the Port from meeting its federal obligations after obtaining the correct permits.

8 The Port offered no response to DPD's motion to limit Mr. Tanaka's testimony about  
9 moorage to sites with cargo terminal permits.

10 DPD respectfully requests an order barring testimony on federal regulations on non-  
11 discrimination in offering moorage; DPD also requests that Mr. Tanaka's testimony on moorage be  
12 limited to sites with cargo terminal permits.

13 **III. LACK OF ENFORCEMENT IS NOT A DPD DETERMINATION OF**  
14 **LAWFULNESS**

15 On August 6, the Port provided an exhibit list that included photographs, berthing status  
16 sheets, and vessel logs that list or show a variety of vessels that appear to be inconsistent with the  
17 use "cargo terminal" at various sites. None of sites are Terminal 5; the other sites are Terminal 91  
18 (composed of Piers 90 and 91) that has a cargo terminal permit (among other permits), plus other  
19 sites that the evidence will show do not have cargo terminal permits. The Exhibit list and examples  
20 of the exhibits are attached as Exhibit B.

21 Both DPD and Foss identify the Examiner's rulings that (1) prior DPD actions inconsistent  
22 with the interpretation do not bar the correct application of the Code through this Interpretation, and  
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<sup>4</sup> Order, p. 5, paragraph 6.

1 (2) that DPD enforcement or lack of enforcement of activities on other sites is relevant.<sup>5</sup> Where the  
2 parties part company is on a third ruling by the Hearing Examiner:<sup>6</sup>

3 Evidence and argument concerning past activities deemed by the  
4 City to be a cargo terminal use may be offered at hearing for this  
5 purpose.<sup>7</sup>

6 . . . . .  
7 Foss also argues that the City's prior permitting actions are  
8 relevant to the appeal, and as noted above, the City's past  
9 determinations of what constitutes a cargo terminal use may aid the  
10 Examiner's understanding.<sup>8</sup>

11 Foss argues that photographs of an activity inconsistent with the Interpretation is lack of  
12 enforcement and thus is a DPD "determination" that the activity is allowed.<sup>9</sup> Foss also claims the  
13 Hearing Examiner has ruled that evidence of activities that have been "allowed" at cargo terminals  
14 is relevant.<sup>10</sup> That is not what the Examiner's Order says – it says activities the City "deemed" to be  
15 cargo terminal and the City's past "determinations" of what constitutes a cargo terminal use are  
16 relevant. "Allowing" a use by a permit and the alleged "allowing" a use by lack of enforcement  
17 actions are very different things.

18 Foss cites no evidentiary rule creating a presumption or inference that photos of moored  
19 vessels (1) is evidence of lack of enforcement or (2) represents a conscious decision – a  
20 determination – made by DPD; nor does Foss cite a basis for presuming or inferring DPD approval  
21 of the activity from the photos.

22 There is simply no way to tell whether DPD knew of or thought about the lawfulness of an  
23 activity on Port property just because there is a photo or berthing chart showing the activity

<sup>5</sup> Order on Motion for a Protective Order Concerning the Deposition of Andrew McKim., p. 1.

<sup>6</sup> Set out at Motion page 3.

<sup>7</sup> Order, p. 3, paragraph 14 (emphasis added).

<sup>8</sup> Order, p. 2, paragraph 10 (emphasis added).

<sup>9</sup> Foss Opposition, p. 2, lines 16-21.

<sup>10</sup> Foss Opposition, p. 3, lines 17-19.

1 occurred. And there is no way of knowing whether DPD believed that inaction was correct based  
2 on the permits or whether DPD made an error in not enforcing. As the party with the burden of  
3 proof and the proponent of the inference, Foss must cite something that supports drawing the  
4 inference of DPD's intentional approval. Foss or the Port should adduce evidence showing that  
5 DPD was right in not enforcing, before DPD is required to rebut.

6 If DPD had initiated an enforcement action and then determined that it should stop  
7 enforcement, that could be a determination, and the parties could argue about its import given  
8 *Mercer Island v Steinman*. But that is not what Foss is relying on.

9 Foss's argument<sup>11</sup> that it will show DPD has approved homeports, and that the City has  
10 taken actions and made statements about mooring activities are within the scope of what the  
11 Examiner's rulings (though DPD disputes the conclusions Foss is drawing from such evidence).<sup>12</sup>  
12 They are actions. But these are not the same as Foss's argument that "lack of enforcement" is a  
13 determination by DPD or that it is determination that the activity is lawful. All they show is what  
14 the Port allowed. Foss claims that "the Hearing Examiner has already ruled" that "actions of both  
15 the regulator and those who are regulated" are relevant and admissible.<sup>13</sup> But that is not what the  
16 Order says: as set out above, the Examiner ruled that it is DPD's determinations and what DPD has  
17 deemed to be cargo terminal that are relevant.

18 With respect to berthing logs and vessel logs the inference is even more attenuated, because  
19 one cannot tell whether DPD would even be aware of the actions listed on them.  
20  
21

22 <sup>11</sup> Foss Opposition p. 3, lines 1-3.

23 <sup>12</sup> Foss also misstates the Interpretation by saying it allows cargo vessels "only while loading and unloading."  
Opposition, p. 2, line 18. That is not what the interpretation says or what Mr. McKim testified to.

<sup>13</sup> Foss Opposition, p. 3, lines 9-12 (emphasis added).

1 In addition, as set out in Section I above, Foss's argument is completely untenable with  
2 respect to photographs showing moorage that is inconsistent with the Interpretation on sites that do  
3 not have a cargo terminal permit.

4 DPD respectfully requests an order excluding the following proposed exhibits for the  
5 purpose of showing DPD's determination that the activities listed or depicted are consistent with the  
6 definition of cargo terminal: Port Exhibits 1 -20 and 25-30; and requiring a showing of a different  
7 relevant purpose before introducing them.

#### 8 IV. POLITICAL MOTIVATION

9 The Examiner ruled that political motivation is not relevant in this appeal. DPD's Motion  
10 seeks a ruling specifically excluding evidence offered for this purpose. Foss says this is  
11 unnecessary and unworkable.

12 Foss also argues that DPD knows it is overreaching in seeking this order because DPD's  
13 motion acknowledged that it is not possible to rule on specific evidence now and did not ask to  
14 have evidence excluded and made its motion in the abstract. In fact, as DPD's motion notes, DPD  
15 could not request a ruling on a specific document because Foss had failed to identify any specific  
16 exhibits in its Foss's Witness and Exhibit list filed with the Examiner on July 21. It contains broad  
17 categories of documents, and it was impossible at that time to determine what the specific evidence  
18 would be.

