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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File No. S-15-001  
) (DPD Project No. 3020324)  
FOSS MARITIME COMPANY )  
)  
from an Interpretation by the Director, Department )  
of Planning and Development. )

\_\_\_\_\_ )  
) Hearing Examiner File No. S-15-002  
) (DPD Project No. 3020324)  
In the Matter of the Appeal of the: )  
)  
PORT OF SEATTLE, )  
) ENVIRONMENTAL INTERVENORS’  
from Interpretation No. 15-001 of the Director of ) PRE-HEARING BRIEF  
the Department of Planning and Development. )  
\_\_\_\_\_ )

INTRODUCTION

This appeal concerns whether the use of Terminal 5 under the Port of Seattle’s lease with Foss Maritime Company (“Foss”) conforms to the “cargo terminal” use designated in Terminal 5’s 1995 Substantial Shoreline Development Permit (“shoreline permit”) issued by the City of Seattle. On June 5, 2015, the Hearing Examiner granted intervention to Puget Soundkeeper Alliance, Seattle Audubon Society, Washington Environmental Council, and Sierra Club

1 (collectively “Soundkeeper” or the “Environmental Intervenors”) in support of the City.<sup>1</sup>

2 Soundkeeper submits this pre-hearing brief to: (1) provide the context surrounding the  
3 1995 shoreline permit and designation of Terminal 5 as a cargo terminal; (2) describe the  
4 evolution of the Port’s characterization of the new use of Terminal 5 from a “vessel supply base”  
5 or “homeport” to a “cargo terminal;” and (3) show how the Department of Planning and  
6 Development (“DPD”) Interpretation conforms to the Shoreline Master Program and why  
7 appropriately characterizing the new use matters.

8 I. THE CITY’S SHORELINE PERMIT DESIGNATED TERMINAL 5 AS A  
9 CARGO TERMINAL AGAINST THE BACKDROP OF THE PORT’S PLANS  
10 FOR TERMINAL 5 TO BE A STATE-OF-THE-ART MARINE CONTAINER  
11 TERMINAL.

12 Terminal 5, located on the West Waterway at the entrance to the Duwamish River, has  
13 been a container terminal for decades. This is the product of Terminal 5’s ideal location and the  
14 Port’s long-range public planning. The Port adopted a Harbor Development Strategy in 1985  
15 and a Container Terminal Development Plan in 1991, and both of these plans designated  
16 Terminal 5 for continued and expanded container terminal operations. *See, e.g.*, PSA Exh. 23 &  
17 26.<sup>2</sup>

18 The Port acted on this designation when it embarked on a major redevelopment and  
19 expansion of Terminal 5 to be a state-of-the-art container terminal in the 1990s as part of the

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19 <sup>1</sup> On March 2, 2015, Soundkeeper filed a separate lawsuit in King County Superior Court, which  
20 challenged the Port’s failure to conduct an environmental review of the lease under the State  
21 Environmental Policy Act (“SEPA”) and also originally raised a claim that the use of Terminal 5 under  
22 the lease would not be as a “cargo terminal” and required a new shoreline permit. *Puget Soundkeeper  
Alliance v. Port of Seattle*, King Cnty. Superior Court No. 15-2-05143-1 SEA, Compl. ¶¶ 66-75 (Mar. 2,  
2015). While the shoreline claim did not proceed in that litigation, Soundkeeper’s complaint documented  
the alleged violation that the City ultimately investigated. On July 31, 2015, the Superior Court granted  
summary judgment to the Port and Foss.

23 <sup>2</sup> The Port is also subject to constraints imposed in its 30-year agreement with the Washington  
24 Department of Natural Resources (“DNR”) for management of state-owned aquatic lands, which indicates  
Terminal 5 is the site of an existing marine container terminal and identifies multiple uses of other  
terminals like Terminal 91. PSA Exh. 2.

1 Southwest Harbor Cleanup and Redevelopment Project. In addition to cleaning up contaminated  
2 sites, the project increased the capacity and efficiency of container terminal operations, including  
3 by significantly enlarging Terminal 5, extending rail lines and road access, and lengthening the  
4 pier to add new berthing capacity. The Port, Washington Department of Ecology, and U.S.  
5 Army Corps of Engineers prepared a joint environmental impact statement (“EIS”) with dozens  
6 of public meetings, hearings, site tours, and community presentations. Notice of Availability of  
7 Final EIS for Southwest Harbor Cleanup & Redevelopment Project (Nov. 1994) (PSA Exh. 24);  
8 Summary of Final EIS (Nov. 1994) (PSA Exh. 25); Draft EIS (Jan. 1994) (DPD Exh. 3).

9 The final EIS described the extensive planning and environmental reviews that led to the  
10 decision to upgrade and expand Terminal 5 to be a state-of-the-art container terminal shipping  
11 facility:

12 To make certain that necessary marine shipping infrastructure is in place when  
13 needed and to provide predictability for property owners and private industry on  
14 the City’s shorelines, the Port began a long-range planning process in 1985  
15 known as the Harbor Development Strategy for Marine Cargo (“HDS”). The  
16 HDS was a comprehensive study conducted with the participation and aid of  
17 citizens, citizen groups, government representatives, and industry groups. The  
18 HDS identifies existing and potential port sites throughout the harbor and  
19 Duwamish Waterway and matches potential marine commerce uses and activities  
20 with each site. The HDS evaluated a full range of port needs and screened each  
21 site for appropriate uses. For example, sites in the Duwamish Waterway were  
22 designated for breakbulk, barge cargo, and fishing industry uses, while sites in the  
23 bordering East and West Waterways were identified for increased container cargo  
24 handling capacity. The HDS screened and identified existing port sites in the  
25 harbor that should be reserved for upgrading container cargo facilities and  
26 identified existing or former shoreline industrial sites, including the Southwest  
Harbor Project site, with the potential for redevelopment and cleanup as container  
facilities. The Southwest Harbor Project site was specifically identified as a site  
suitable for a container shipping terminal.

The Port completed its most recent update of the HDS in 1991, based on the  
Container Terminal Development Plan (“Container Plan”), which focused  
specifically on container cargo. The Container Plan, and an accompanying plan-  
level EIS, affirmed the designation and screening of harbor area development  
sites in the HDS. The Container Plan determined that the Port should increase the

1 efficiency of its container terminals, in conjunction with providing over 600 acres  
2 of additional container cargo facilities over the next 20 years, 240 acres of which  
would be needed by the year 2000.