19 DPD has now received the exhibits. Exhibits 13 and 14<sup>14</sup> are redacted emails showing no  
20 text, only a "to and from" between Diane Sugimura and the Mayor's staff (Viet Shelton) and a  
21 subject line concerning Terminal 5. They have no purpose relevant to the determination of the  
22

23 \_\_\_\_\_  
<sup>14</sup> Exhibits are attached as Ex. B to this Reply.

1 meaning of "cargo terminal," their sole purpose is to suggest that the Interpretation is politically  
2 motivated, and they should be excluded.

3 Similarly, the press release that is Exhibit 11 and its circulation by Diane Sugimura in Ex.  
4 12<sup>15</sup> should be excluded. While Foss claims documents could be offered for other purposes such as  
5 the people involved, background, and timing, this document is offered to show that "the people  
6 involved" are the Mayor and Council who have sought an interpretation. This is not relevant to the  
7 meaning of the term cargo terminal.

8 Foss also examined Mr. McKim on whether the mayor and city council requested the  
9 interpretation or were consulted in writing the Interpretation, or paid for the Interpretation, and  
10 timing of the issuance of the Interpretation in connection with the Mayor's attendance at a breakfast  
11 on environmental issues.<sup>16</sup> These topics have no bearing on the merits of the Interpretation, and  
12 those lines of examination should be excluded.

13 Finally, Foss argues that because this is not a jury trial and the Examiner will not be  
14 improperly affected, it is not necessary to exclude evidence showing political motivation. But Foss  
15 adds the caveat: "if it is in fact deemed to be irrelevant."<sup>17</sup> The Examiner has held it to be  
16 irrelevant. Foss is creating a record for later appeal of the Examiner's decision and for argument on  
17 issues that is outside the scope of this hearing. That record should be created in those fora, not this  
18 appeal.

19 DPD respectfully requests an order that evidence of political motivation is not relevant, and  
20 that evidence that has other relevance will be considered for that purpose only. DPD also asks the  
21 Examiner to exclude Foss Exhibits 11, 12, 13, and 14 and to bar examination on whether the Mayor

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23 <sup>15</sup> Also Attached as Exhibit B.

<sup>16</sup> Attached as Ex. C.

<sup>17</sup> Foss Opposition p. 5, line 6.



1 or City Council was involved in any way with the Interpretation and the reasons why the  
2 Interpretation was released on Monday, May 4, 2015.

3 DATED this 11<sup>th</sup> day of August, 2015.

4 PETER S. HOLMES  
Seattle City Attorney

5 By: s/Eleanore S. Baxendale, WSBA #20452  
6 Assistant City Attorney  
7 [eleanore.baxendale@seattle.gov](mailto:eleanore.baxendale@seattle.gov)  
8 Seattle City Attorney's Office  
701 Fifth Ave., Suite 2050  
Seattle, WA 98104-7097  
9 Ph: (206) 684-8232  
10 Fax: (206) 684-8284  
*Attorneys for Respondent*  
*Department of Planning and Development*

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **Department of Planning and**  
3 **Development's Reply on Its Motion In Limine** with the Seattle Hearing Examiner using its e-filing  
4 system.

5 I also certify that on this date, a copy of the same document was sent to the following  
6 parties listed below in the manner indicated:

7 John C. McCullough (X) email: [jack@mhseattle.com](mailto:jack@mhseattle.com)  
McCullough Hill Leary P.S.  
8 701 Fifth Avenue, Suite 6600  
Seattle, WA 98104-7006  
9 *Attorneys for Appellant*  
*Foss Maritime Co.*

10 David R. West (X) email: [drwest@gsblaw.com](mailto:drwest@gsblaw.com)  
Donald B. Scaramastra (X) email: [dscaramastra@gsblaw.com](mailto:dscaramastra@gsblaw.com)  
11 Daniel J. Vecchino (X) email: [dvecchio@gsblaw.com](mailto:dvecchio@gsblaw.com)  
Garvey Schuber Barer  
12 1191 – 2<sup>nd</sup> Avenue, 18<sup>th</sup> Floor  
Seattle, WA 98101-2939  
13 *Attorneys for Appellant*  
*Foss Maritime Co.*

14 Traci Goodwin (X) email: [goodwin.t@portseattle.org](mailto:goodwin.t@portseattle.org)  
Senior Port Counsel  
15 Port of Seattle  
P. O. Box 1209  
16 Seattle, WA 98111-1209  
17 *Attorneys for Appellant*  
*Port of Seattle*

18 Patrick J. Schneider (X) email: [schnp@foster.com](mailto:schnp@foster.com)  
Foster Pepper PLLC  
19 1111 Third Ave., Suite 3400  
Seattle, WA 98101-3299  
20 *Attorneys for Appellant*  
*Port of Seattle*

1 Patti A. Goldman  
2 Matthew R. Baca  
3 Earthjustice  
4 705 Second Ave., Suite 203  
5 Seattle, WA 98104-1711  
6 *Attorneys for Intervenors*  
7 *Puget Soundkeeper Alliance, Seattle*  
8 *Audubon Society, Sierra Club, and*  
9 *Washington Environmental Council*

(X) email: [pgoldman@earthjustice.org](mailto:pgoldman@earthjustice.org)

(X) email: [mbaca@earthjustice.org](mailto:mbaca@earthjustice.org)

10 Joshua C. Allen Brower  
11 Molly K.D. Barker  
12 Veris Law Group PLLC  
13 1809 Seventh Avenue, Suite 1400  
14 Seattle, WA 98101-1394  
15 *Attorneys for T-5 Intervenors*

(X) email: [josh@verislawgroup.com](mailto:josh@verislawgroup.com)

(X) email: [molly@verislawgroup.com](mailto:molly@verislawgroup.com)

16 the foregoing being the last known address of the above-named parties.