3 The HDS and the 1991 Container Plan identified areas in the southwest portion of  
4 Elliott Bay, including the area proposed for the Southwest Harbor Project, as  
needed to meet existing and projected container cargo service demands.

5 Technical Appendix F-2: Shoreline and Land Use Analysis at 18 (PSA Exh. 26).<sup>3</sup>

6 Not only did the 1994 EIS for the Southwest Harbor Project analyze the cleanup of toxic  
7 contamination as part of the redevelopment, but it also assessed the impacts of the container  
8 terminal operations and the loss of public access to shorelines from the expanded rail lines and  
9 container terminals. PSA Exh. 25 at S-23, S-32 to S-37. The EIS did not analyze the  
10 environmental impacts of mooring drill rigs in the off-season or of the types of repairs and  
11 maintenance that would take place if such moorage occurred.

12 Among the permits for the Southwest Harbor Project, the City of Seattle issued a  
13 Shoreline Substantial Development Permit, which “establishes Terminal 5 as a ‘cargo terminal.’”  
14 Foss Exh. 33 at 4. The permit included conditions to mitigate impacts from container terminal  
15 operations, such as noise, lighting, and increased truck and rail traffic. *Id.* at 2. While the permit  
16 considers spills from upland painting and repairs, *id.* at 60, it imposed no conditions to address  
17 water pollution or oil spills from maintenance and repairs of moored vessels. Likewise, the  
18 permit did not anticipate navigation impacts, finding that “[n]o part of the proposal, once  
19 completed, would present hazards or obstructions to navigational channels.” *Id.* at 65.

20 The Port is now embarking on a project to modernize Terminal 5 to enable it to handle  
21 the larger, post-Panamax container vessels coming to dominate international shipping. Minutes  
22 of Port Commission May 13, 2014 Meeting (PSA Exh. 5); Staff Briefing Memo for June 3, 2014

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23 <sup>3</sup> This appendix assessed the consistency of the development and use designation with the Shoreline  
24 Management Act, Seattle’s Shoreline Master Program, and its land use regulations and policies. *Id.* at 1.

1 Commission Meeting at 1 (DPD Exh. 22).<sup>4</sup> This upgrade is part of the Port’s plan to grow  
2 container annual volume to 35 million containers over the next 25 years. Transcript of Public  
3 Port Commission Meeting, at 53 (Jan. 13, 2015) (DPD Exh. 23).<sup>5</sup>

4 II. THE EVOLUTION OF THE PORT’S CHARACTERIZATION OF THE NEW  
5 USE OF TERMINAL 5 AS A CARGO TERMINAL.

6 In June 2014, after the Port began looking for an interim tenant for Terminal 5 during the  
7 modernization, Foss expressed interest in leasing 50 acres of berth and yard area to serve as a  
8 homeport for Shell’s Arctic drilling fleet. Staff Briefing Memo for Jan. 7, 2015 Commission  
9 Meeting at 5 (DPD Exh. 24). In 2014, Shell gave a presentation to the Port laying out its  
10 overwintering plans, planned maintenance activities such as vessel sand-blasting, painting, tank  
11 cleaning, retrofitting, and welding. Email from Michael McLaughlin to Linda Styrk, attaching  
12 Shell PowerPoint at CW-223, -225, -228 (PSA Exh. 22). Shell commissioned various  
13 environmental and structural surveys to assess the suitability of Terminal 5 to moor large drill  
14 rigs. *Id.* at CW-228. Foss has described maintenance and repair activities that would take place  
15 under the lease as including welding, painting, electrical and piping repairs, and replacing or  
16 repairing navigational and mechanical systems and other equipment both on deck and elsewhere  
17 on the vessels. Foss Exh. 21 at RFP 4000976. Neither Shell nor Foss described the proposed  
18 use as transshipping large volumes of container or other cargo to other locations and carriers, as  
19 Terminal 5 had been done for decades. By December 2014, the Port and Foss had gone far down

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21 <sup>4</sup> The staff briefing materials are available on the Port’s website as part of its public meeting records,  
22 along with audio and video recordings of the meeting.

23 <sup>5</sup> In 1985, the Port entered into a 30-year lease for the operation of Terminal 5 as a container  
24 terminal, and Eagle Marine Services took over that lease after the redevelopment. In July 2014,  
25 the Port terminated that lease and transitioned Eagle Marine’s operations to another terminal  
26 because container terminal operations would interfere with the modernization project. Foss Exh.  
36 at 1.

1 the path of reaching an agreement for a vessel supply base for Shell and had entered a Letter of  
2 Understanding for that purpose. *See* Foss Exh. 39.

3 The Commission’s January 13, 2015, meeting marked the first disclosures to the public  
4 about the homeport use of Terminal 5. The Port released a staff briefing memorandum and gave  
5 a PowerPoint presentation at the meeting in which staff called the use a “homeport,” “[o]ver-  
6 wintering moorage,” “commercial moorage,” “vessel berth moorage and provisioning,” and “a  
7 home porting opportunity that links moorage and provisioning of commercial vessels that are  
8 involved in the off-shore activity up in Alaska.” Staff Briefing Memo for Jan. 7, 2015  
9 Commission Meeting at 6 (DPD Exh. 24); Transcript of Jan. 13, 2015 Port Commission Meeting  
10 at 5-9, 14 (DPD Exh. 23). The briefing memo explained that: “T-5 would receive, inventory,  
11 and stage equipment and supplies that would be loaded to a fleet of vessels, including  
12 exploration drill rigs, ice-breakers, provisioning vessels, environmental response vessels, tugs  
13 and barges for seasonal operations in Alaska.” Staff Briefing Memo for Jan. 7, 2015  
14 Commission Meeting at 6 (DPD Exh. 24). The vessels would over-winter at Terminal 5 from  
15 October through May, and equipment and supplies would be loaded onto the fleet. *Id.*

16 The President and CEO of Foss, Paul Stevens, told the Commissioners that Foss  
17 proposed “to use a portion of T-5 to accomplish the staging, loading, outfitting of marine assets  
18 planned for Shell’s Arctic exploration endeavor.” Transcript of Jan. 13, 2015 Port Commission  
19 Meeting at 21 (City Exh. 23). He further explained that the winterization plan would include  
20 outfitting the vessels “with pipe and food and liquids.” *Id.* at 24. He did not describe loading  
21 cargo onto common carriers to be transshipped to other locations. At the meeting, one  
22 Commissioner pointed to the millions of public dollars invested in making Terminal 5 a premier  
23 container terminal and observed that the homeport “is a change of use.” *Id.* at 55.