17 Dated this 11<sup>th</sup> day of August, 2015, at Seattle, Washington.

18  
19  
20  
21  
22  
23  
  
ROSIE LEE HAILEY

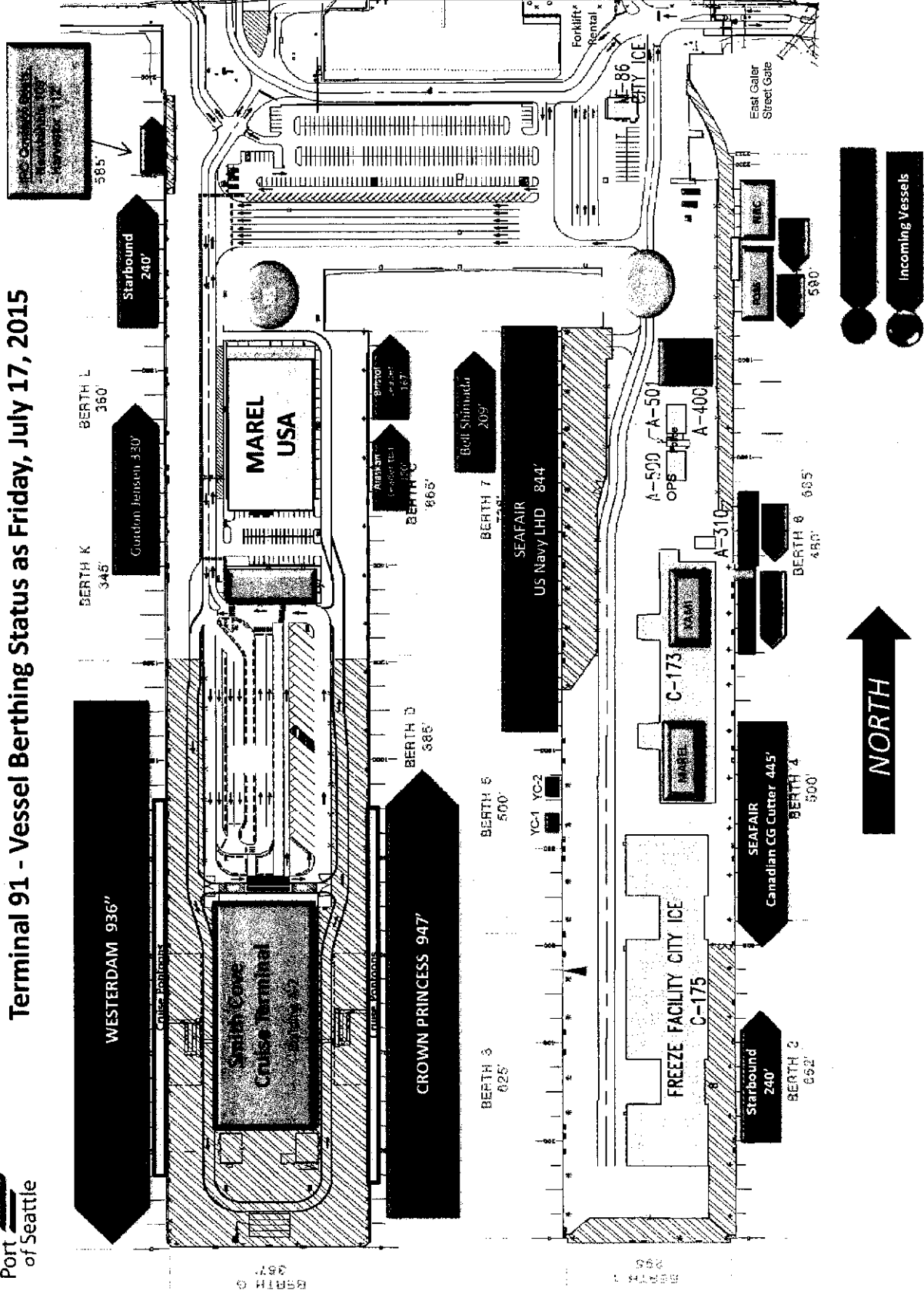
**PORT OF SEATTLE EXHIBITS – TERMINAL 5**

<b>POS Exhibit #</b>	<b>Date</b>	<b>Description</b>	<b>Bates Number</b>
1	1/14/11	01-14-2011 1730 hrs. T91 Berthing Status ACOE USCG	POS000001-POS000002
2	5/23/15	05-23-2015 Saturday Berthing Projects Events	POS000003-POS000008
3	6/24/15	06-24-2015 Wednesday Berthing Projects Events	POS000009-POS0000014
4	7/17/15	07-17-2015 Friday Berthing Projects Events	POS000015-POS000020
5	8/11/14	08-11-2014 Monday Berthing Projects Events	POS000021-POS000023
6	9/10/13	09-10-2013 Tuesday Berthing Status n Schedule	POS000024-POS000026
7	11/26/14	11-26-2014 Wednesday Berthing Projects Events	POS000027-POS000031
8	12/17/10	12-17-2010 5 pm Berthing Status n Schedule	POS000032-POS000033
9	7-12/14	2014 VSL LOG by MONTH (July-Dec.)	POS000034-POS000058
10	1-6/15	2015 VSL LOG by MONTH (Jan.-June)	POS000059-POS000082
--	--	Bates #'s missing due to corrupt document	POS000081-POS000180
11		Vessel Activity Report	POS000181-POS000222
12	7/29/15	Canadian Vessel, #1	POS000223
13	7/29/15	Canadian Vessel, #2	POS000224
14	7/30/15	Navy Vessels P-66 150730, #1	POS000225
15	7/30/15	Navy Vessels P-66 150730, #2	POS000226
16	7/30/15	Navy Vessels T-91 150730, #1	POS000227
17	7/30/15	Navy Vessels T-91 150730, #2	POS000228
18	9/13/77	Aleutian Key 770913 0#23B5A	POS000229
19	12/01/83	Ocean Odyssey 831201 #23B3E	POS000230
20	12/85	Oil rig 12-85 008-Edit	POS000231
21	5/2/96	P66 SMUP	POS000232-POS000263
22	5/14/15	Terminal Tariff	POS000264-POS000336
23	7/21/15	Mooring Dolphins Map 2 (2)	POS000337
24	7/30/15	Port Maritime Facilities	POS000338
25	11/98	Kalakala	POS000339
26	9/91	P-66 Darrada	POS000340
27	8/98	P-66	POS000341
28	9/13	Serene at T-91	POS000342
29	1/99	T-37 Project Arabia	POS000343
30	11/92	T-42	POS000344

**Exhibit A**



Terminal 91 - Vessel Berthing Status as Friday, July 17, 2015



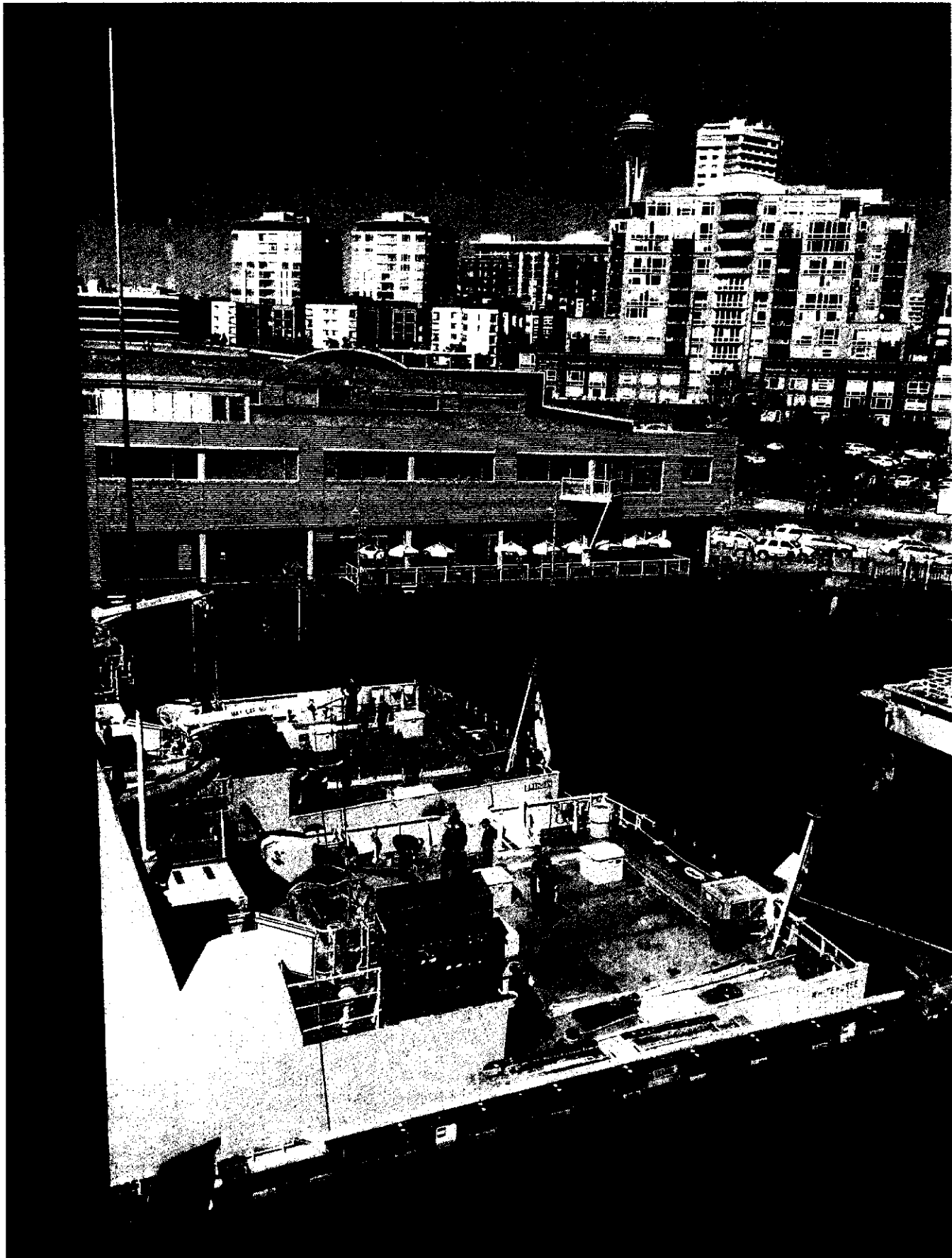


91	M	Fish	Harvester	112	6/30/2014 04:03 PM	7/2/2014 06:31 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/2/2014 01:19 PM	7/7/2014 06:20 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/7/2014 03:53 PM	7/9/2014 06:20 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/9/2014 04:27 PM	7/14/2014 06:09 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/14/2014 08:20 PM	7/16/2014 06:30 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/16/2014 05:29 PM	7/21/2014 07:31 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/21/2014 05:07 PM	7/23/2014 07:31 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/23/2014 01:10 PM	7/28/2014 07:33 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/28/2014 04:59 PM	7/30/2014 06:00 AM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/30/2014 03:48 PM	7/30/2014 07:23 PM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
91	M	Fish	Harvester	112	7/30/2014 11:51 AM	7/23/2014 01:10 PM	No	No	No	No	Lease Use	IPC	Bill Utilities Only
90	2	Fish	Untrak	185	7/22/2014 04:20 PM	7/23/2014 08:01 AM	No	No	No	No	Off load to City use	Iquique US	Full Tariff Dockage + Wharfage + Other
69	E	Other	HMCs BRANDON	180	7/30/2014 02:40 PM	8/4/2014 08:20 AM	No	No	No	No	Idle / Sea Trials	Iquique US	Full Tariff Dockage + Wharfage + Other
69	E	Other	HMCs EDMONTON	180	7/30/2014 03:08 PM	8/4/2014 08:00 AM	No	No	No	No	Seafair 2014	Norton Lty, Intl	Full Tariff
91	K	Barge	DB Rainier	142	7/25/2014 05:00 PM	7/25/2014 06:16 PM	No	No	No	No	Direct Barge Loading from Apron	Orion Construction	Tariff Dockage
91	K	Tug	Shagit	58	7/25/2014 05:00 PM	7/25/2014 08:16 PM	No	No	No	No	Tender to DB Rainier	Orion Construction	Charge for lending of vessel. Not at Dock
90	1	Fish	Excellence	367	6/30/2014 09:38 AM	7/5/2014 11:32 AM	No	Yes	Yes	No	Offload	Phoenix Processor	Full Tariff
90	5	Other	USCG MELLON	378	7/30/2014 03:09 PM	8/4/2014 08:00 AM	Yes	No	No	No	SeaFair / Naval Fleet Week	Ship Supply	Full Dockage + other
90	7	Other	USS Essex	844	7/29/2014 01:25 PM	7/30/2014 09:55 AM	Yes	No	No	No	SeaFair / Naval Fleet Week	Ship Supply	Full Dockage + other
90	7	Other	USS Essex	844	7/30/2014 02:59 PM	8/4/2014 08:58 AM	Yes	No	No	No	SeaFair / Naval Fleet Week	Ship Supply	Full Dockage + other
90	7	Other	YC-1569	110...	7/25/2014 11:00 AM	8/4/2014 01:55 PM	Yes	No	No	No	Stand-Off Pontoon	Ship Supply	Full Dockage + other
90	7	Other	YC-1569	110...	7/25/2014 11:00 AM	8/4/2014 01:55 PM	Yes	No	No	No	Stand-Off Pontoon	Ship Supply	Full Dockage + other
90	1	Other	Thomas G Thompson	274	7/6/2014 09:03 AM	7/8/2014 09:20 AM	No	No	No	No	Offload & Backload	University of Washington	Full Tariff + Water
90	1	Other	Thomas G Thompson	274	7/10/2014 04:02 PM	7/13/2014 12:10 PM	No	No	No	No	Offload & Backload	University of Washington	Full Tariff + Water
18	N	Barge	Kiamath & 360	400	4/30/2013 04:15 PM	7/26/2014 08:15 AM	Yes	No	No	No	Idle	Crowley Maritime	Tariff Dockage / Dolphins
90	5	Other	MELLON pontoons	100	7/25/2014 08:16 AM	7/26/2014 08:15 AM	Yes	No	No	No	Install	Global	Full Dockage + other
90	5	Other	MELLON pontoons	100	7/26/2014 08:16 AM	7/28/2014 08:15 AM	Yes	No	No	No	Idle thru weekend	Global	Full Dockage + other
90	5	Other	MELLON pontoons	100	7/28/2014 08:16 AM	8/4/2014 01:55 PM	Yes	No	No	No	Stand-Off Pontoon	Ship Supply	Full Dockage + other
90	5	Other	MELLON pontoons	100	8/4/2014 01:56 PM	8/6/2014 01:56 PM	Yes	No	No	No	Remove	Global	Full Dockage + other