1 Throughout the negotiations and the public meeting, neither the Port nor Foss described  
2 the new use as a cargo terminal. In fact, a colloquy between the Port and Foss over how to  
3 describe the use of the property in the letter of understanding contrasts the new and old uses. A  
4 Port staff person initiated the dialogue as follows:

5 Ideally broadly worded to afford you flexibility over time. Examples for  
6 container terminals and cruise terminals, respectively, are along the lines of:

7 The Lessee shall use the entire Premises in a first-class manner for  
operation of a container terminal and marine cargo handling facility . . .

8 Lessee shall use the Premises in a first-class manner for operation of a  
9 passenger cruise terminal . . .

10 Accordingly, for Foss perhaps something along the lines of:

11 Lessee shall use the entire Premises in a first-class manner as a vessel  
fleeting base . . .

12 The Foss CEO responded: “Vessel supply base and storage depot,” as a characterization of the  
13 use. PSA Exh. 29. The letter of understanding between the Port and Foss adhered to this request  
14 and identified the use as a “Vessel Supply Base and Storage Depot.” Foss Exh. 39 at 2.

15 In January 2015, the Port’s Director of Seaport Environment and Planning provided the  
16 following response to a question from Port staff and counsel as to whether there will be vessel  
17 maintenance and repairs under the lease:

18 The primary use is moorage of vessels, any repair or maintenance that occurred  
19 would be incidental and minor and in compliance with applicable regulations.  
This is a normal and customary part of vessel moorage.

20 PSA Exh. 28.

21 It was not until February 2015 when the Port sought to justify invoking exemptions from  
22 SEPA and shoreline permitting that its characterization of the use as berthing, mooring, and  
23 provisioning gave way to its characterization of the use as a cargo terminal. Foss planned to  
24

1 replace the bollards at Terminal 5 with heavy duty ones that could moor an enormous drill rig.  
2 The Port sought an exemption from shoreline permitting requirements from the City and invoked  
3 a categorical exemption from the State Environmental Policy Act (“SEPA”) that applies to  
4 repairs of existing structures.<sup>6</sup> In the course of reviewing the request for a shoreline exemption,  
5 the City asked for a description of the new activities. In response, the Port explained that vessels  
6 of various lengths would use Terminal 5 and “require a variety of mooring options to secure the  
7 vessels in the safest manner.” Mem. to Benjamin Perkowski, DPD, from George Blomberg,  
8 Port, Re: Correction Notice Number One, SSDP Exemption (Feb. 5, 2015) (attached to Foss  
9 Exh. 55 at RFP 4000335). The Port then stated that:

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

20 *Id.* at RFP 4000336. This same description of the activities appeared in the Port’s SEPA memo  
21 justifying invocation of the categorical exemption that applies to leases of real property when the  
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23 <sup>6</sup> In early January, Foss entered into a short-term license to access Terminal 5 “for installation of mooring  
24 bollards” and other repairs. Foss Exh. 40. The bollards needed to be replaced with heavy-capacity  
25 bollards that could tie up the specific types of vessels that would be moored at Terminal 5. Foss Exh. 47;  
26 PSA Exh. 21 (Port described the repairs as replacing the bollards with heavy-duty ones “required for  
moorage of a particular class of vessel.”). While the Port originally referred to the “installation” or  
“replacement” of the bollards, it shifted as it sought to justify exemptions from SEPA and shoreline  
permitting and began to describe the repairs as “re-installing” or “restoring” the bollards to the original  
heavy-capacity bollards at Terminal 5 at some time in the past. Foss Exh. 47 at 1/RFP 4000860 (Port’s  
request for shoreline exemption); Foss 47 at RFP 4000863 (Port’s original SEPA exemption justification  
for repair); Foss 47 at RFP 4000335 (Port’s response to Correction Notice related to request for shoreline  
permit exemption); Foss 52 at 1/W-322 (Port’s revised SEPA exemption justification for repair). It turns  
out the original bollards were removed in 1985 before the Port entered into a 30-year lease for Terminal 5  
to be a container terminal. DPD Exh. 26 at CW-146 to -148.



1 use will remain essentially the same as the prior use. PSA Exh. 19.<sup>7</sup> The City issued the  
2 requested shoreline exemption, but subject to conditions, including that “[n]o change in use at  
3 Terminal 5 is approved as part of this exemption,” and that the “Project is subject to zoning  
4 review and approval for consistency with applicable development standards.” Foss Exhs. 54 &  
5 55.

6 In drafts of the lease, the Port first described the use of Terminal 5 as “a water-dependent  
7 Vessel Supply Base and Storage Depot,” PSA Exh. 13, and “a vessel supply base and storage  
8 depot related to vessel supply activities,” PSA Exhs. 14, 15, both of which draw from the  
9 description offered by Foss for and included in the January letter of understanding. Foss  
10 continued to suggest language that described the use as a “vessel outfitting and supply base,”  
11 PSA Exh. 16, but the Port rejected that language and instead inserted a paraphrase of the SMP’s  
12 “cargo terminal” definition. *See* PSA Exh. 15, 17-18.

13 On February 9, 2015, the Port signed the lease with Foss. Foss Exh. 36. The lease  
14 identifies the use of Terminal 5 as a “cargo terminal” and parrots the definition of “cargo  
15 terminal” in the City’s Shoreline Master Program. Lease § 5.1 at 5.<sup>8</sup> The term is for two years  
16 with the possibility of two one-year extensions. *Id.* §§ 2.1 & 2.4 at 3.

### 17 III. THE DPD INTERPRETATION CONFORMS TO THE SHORELINE MASTER 18 PROGRAM.

19 The City’s Shoreline Master Program defines “cargo terminal” at SMC 23.60.906 as:

20 a transportation facility in which quantities of goods or container cargo are stored  
21 without undergoing any manufacturing process, transferred to other carriers or

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22 <sup>7</sup> That exemption is the subject of *Puget Soundkeeper Alliance v. Port of Seattle*.

23 <sup>8</sup> Neither the Superior Court Judge who issued a constitutional writ for the SEPA litigation nor the Judge  
24 who ruled on summary judgment motions accepted the argument that the lease term controls if the actual  
25 use does not conform to the City’s definition of “cargo terminal.” Order Granting the Writ at 4, King  
26 Cnty. Superior Court No. 15-2-05143-1 SEA Dkt. No. 27; Transcript of July 31, 2015 Summary  
Judgment Hearing (to be filed by DPD).

1 stored outdoors in order to transfer them to other locations. Cargo terminals may  
2 include accessory warehouses, railroad yards, storage yards, and offices.<sup>9</sup>

3 The DPD Interpretation at issue in this appeal determined that: “The unifying theme is  
4 that the goods are at the cargo terminal **in order to be transferred to other locations.**” DPD  
5 Interpretation No. 15-001, at 4, ¶ 6 (Foss Exh. 1) (emphasis added). As applied to the new use,  
6 the Interpretation concluded that: “The drilling rig would be at Terminal 5 only for the purpose  
7 of seasonal storage. Terminal 5 would not serve as a stop where the rig or the equipment on it  
8 would be stored or transferred in the course of transit from a starting location to an ultimate  
9 destination.” *Id.*

10 Interestingly, while the Port has appealed the DPD Interpretation, its documentation of a  
11 SEPA exemption for the Foss lease acknowledged that Terminal 5 was constructed and used as a  
12 container terminal for decades and that “[m]aintaining marine industrial cargo transshipment  
13 uses and activities at Terminal 5 is consistent with the port’s long-term objective” and the City’s  
14 land use, shoreline, and aquatic area use policies and plans. PSA Exh. 19. As support, the Port  
15 referred to the 1995 shoreline permit for Terminal 5 and the City’s Shoreline Master Program.  
16 In other words, at that time, the Port recognized that transshipment of cargo is the defining  
17 feature of a cargo terminal.

18 At the upcoming hearing, the parties will parse the definition of “cargo terminal” and the  
19 DPD Interpretation. The Interpretation speaks for itself and offers the only reading of the term  
20 “cargo terminal” that avoids rendering other terms in the definition surplusage and swallowing  
21 up other use designations in the City’s Shoreline Master Program.

22 The definition identifies accessory facilities at cargo terminals to include warehouses and  
23 storage yards. If the phrase “**in order to be transferred to other locations**” did not modify the

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24 <sup>9</sup> The new Shoreline Master Program adds a comma after “carrier.” SMC 23.60A.906.

1 word “stored,” a cargo terminal could be a facility where cargo and goods would be stored, *e.g.*,  
2 in warehouses or in storage yards. The warehouse facilities and storage yards identified as  
3 accessory to the cargo terminal use would then be deemed the primary use of the facility.<sup>10</sup>

4 In several places, the DPD Interpretation uses the term “moorage” in describing the new  
5 use of Terminal 5. The Port likewise used the term “moorage” in describing the new use, *see*,  
6 *e.g.*, DPD Exh. 24 at 6, and Foss called it a “[v]essel supply base and storage depot,” PSA Exh.  
7 29. The City’s Shoreline Master Program has other use categories that encompass this type of  
8 activity, called “commercial moorage” in the prior Shoreline Master Program and “commercial  
9 marina” in the revised Program. The old definition of “commercial moorage” described “a  
10 parking and moorage use in which a system of piers, buoys, or floats is used to provide moorage,  
11 primarily for commercial vessels . . . .” SMC 23.60.906. “Commercial marina” is now defined  
12 as “a use in which a system of piers, buoys, or floats is used to provide moorage for . . . (2)  
13 commercial vessels moored for the operation of commercial businesses.” SMC 23.60A.926.  
14 Both definitions identify minor vessel repair as an accessory use. Construing the definition of  
15 “cargo terminal” to encompass moorage as a primary use devoid of common carriers engaged in  
16 the business of transporting cargo and goods to other places or entities would allow “cargo  
17 terminal” to swallow up other shoreline uses, including commercial moorage and commercial  
18 marina. Under the Port’s reading, a cargo terminal could be the location of moorage and  
19 outfitting of any vessel, apparently for any length of time.

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21 \_\_\_\_\_  
22 <sup>10</sup> The “cargo terminal” definition uses the word “carriers,” which indicates that it refers to the business of  
23 transporting and transferring large quantities of goods or cargo to other locations or businesses. The word  
24 “carriers” is defined as “[a]n individual, partnership, or corporation engaged in the business of  
transporting goods or passengers by rail, road, sea, air, inland waterway, or by combination of such  
modes.” J. Monroe & R. Stewart, Dictionary of Maritime and Transportation Terms at 75 (2005). The  
use of the word “carrier” provides further evidence that transshipping goods and cargo is the primary use.

1 Similarly, the DPD Interpretation appropriately rejects the notion that provisioning the  
2 drilling fleet should be deemed to be a cargo terminal use. As part of the winterization plan, the  
3 drill rig and other vessels would be outfitted or provisioned. DPD Exh. 24 at 6. Loading  
4 supplies onto the vessels before they ship out to the Arctic does not mean Foss or Shell is  
5 transshipping large volumes of goods or container cargo from one location to another as a  
6 carrier. Instead, it describes the type of incidental provisioning and outfitting activities that takes  
7 place at a wide array of marine facilities like cruise ship terminals, Fisherman’s Terminal, and  
8 marinas. Ships that moor at commercial moorage facilities will be outfitted as they prepare to  
9 move on, cruise ships will receive provisions for their next journey, and overhauled ships will be  
10 outfitted when they are seaworthy. In none of these situations is the provisioning activity the  
11 primary use, nor does it convert each of these other facilities into cargo terminals.

12 In its response to DPD’s interrogatories, the Port suggests another unworkable path,  
13 which would allow long-term moorage and outfitting of drill rigs at any terminal. In that  
14 response, the Port’s attorneys contend that:

15 moorage is inherent in the use of all marine facilities, including cargo terminals,  
16 because moorage is an inherent aspect of navigation. A ship must moor in order  
17 to use a marine facility of any description. To treat such moorage as a separate  
18 use rather than an inherent use of a marine facility is nonsensical as well as  
19 inconsistent with the Shoreline Management Act and the City’s SMP.