POS000036

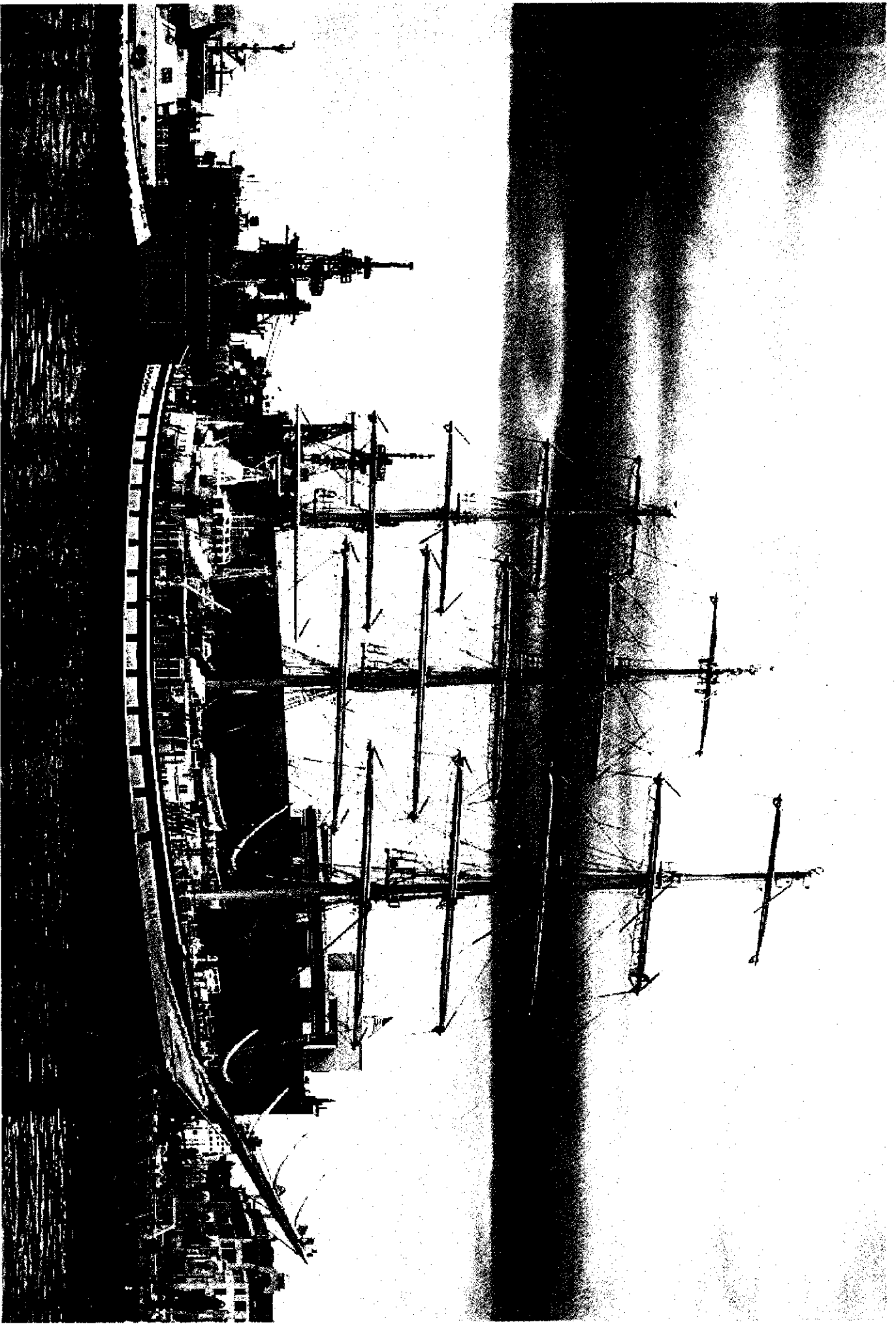






POS000224





POS000340

Foss Hearing Exhibits - Terminal 5

Foss Ex#	Date	Document Description	Bates or Doc Identifier, if any
F001	5/7/2015	DPD Interpretation No. 15-001	McKim Dep Ex 1
F002		Draft of DPD Interpretation No. 15-001	McKim Dep Ex 8 RFP1000004-007
F003		Int15001 DRAFT DPD Interpretation No. 15-001	
F004		Int15001v3 DRAFT DPD Interpretation No. 15-001	
F005		Int15001v3TimesNewRoman DRAFT DPD Interpretation No. 15-001	
F006		Int15001v4 DRAFT DPD Interpretation No. 15-001	
F007		Int15001v5 DRAFT DPD Interpretation No. 15-001	
F008	4/13/2015	Questions for Interpretation	McKim Dep Ex 9 (RFP100001-3)
F009	3/24/2015	Email from McKim to Goodwin et al Re Terminal 5	
F010	3/2/2015	Email from Roger Wynne to D Sigumura et al re Terminal 5 complaint, WITH ATTMT	DPD000118 to 1126
F011	3/9/2015	Press release from Mayor & City Council	SCC000416-417
F012	3/9/2015	Email from Diane Sugimura to Cliff Portman et al re FW: From the Office of the Mayor...	DPD000116-117
F013	3/21/2015	Email from Diane Sugimura to Viet Shelton; et al re PRIV'D Terminal 5, judge's ruling	MAYOR000029-32
F014	3/21/2015	Email from Diane Sugimura to Viet Shelton; Jason Kelly et al re PRIV'D Terminal 5, judge's ruling	MAYOR000025-28
F015	3/23/2015	Email from Eleanore Baxendale to Diane Sugimura, et al re Terminal 5	DPD000104-105
F016	3/13/2015	Terminal 5 Interim lease moorage graphic DPD meeting 3/13/15	
F017	3/13/2015	Handwritten notes "George Blomberg, Mike Merritt"	RFP0000978
F018	3/13/2015	Preliminary Answers from the Port	RFP0000980-984
F019	4/6/2015	Email from Traci Goodwin to Diane Sugimura et al re activities at Port of Seattle cargo terminals with three attachments - Foster Pepper letter of 4/3/15 and Styrk cover and memo of 4/6/15	McKim Dep Ex 20 (RFP4000959- 970)
F020	4/6/2015	Memo by Linda Styrk re Cargo Uses and Activities at Port of Seattle Cargo Terminals	McKim Dep Ex 3 (W-195-215)
F021	4/8/2015	Email from David West to A McKim et al re Foss Letter to McKim re Terminal 5 Activities, with attmt	McKim Dep Ex 4 (RFP4000971-977)
F022	4/15/2015	Letter from Linda Styrk to Diane Sugimura, Perkowski, McKim re request for information concerning cargo uses at Port of Seattle properties	W-217 to W-310
F023	4/23/2015	Declaration of George Blomberg	W-318 to 320
F024	4/23/2015	Declaration of Paul Meyer	W-191 to 193
F025		Webster's New Collegiate Dictionary definitions; Excerpt from Webster's New Collegiate Dictionary produced by DPD reflecting definition of "good"	McKim Dep Ex 7 (RFP2000213-215)
F026	3/11/2015	Emails from Eleanore Baxendale attaching Complaint Exhibits	RFP4000573, 670, 817
F027	3/12/2015	Email from Roger Wynne to Eleanor Baxendale et al re PRIV'D; Terminal 5 staffing at Law	DPD000115
F028	4/15/2015	4/3/15 Letter to Diane Sugimura from Foster Pepper with handwritten notes	DPD000360-364
F029	4/15/2015	4/6/15 Styrk Letter to Sugimura et al re RFI concerning cargo uses... with handwritten notes	McKim Dep Ex 2 (DPD000370-376)
F030	4/23/2015	Printout of slides from PowerPoint presentation "Terminal 5: Proposed Use" with handwritten notes	DPD000399-402





# NEWS RELEASE

OFFICE OF THE MAYOR &  
SEATTLE CITY COUNCIL

Mayor Ed Murray  
Council President Tim Burgess  
Councilmember Sally Bagshaw  
Councilmember Sally J. Clark  
Councilmember Jean Godden  
Councilmember Bruce Harrell  
Councilmember Nick Licata  
Councilmember Mike O'Brien  
Councilmember Tom Rasmussen  
Councilmember Kshama Sawant

**FOR IMMEDIATE RELEASE**  
March 9, 2015

**Contact:**  
Jason Kelly, Mayor's Office Press Secretary, 206.684.8379  
Dana Robinson Slote, Council Communications, 206-615-0061