18 Port of Seattle’s Attorney Responses to DPD’s First Set of Interrogatories at 5 (Aug. 10, 2015).<sup>11</sup>  
19 The Port’s view that moorage is inherent in all of the SMP use designations and therefore  
20 allowed at all marine facilities would remove any limitation on which types of permits can host  
21 Arctic drill rigs. Under that reading, drill rigs could moor at a passenger or cruise terminal. The  
22 Port’s reading would create an unworkable system and one that would never require shoreline

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23 <sup>11</sup> The Port’s response to the City’s interrogatories is attached. In addition, Puget Soundkeeper will be  
24 submitting the discovery responses, which were received late yesterday, as supplemental exhibits.

1 permitting and environmental and public review of the effects of a new kind of moorage—such  
2 as homeporting Arctic drill rigs—at a marine facility permitted for a different type of use.

3 Properly classifying the use category for Terminal 5 matters because a shoreline permit  
4 must mitigate harm to shorelines, the environment, and public access from the use. The prior  
5 shoreline permit imposed mitigation conditions to lessen community and shoreline impacts from  
6 container terminal operations, focusing for example on lighting, noise, and train and truck traffic.  
7 Foss Exh. 33 at 2. The focus of that permit and its EIS did not include the impacts from  
8 homeporting the drill fleet, which will entail longer-term moorage and more extensive vessel  
9 repairs and maintenance in the off-season than when container ships called at Terminal 5 to load  
10 and unload. The commercial moorage and commercial marina uses identify vessel repair as an  
11 accessory use, and the permit writers presumably impose conditions to reduce environmental  
12 harm from such activities—yet no such consideration or mitigation is found in Terminal 5’s  
13 shoreline permit.

14 Similarly, in writing a new permit to cover the over-wintering moorage of the drill rig  
15 and associated vessels at Terminal 5—as is required by the SMP definitions and the  
16 Interpretation—the City permit writer would determine whether the prior shoreline permit  
17 conditions adequately mitigate water pollution, shoreline access, and navigation and fishing  
18 impacts from the new use or whether new conditions must be added. Of particular note, the  
19 Polar Pioneer drill rig is enormous compared to the container ships that have been calling at  
20 Terminal 5. It juts into the West Waterway and obstructs navigation in a way that container  
21 ships did not and the 1995 shoreline permit never anticipated. Soundkeeper will offer the  
22 testimony of staff that have patrolled the West Waterway along Terminal 5 and have prepared to  
23 navigate around Polar Pioneer with its 100-yard exclusion zone when it was moored at Terminal  
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1 5. See PSA Exh. 1. These and other novel or intensified impacts from homeporting Shell's  
2 Arctic drilling fleet should be considered and mitigated in the shoreline permitting process.

3 CONCLUSION

4 At the hearing, Soundkeeper will join the City in demonstrating that the interpretation is  
5 sound because the Port's and Foss's use of Terminal 5 as a homeport for an Arctic drilling fleet  
6 is not consistent with the 1995 shoreline permit and the SMP's definition of "cargo terminal."

7 Respectfully submitted this 11<sup>th</sup> day of August, 2015.

8  
9 *s/ Patti Goldman*

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**EXHIBIT 39**

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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File:  
) **S-15-001 and S-15-002**  
)  
**FOSS MARITIME COMPANY** ) FOSS MARITIME COMPANY’S  
) OBJECTIONS AND RESPONSES TO  
) DEPARTMENT OF PLANNING AND  
from an interpretation by the Director, ) DEVELOPMENT’S FIRST SET OF  
Department of Planning and Development. ) INTERROGATORIES  
)  
\_\_\_\_\_)

Pursuant to Hearing Examiner Rule of Practice and Procedure (“Rule”) 3.11 and Washington Civil Rule 33, Foss Maritime Company (“Foss”) responds and objects to Department of Planning and Development’s (“DPD”) First Set of Interrogatories (“Interrogatories”) as follows:

**GENERAL OBJECTIONS**

1. Foss objects to the Interrogatories to the extent that they seek information protected by the attorney client privilege.
2. Foss objects to the Interrogatories to the extent that they seek information protected by the work product doctrine, the common interest doctrine, or the joint defense doctrine.
3. Foss objects to the Interrogatories to the extent that they purport to require Foss to



1 interview an unduly burdensome number of its employees to provide a complete answer. Foss  
2 has conducted a reasonable investigation to determine its responses to these interrogatories.

3 4. Foss objects to the Interrogatories to the extent that they seek responses from Foss  
4 beyond the requirements of the Hearing Examiner Rules or Washington Court Rules.

5 5. Foss objects to the Interrogatories to the extent they seek confidential and  
6 proprietary business or financial information. Such information is highly confidential, not  
7 reasonably calculated to lead to the discovery of admissible evidence, is unduly burdensome to  
8 produce, and would cause harm to Foss which is disproportionate to the relevance of such  
9 information, if any.

10 6. Foss objects to the Interrogatories to the extent they are vague, ambiguous or  
11 susceptible to varying interpretations. Foss is responding to the Interrogatories as it interprets  
12 and understands them. If DPD subsequently asserts an interpretation of any Interrogatory that  
13 differs from the understanding of Foss, Foss reserves the right to supplement its objections  
14 and/or responses herein.

15 7. Foss objects to the Interrogatories to the extent they incorporate, reference, or rely  
16 upon factual assumptions, characterizations, or legal conclusions that are incorrect, speculative,  
17 or inappropriate. Any information provided by Foss in response to any of the Interrogatories  
18 shall not be deemed an admission, concession, or acquiescence to the accuracy of any  
19 assumption, characterization, or conclusion incorporated within, or referred to or relied upon in  
20 any Interrogatory.



1 For the purpose of this interrogatory, “intrinsic” has the meaning in Seattle Municipal Code  
2 23.60.940 (“use, accessory”).