## **Mayor, Council Call for Review of Shell's Arctic Drilling Fleet Permits at Port's Terminal 5**

**SEATTLE** – Mayor Ed Murray and the Seattle City Council announced today that Seattle's Department of Planning and Development (DPD) will review, investigate and determine whether the plans at Port of Seattle's Terminal 5 to host Shell Oil's Arctic drilling fleet are allowed under the current Shoreline Substantial Development Permit granted to Terminal 5.

Reports indicate that Shell Oil would moor vessels that are returning from drilling in the Arctic. In the past, Shell's drilling fleet has needed extensive repairs, maintenance and conversions after returning from a season of drilling. These activities may substantially change Terminal 5's use and require new, different permits than the one currently granted by DPD which could require additional environmental review if the Port wishes to move forward with the lease.

"Any project of this apparent significance to our industrial lands must go through the appropriate review. It's important that the public and surrounding businesses are informed of all the possible impacts of this lease – both economic and environmental – and that these impacts are sufficiently disclosed and evaluated," said Murray. "This is why I'm directing DPD to conduct a thorough review of the Terminal 5 proposal and determine if the anticipated activities at the terminal involving the Shell drilling fleet require new permits before it can proceed."

"I have grave concerns about Shell Oil's Arctic drilling fleet coming to Puget Sound in a damaged state, discharging oil and other toxic pollutants along our shorelines during transport and repair, jeopardizing the local ecosystem and undoing decades of work to clean up the

**SCC000416**

Sound,” said Councilmember Mike O’Brien. “Shell’s track record with the *Noble Discoverer* in the Arctic includes eight felony offenses relating to environmental and maritime crimes, such as discharging oil-contaminated water directly overboard, which is simply unacceptable.”

“For years the Port and the City have worked together to develop rational solutions and develop alternative treatment technologies to reduce pollution in the Duwamish and Elliott Bay,” said Councilmember Sally Bagshaw. “While the immediate value of a lease to repair arctic drilling equipment may appear to be high, we believe this agreement is shortsighted and ignores the long-term costs to our economy and environment.”

The current permit, called a Shoreline Substantial Development Permit, designated Terminal 5 as a “cargo terminal” – usually meaning goods are stored and ultimately transferred from this terminal to other carriers or locations. But if the Arctic drilling fleet is actually being moored and repaired at Terminal 5, there could be significant and adverse impacts on the surrounding environment. As part of DPD’s investigation and fact-finding, the Department will begin working with the Port of Seattle to clarify all of the activities anticipated at Terminal 5, including, but not limited to, the types of vessels to be moored and the maintenance and repairs to be conducted.

##

*Most press conferences and meetings are broadcast live to the web by Seattle Channel at either [seattle.gov/mayorlive](http://seattle.gov/mayorlive) or [seattle.gov/councillive](http://seattle.gov/councillive)*

**SCC000417**





000116

**Philibosian, Scarlett**

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**From:** Sugimura, Diane  
**Sent:** Monday, March 09, 2015 12:45 PM  
**To:** Portman, Cliff; Perkowski, Ben; Philibosian, Scarlett; McKim, Andy  
**Cc:** DPD\_Executive\_Team  
**Subject:** FW: From the Office of the Mayor: Mayor, Council Call for Review of Shell's Arctic Drilling Fleet Permits at Port of Seattle's Terminal 5

Mike Merritt "caught" me in the lobby this morning ... I told him we would be getting in touch with him and whomever to get a full understanding of what/how they are proposing to use their facility.