3 **ANSWER:** Foss incorporates the General Objections above into this response. Foss  
4 further objects to the Interrogatory as seeking to have Foss put on a dress rehearsal of the hearing in  
5 this matter, which is an improper interrogatory pursuant to *Weber v. Biddle*, 72 Wash.2d 22, 29  
6 (1967) (“the opposing party cannot be required to put on a dress rehearsal of the trial. While it is  
7 proper to elicit information as to evidentiary facts as contrasted with ultimate facts, nevertheless it is  
8 improper to ask a Party to state evidence upon which he intends to rely to prove any fact or facts.”).  
9 Foss further objects to this Interrogatory as overbroad, unduly burdensome and untimely insofar as  
10 it seeks all facts that “relate to, support, or refute” its contention, seeks “all persons” with  
11 knowledge of such facts, and seeks “all documents” that “support, refute, or relate to” the  
12 contention. The hearing in this matter is in three days and the time for disclosing exhibits and  
13 witnesses has passed. Foss further objects to this Interrogatory as vague, ambiguous, and not  
14 reasonably calculated to lead to this discovery of admissible evidence, and as seeking a legal  
15 conclusion about a term that is used in an ordinance. Subject to and without waiving the foregoing  
16 objections, and based on the assumption that the reference to “Polar Explorer” means “Polar  
17 Pioneer,” Foss responds as follows:

18 Moorage is intrinsic to the operations of any cargo terminal. Vessels cannot load or unload  
19 without mooring; cargo terminals cannot operate without facilities to moor vessels as they load and  
20 unload; a core function of cargo terminals is servicing commercial vessels of all types, not just those  
21 that carry cargo as their primary function; commercial vessels need moorage locations appropriate  
22 to the type of vessel for periods in which they are not actively sailing. There is no basis for  
23 differentiating between various vessels or types of vessels in this regard. Facts supporting these

1 contentions include but are not limited to facts regarding the historical uses of cargo terminals in the  
2 Puget Sound area; the nature of maritime commerce, and the operations of ports, vessels, and  
3 terminals. Foss further notes that, by its nature, the loading and unloading of vessels takes may take  
4 a significant amount of time, during which a vessel must remain moored.

5 The Polar Pioneer is no different than any other vessel that has moored at City cargo  
6 terminals for decades. Terminal 91, a cargo terminal, routinely hosts all types of vessels for short  
7 and long term moorage, including icebreakers, research vessels, oil spill response vessels, naval  
8 vessels (U.S. and foreign), fishing vessels, fire boats, police boats, tugs, barges, and cargo vessels.  
9 The City has known of Terminal 91's use as a "homeport" for such vessels and has cited that use in  
10 documents it authored, documents which considered whether additional uses should be permitted.  
11 The City's purported distinctions between Terminal 5 and other cargo terminals in the City, as well  
12 as distinctions between vessels based on their "function," are selective and discriminatory and are  
13 not based on any criteria in the code.

14 Foss has identified persons with knowledge of these facts, and has identified and produced  
15 documents relating to these facts, in its Witness and Exhibit list. Virtually every person involved in  
16 the maritime industry would have knowledge of facts relevant to this matter. Documents relevant to  
17 this issue would also include thousands if not millions of documents pertaining to marine  
18 operations.

19 Foss further incorporates by reference the materials submitted by Foss and the Port to the  
20 City in connection with the City's Interpretation at issue in this appeal; the pre-hearing briefs to be  
21 filed by the parties; and the other pleadings submitted in this matter.

1           **INTERROGATORY NO. 3:** If you contend that the activity of mooring and  
2 provisioning an oil rig, such as the Polar Explorer, and its assisting vessels at Terminal 5 is “no  
3 different than other activities that have been treated by the City as a cargo terminal use” (Hearing  
4 Examiner Order on Motion to Dismiss, paragraph 8), please:

5           a. State all facts that relate to, support, or refute your contention, including but not  
6 limited to:

- 7                   i. what activity occurred,  
8                   ii. when it occurred,  
9                   iii. where it occurred,  
10                  iv. the nature of the City’s action showing it treated the activity as a cargo  
11 terminal use;

12           b. Identify all persons with knowledge of facts that relate to, support, or refute your  
13 contention; and

14           c. Identify all documents that support, refute, or relate to your contention.

15           **ANSWER:** Foss incorporates by reference its objections to Interrogatory No. 1. Subject  
16 to and without waiving the foregoing objections, Foss responds as follows:

17           Foss contends that its activities at Terminal 5 are no different than other activities that have  
18 been treated by the City as cargo terminal uses. Foss incorporates by reference its response to  
19 Interrogatory No. 1. Foss further states that vessels of all types regularly moor and provision at  
20 Terminal 91 without any associated loading or unloading of cargo, and have done so for decades.

21           Foss has identified persons with knowledge of these facts, and has identified and produced  
22 documents relating to these facts, in connection with its Witness and Exhibit list.  
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2                   **INTERROGATORY NO. 4:** Please identify all Shell vessels and floating structures and  
3 Shell contractor vessels and floating structures that have moored or docked at Terminal 5 in  
4 2015.

5                   **ANSWER:** Foss objects to the term “Shell contractor vessels and floating structures” as  
6 vague. As Foss best understands those terms, Foss responds that the following vessels have moored  
7 or docked at Terminal 5 since Foss signed the lease for Terminal 5:

- 8                   a. Polar Pioneer
- 9                   b. Harvey Champion
- 10                  c. Harvey Supporter
- 11                  d. Harvey Explorer
- 12                  e. Tuuq
- 13                  f. Harvey Spirit
- 14                  g. KRS 286-6
- 15                  h. Tor Viking II
- 16                  i. Aiviq
- 17                  j. American Trader

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20                   **INTERROGATORY NO. 5:** Please describe all activities Shell and Shell contractors  
21 have conducted at Terminal 5 in 2015.

22                   **ANSWER:** Foss incorporates the General Objections above into this response. Foss

1 further objects to this Interrogatory as overbroad and unduly burdensome insofar as it seeks a  
2 description of “all” activities Shell and Shell contractors have conducted, and to the extent it seeks  
3 discovery of information outside of Foss’s possession, custody, or control. Subject to and without  
4 waiving these objections, Foss responds as follows:

5         Since Foss leased Terminal 5, Foss has used Terminal 5 as a cargo terminal, in accordance  
6 with the requirements of its lease with the Port of Seattle. Foss received goods, cargo, equipment,  
7 supplies, stores, provisions and other materials from third parties who delivered those items to  
8 Terminal 5 by rail or truck. Such materials was staged, arranged and stored on the terminal to  
9 facilitate loading the goods onto vessels. Many of the materials were packed into containers.  
10 Using contracted longshore labor, Foss loaded such items onto various vessels that are owned by  
11 Foss, chartered by Foss, or owned or chartered by Shell contractors, for transfer and transportation  
12 of those items to other locations. Vessel personnel and longshore labor then secured those materials  
13 aboard the vessels for transfer to other locations. Foss also unloaded goods from vessels, including  
14 vessels owned or chartered by third party customers as well as vessels owned by or chartered by  
15 Foss. Foss provided interim storage and disposal of unloaded items at Terminal 5 for itself and its  
16 customers. Foss transferred items to third parties who will transport them from Terminal 5 by truck  
17 or rail. Standard, routine run and maintain activities were conducted.

18         Foss and Shell personnel performed numerous tasks at Terminal 5 in support of these  
19 loading and unloading activities. Foss had personnel who oversaw and maintained security for the  
20 terminals; ensured that safety and operations procedures were followed; documented and directed  
21 the loading and unloading operations as well as the docking and mooring of the vessels; performed  
22 routine run and maintain activities as appropriate; and numerous other support operations. Shell had  
23 personnel employed at Terminal 5 who performed similar functions, as did Shell contractors.

1 In addition, routine maintenance and minor repair work was performed at Terminal 5. The  
2 crews of the vessels used, monitored and tested their systems to be sure that they were fully  
3 operational. This included ongoing testing of navigational and mechanical systems. The vessels  
4 hired consultants, contractors to help with testing and, as needed, servicing, replacement and/or  
5 repair of ship's equipment on and within the vessel.

6 Prior to taking possession of Terminal 5, Foss replaced bollards on the pier apron. Foss also  
7 repaired shore-side facilities and readied those facilities for Foss's operation of the cargo terminal.

8 Foss has escorted numerous governmental officials who have asked to inspect or tour  
9 Terminal 5.

10 Foss further incorporates by reference its response to Interrogatory No. 1, and the materials  
11 referenced therein.

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15 **INTERROGATORY NO. 6:** If you contend that during 2105 the Polar Explorer or  
16 attending vessels moored at Terminal 5 loaded and unloaded items that are within the definition  
17 goods or container cargo in SMC 23.60.940/23.60A.940, please

- 18 a. state all facts that relate to your contention, including type, quantity (or tonnage)  
19 and purpose for the items loaded,  
20 b. Identify all persons with knowledge of those facts, and  
21 c. Identify all documents that relate to, support, or refute your contention.

22 **ANSWER:** Foss incorporates its objections and response to Interrogatory No. 1. Subject  
23 to and without waiving the foregoing objections, Foss responds as follows:



1 Foss loaded substantial quantities and numerous type of materials onto several vessels since  
2 Foss took possession of Terminal 5 in February 2015. Foss believes and contends that all of this  
3 material constitutes “goods or containerized cargo” as that term is used in both SMC 23.60.940 and  
4 SMC 23.60A.940. The types of materials (much of them loaded into containers) that were loaded  
5 onto the Polar Pioneer and onto seven other vessels associated with Shell’s Arctic exploration  
6 project are identified in Foss’s hearing exhibits, which contain photographs of the materials on the  
7 dock as well as loaded on the vessels; cargo manifests; load or stow plans; and other documents  
8 indicating the materials which were received at Terminal 5, stored on the terminal, and then loaded  
9 on the vessels.

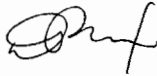
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14 **INTERROGATORY NO. 7:** Please identify all persons who negotiated the agreements  
15 between you and Shell for using Terminal 5.

16 **ANSWER:** Foss incorporates the General Objections above into the response to this  
17 Interrogatory. In addition, Foss objects to this Interrogatory as overbroad, as requesting information  
18 not reasonably calculated to lead to the discovery of admissible evidence, and as requesting  
19 information that is proprietary and confidential. The identity of such persons is not reasonably  
20 calculated to lead to the discovery of admissible evidence.

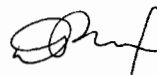
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23 DATED this 10<sup>th</sup> day of August, 2015.

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GARVEY SCHUBERT BARER

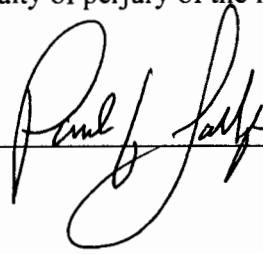
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MCCULLOUGH HILL LEARY, P.S.

By   
\_\_\_\_\_  
John C. McCullough, WSBA #12740  
Attorneys for Foss Maritime Company

VERIFICATION

Paul Gallagher, being first duly sworn, upon oath deposes and says: I am a Vice President of Foss Maritime Company, and am qualified to verify Foss Maritime Company's interrogatories responses. I have read the above and foregoing DEPARTMENT OF PLANNING AND DEVELOPMENT'S FIRST SET OF INTERROGATORIES TO FOSS MARITIME COMPANY, and the answers and responses thereto, know the contents thereof, and believe the same to be true and correct, under penalty of perjury of the laws of the state of Washington.

  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that on August 10, 2015, I caused to be served the foregoing document, FOSS MARITIME COMPANY'S OBJECTIONS AND RESPONSES TO DEPARTMENT OF PLANNING AND DEVELOPMENT'S FIRST SET OF INTERROGATORIES, on the person(s) identified below in the manner shown:

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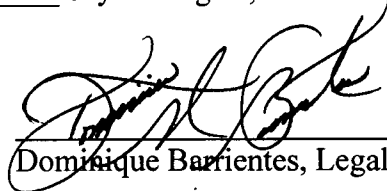
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Dated at Seattle, Washington, this 10<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
Dominique Barrientes, Legal Assistant

**EXHIBIT 40**

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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>	)	FOSS MARITIME COMPANY'S
	)	OBJECTIONS AND RESPONSES TO
	)	DEPARTMENT OF PLANNING AND
from an interpretation by the Director,	)	DEVELOPMENT'S FIRST SET OF
Department of Planning and Development.	)	REQUESTS FOR PRODUCTION OF
	)	DOCUMENTS

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Pursuant to Hearing Examiner Rule of Practice and Procedure ("Rule") 3.11 and Washington Civil Rule 34, Foss Maritime Company ("Foss") responds and objects to Department of Planning and Development's ("DPD") First Set of Requests for Production ("Requests") as follows:

**GENERAL OBJECTIONS**

1. Foss objects to the Requests to the extent that they seek production of documents that are protected from disclosure by attorney-client privilege, as attorney work product, as material prepared in anticipation of litigation, hearing or trial, or as containing mental impressions, conclusions, opinions, or legal theories of one or more of Foss's attorneys.