Guess we should start making a list of our questions ... in addition to asking them to tell us their plans.

---

**From:** Gore, Mike [mailto:Mike.Gore@SEATTLE.GOV]  
**Sent:** Monday, March 09, 2015 12:31 PM  
**To:** MOPRESS@TALK2.SEATTLE.GOV  
**Subject:** From the Office of the Mayor: Mayor, Council Call for Review of Shell's Arctic Drilling Fleet Permits at Port of Seattle's Terminal 5



**NEWS RELEASE**

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**OFFICE OF THE MAYOR &  
SEATTLE CITY COUNCIL**

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##



Mike Gore  
Deputy Press Secretary  
City of Seattle, Office of the Mayor  
O: 206.684.7991 | M: 206.437.2471 | [mike.gore@seattle.gov](mailto:mike.gore@seattle.gov)



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F013

**From:** Sugimura, Diane  
**To:** Shelton, Viet; Gregorich, Chris; Joncas, Kate; Harper, Nick; Giliss, Edie; Kelly, Jason W  
**Cc:** Wynne, Roger; Gonzalez, Lorena  
**Subject:** PW: PRIV'D; Terminal 5, judge's ruling  
**Date:** Saturday, March 21, 2015 6:09:30 PM  
**Attachments:** [REDACTED]

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[REDACTED]

[REDACTED]

-----Original Message-----

**From:** Wynne, Roger  
**Sent:** Friday, March 20, 2015 01:40 PM Pacific Standard Time  
**To:** Baxendale, Eleanore; Sugimura, Diane; Gonzalez, Lorena; Lumsden, Faith; McKim, Andy; Laird, Bob; Perkowski, Ben; Philibosian, Scarlett  
**Cc:** Stevens, Bryan  
**Subject:** PRIV'D; Terminal 5, judge's ruling

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED] Wynne  
Assistant City Attorney  
Land Use Section Director

Seattle City Attorney's Office  
600 4<sup>th</sup> Avenue, 4<sup>th</sup> floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
Phone: 206-233-2177  
FAX: 206-684-8284  
[roger.wynne@seattle.gov](mailto:roger.wynne@seattle.gov)

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**From:** Wynne, Roger  
**Sent:** Friday, March 13, 2015 12:51 PM  
**To:** Baxendale, Eleanore; Sugimura, Diane; Gonzalez, Lorena; Lumsden, Faith; McKim, Andy; Laird, Bob; Perkowski, Ben; Philibosian, Scarlett  
**Cc:** Stevens, Bryan  
**Subject:** PRIV'D; Terminal 5, judge expects to rule by end of next week

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
Roger



**Roger Wynne**  
Assistant City Attorney  
Land Use Section Director

Seattle City Attorney's Office  
600 4<sup>th</sup> Avenue, 4<sup>th</sup> floor  
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MAYOR000032





**From:** Sugimura, Diane  
**To:** Shelton, Viet; Kelly, Jason W  
**Subject:** FW: PRIV'D; Terminal 5, judge's ruling  
**Date:** Saturday, March 21, 2015 6:09:59 PM

---

Sent with Good (www.good.com)

-----Original Message-----

**From:** Wynne, Roger  
**Sent:** Friday, March 20, 2015 01:43 PM Pacific Standard Time  
**To:** Baxendale, Eleanore; Sugimura, Diane; Gonzalez, Lorena; Lumsden, Faith; McKim, Andy; Laird, Bob; Perkowski, Ben; Philibosian, Scarlett  
**Cc:** Stevens, Bryan  
**Subject:** RE: PRIV'D; Terminal 5, judge's ruling

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[REDACTED]

[REDACTED] Wynne, Roger  
**Sent:** Friday, March 20, 2015 1:41 PM  
**To:** Baxendale, Eleanore; Sugimura, Diane; Gonzalez, Lorena; Lumsden, Faith; McKim, Andy; Laird, Bob; Perkowski, Ben; Philibosian, Scarlett  
**Cc:** Stevens, Bryan  
**Subject:** PRIV'D; Terminal 5, judge's ruling

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[REDACTED]

1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cheers,  
- Roger



**Roger Wynne**  
Assistant City Attorney  
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**Cc:** Stevens, Bryan

**Subject:** PRIVD; Terminal 5, judge expects to rule by end of next week

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[REDACTED]

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MAYOR000028

# Deposition of Andy McKim

## Foss Maritime Company v. City of Seattle, Department of Planning and Development

July 22, 2015



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**Exhibit C**

1 involvement with," as long as they pay the fee, you'll  
2 perform the interpretation?

3 A Yes.

4 Q How often are interpretations requested by someone  
5 who's not the property owner or the -- one of the project --  
6 involved in the project somehow?

7 A I would have to check the records. But  
8 interpretations are often requested by parties who oppose a  
9 project.

10 Q How often in the past has the mayor's office  
11 requested an interpretation?

12 A I don't believe the mayor's office has ever  
13 requested an interpretation.

14 Q How often has a member of the city council or  
15 their staff requested an interpretation?

16 A I don't believe that has ever happened.

17 Q Earlier you were describing the means by which you  
18 conduct your interpretations, and you started off by saying  
19 you try to become familiar with the facts. What's your  
20 typical process of assembling the facts?

21 A Again, that's going to vary, depending on the  
22 nature of the interpretation. Sometimes the facts are  
23 available in records that we already have at the department.

24 Other times, we can ask for facts from people who  
25 have access to the facts. Often it involves research into

1 Q I'm just trying to understand. You authored this  
2 document and it says there were general questions received  
3 by the department.

4 A Right.

5 Q And I'm trying to understand whose questions were  
6 those?

7 A My recollection is that the director raised the  
8 question.

9 Q So it's your understanding that the interpretation  
10 was generated at the director's instigation?

11 A The director asked that we look into the issue.  
12 And the city attorney's office suggested that we  
13 prepare the response in the form of a formal land use code  
14 interpretation.

15 Q So you're not aware of any questions the DPD  
16 received?

17 A I did not receive questions directly.

18 Q Are you aware that the mayor's office has stated  
19 that it directed DPD to do a review?

20 A I believe I have heard that, yes.

21 Q Is that correct, the mayor's office directed DPD  
22 to do a review?

23 A As I say, the mayor's office did not direct me to  
24 do something. I believe that he may have asked the director  
25 to look into the question.



1 Q Okay. And same question with regard to the city  
2 council: Are you aware that the city council members have  
3 asserted that they asked or directed DPD to do a review?

4 A I believe I have heard that.

5 Q But you're not aware of that personally one way or  
6 the other?

7 A No, not directly.

8 Q Was there ever any discussion about the need for  
9 the interpretation to be done by some particular date that  
10 wasn't tied to the arrival of the vessels?

11 A Yes. I believe -- well, no, actually. I mean, it  
12 was all related to the arrival of the vessels. I know that  
13 the director wanted it by the particular date that it was  
14 actually issued. But my understanding is that that is  
15 related to when the vessels were anticipated.

16 Q So it was issued on a Monday, as I recall; is that  
17 correct?

18 A It was actually -- yeah, it was formally published  
19 the following Thursday because of the publication  
20 requirements, but it was actually issued on the previous  
21 Monday, yes.

22 Q And the Monday being May 7th; is that right?

23 A I believe May 7th is the Thursday, maybe.

24 Q Okay.

25 A And it may have been May 4th.

1           That, you know, and this particular case, if we  
2 were -- that it was the idea if we were writing something  
3 that said that we agree to the cargo terminal, that the  
4 proposed use could occur at a cargo terminal, I don't think  
5 it would be inappropriate for us to also say this has  
6 nothing to do with, you know, approval or disapproval of how  
7 those oil rigs will be used. This is simply a matter of the  
8 land use code interpretation, simply a matter of what the  
9 code allows.

10           And the code is a neutral, which is why I said --  
11 for example, you asked about Greenpeace vessels. And they  
12 would be in the same situation, that we do apply the code  
13 neutrally. And sometimes, you know, maybe we want to remind  
14 people of that.

15           Q     The code interpretation here was requested by the  
16 mayor and city council, correct?

17           A     Yes.

18           Q     And that was done for political reasons, correct?

19                   MS. BAXENDALE: Objection.

20                   Don't answer the question.

21           Q     (By Mr. West) Well, you just said it wasn't --  
22 you just said politics did not drive the land use code  
23 interpretation. In fact, it was requested for political  
24 means, wasn't it?

25                   MS. BAXENDALE: Objection.

1 Don't answer the question.

2 Q (By Mr. West) I'm following up on your answer.

3 A I think that you mischaracterized what I said. I  
4 said politics didn't play any part in the interpretation,  
5 what the interpretation says.

6 Q But it played a part in the interpretation being  
7 requested in the first place, did it not?

8 MS. BAXENDALE: Objection.

9 Don't answer the question.

10 MR. WEST: Okay. Why don't we take a break.

11 (Recess.)

12 Q (By Mr. West) Again, looking at Exhibit No. 8,  
13 which is your draft document, draft, the last page, Section  
14 IV, "Lay berthing as a continuation of the legal, historic  
15 use of the property," have you read this portion of your  
16 draft recently?

17 A Not lately, no.

18 Q Why don't you just read through it and familiarize  
19 yourself with it, and let me know when you're done.

20 MR. SCHNEIDER: I'm sorry, David, where are we  
21 at?

22 MR. WEST: Exhibit 8, last page.

23 MR. SCHNEIDER: Last page.

24 THE WITNESS: Okay.

25 Q (By Mr. West) Do you stand by what you've written

1 Q Since the requesters, as I understand it, were the  
2 mayor and city council, did you bill their departments for  
3 your time, or how was it dealt with in this case?

4 MS. BAXENDALE: Objection. Misstates  
5 testimony. Assumes facts not in evidence.

6 THE WITNESS: I'm sorry?

7 MS. BAXENDALE: I said it assumes facts not  
8 in evidence.

9 You can answer if you understand it.

10 THE WITNESS: There has not been any billing  
11 for this interpretation.

12 Q (By Mr. Schneider) Will there be?

13 A No.

14 Q So it comes out of the department's general  
15 budget?

16 A Yes.

17 Q So who framed the question that you were  
18 answering?

19 A I don't recall specifically who asked the question  
20 for the interpretation. I know that we were asked to look  
21 into this. And I believe that it was that that question was  
22 delivered to me by the director.

23 And then in terms of clarifying specifically what  
24 issues we were looking at, I clarified those.

25 The general question, as I understood it, was

1 necessarily ask to do it as an interpretation. That was a  
2 separate decision.

3 But my understanding was that there was some  
4 urgency because of actual activity, impending activity  
5 regarding the drilling rig.

6 Q Did you know or learn or hear about the mayor  
7 discussing the interpretation at the climate solutions  
8 breakfast?

9 MS. BAXENDALE: Objection. Compound.

10 THE WITNESS: Yes. I knew that he had a  
11 breakfast.

12 Q (By Mr. Schneider) Okay. And the breakfast was  
13 May 4th?

14 A I believe so, yes.

15 Q Okay. And do you know how or when the  
16 interpretation was given to the press?

17 A I believe it was released on May 4th, that  
18 morning.

19 Q Do you know whether -- do you know whether it was  
20 given to the Port or to Foss?

21 A My understanding was that it was also sent to the  
22 Port and Foss earlier that morning.

23 Q Do you know whether it was sent to the Port or  
24 Foss before it was given to the press or announced by the  
25 mayor at the breakfast?

1           A     I wasn't the one who released it.

2                     It was my understanding that it was to be released  
3 to the Port and Foss as a courtesy before it was made  
4 public.

5           Q     Do you know whether that happened?

6           A     I don't.

7           Q     Now, do you remember that you sent me a copy of  
8 it?

9           A     I sent a copy that day, yes.

10          Q     Okay. Do you remember, was there any delay from  
11 when I requested the copy to when you sent it?

12          A     I don't recall.

13          Q     Okay. So this idea of the -- I think you used a  
14 couple of phrases interchangeably: Primary purpose, main  
15 thrust of the use of the vessel. Where does that concept  
16 come from?

17          A     Well, as we're categorizing uses, we do look at  
18 the principal activity associated with something. And in  
19 this particular case, the question was for differentiating  
20 the -- what constitutes a cargo terminal, what activities or  
21 uses are appropriate at a cargo terminal, as opposed to  
22 other categories in the code.

23                     So it seems like you might have, as we came up in  
24 discussing definitions, you know, something like a warehouse  
25 that might fall under multiple categories, or whether