2. Foss objects to the Requests to the extent that they seek or may be deemed to seek documents possessed by third-parties not under Foss's control.

1 3. Foss objects to the Requests to the extent that they seek responses from Foss  
2 beyond the requirements of the Hearing Examiner Rules or Washington Civil Rules.

3 4. Foss objects to the Requests to the extent they seek the production of documents  
4 containing confidential and proprietary business or financial information. Such information is  
5 highly confidential, not reasonably calculated to lead to the discovery of admissible evidence,  
6 and unduly burdensome to produce.

7 5. Foss objects to the Requests to the extent they are vague, ambiguous or  
8 susceptible to varying interpretations. Foss is responding to the Requests as it interprets and  
9 understands those requests. If DPD subsequently asserts an interpretation of any Request that  
10 differs from the understanding of Foss, Foss reserves the right to supplement its objections  
and/or responses herein.

11 6. Foss objects to the Requests to the extent they incorporate, reference, or rely upon  
12 factual assumptions, characterizations, or legal conclusions that are incorrect, speculative, or  
13 inappropriate. Any information provided or production of or reference to documents by Foss in  
14 response to any of the Requests shall not be deemed an admission, concession, or acquiescence  
15 to the accuracy of any assumption, characterization, or conclusion incorporated within, or  
16 referred to or relied upon in any request.

### 17 **RESPONSES TO SPECIFIC REQUESTS**

18 **REQUEST FOR PRODUCTION NO. 1:** Please provide all agreements and all draft  
19 agreements between you and Shell for use of Terminal 5.

20 **RESPONSE:** Foss incorporates the General Objections above into the response to this  
21 Request. In addition, Foss objects to this Request as overbroad, as requesting information not  
22 reasonably calculated to lead to the discovery of admissible evidence, and as requesting information  
23 that is proprietary and highly confidential. Subject to and without waiving these objections, the

1 documents produced as FOSS\_0001 to FOSS\_00005 are the pertinent provisions of Purchase  
2 Contract UA54145 for the Supply of Material Handling and Terminal Services between Shell  
3 Offshore, Inc. and Foss Maritime Co., insofar as that contract pertains to the types of services Foss  
4 contracted to provide Shell at Terminal 5.

5  
6 **REQUEST FOR PRODUCTION NO. 2:** Produce a true, correct, accurate and complete  
7 copy of all documents identified in your answers to the preceding interrogatories.

8 **RESPONSE:** Foss incorporates the General Objections above into the response to this  
9 Request. Subject to and without waiving the foregoing objections, Foss has produced documents  
10 responsive to this Request, consisting of its designated exhibits in this matter.

11 DATED this 10<sup>th</sup> day of August, 2015.

12 GARVEY SCHUBERT BARER

13 By 

14 \_\_\_\_\_  
15 David R. West, WSBA #13680  
16 Donald B. Scaramastra, WSBA #21416  
17 Daniel J. Vecchio, WSBA #44632  
18 Attorneys for Foss Maritime Company

17 MCCULLOUGH HILL LEARY, P.S.

18 By 

19 \_\_\_\_\_  
20 John C. McCullough, WSBA #12740  
21 Attorneys for Foss Maritime Company



**CERTIFICATE OF SERVICE**

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that on August 10, 2015, I caused to be served the foregoing document, FOSS MARITIME COMPANY'S OBJECTIONS AND RESPONSES TO DEPARTMENT OF PLANNING AND DEVELOPMENT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS, on the person(s) identified below in the manner shown:

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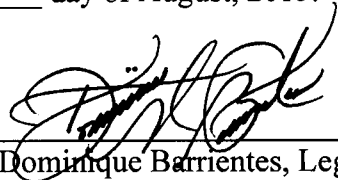
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Dated at Seattle, Washington, this 10<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
Dominique Barrientes, Legal Assistant

**PURCHASE CONTRACT UA54145**

**FOR THE**

**SUPPLY OF MATERIAL HANDLING AND TERMINAL SERVICES**

**between:**

**SHELL OFFSHORE, INC.**

**and**

**FOSS MARITIME COMPANY**



### Section III – Scope Description

#### 1. GENERAL

This order shall constitute an agreement by CONTRACTOR to furnish all tools and equipment, materials (except COMPANY-furnished material), labor and supervision to provide terminal/dock facilities (slips), onsite storage, and material handling operations in support of COMPANY's operations at Terminal 5, Seattle, Washington (Terminal).

It shall be the CONTRACTOR'S responsibility to see that such activities are performed in such a manner as to yield results in accordance with COMPANY'S project objectives.

CONTRACTOR agrees to provide these services safely and efficiently on an economic and timely basis, and in keeping with standards and practices generally accepted in the industry and highlighted in the Shell/Contractor Safety Interface Document.

CONTRACTOR will provide and manage trained and qualified personnel to ensure the job function is efficiently executed for COMPANY's business throughout the contract period.

CONTRACTOR'S duties shall include the following:

1. CONTRACTOR shall provide Slips, Staging Areas, Living Quarters, Marshalling Areas, Personnel, and Equipment to meet COMPANY's needs at the Terminal.
2. CONTRACTOR shall operate Terminal and ensure general housekeeping at the Terminal is maintained consistent with personnel safety and accident free operations as the primary concern.
3. CONTRACTOR is responsible for the receipt, storage, staging, loading and unloading of all material used by COMPANY in the performance of its business.
4. CONTRACTOR shall load/unload marine vessels, trucks, etc. in accordance with COMPANY requirements.
5. CONTRACTOR shall handle, sort (if necessary), and place in proper disposal container(s), identified for COMPANY USE ONLY, all trash and other non-hazardous solid waste generated from COMPANY activities, which originate at the Terminal. COMPANY shall deliver to the Terminal its hazardous and non-hazardous solid waste generated offshore, pre-sorted and placed into properly marked containers. Upon arrival at the Terminal, CONTRACTOR shall off-load both solid and hazardous wastes and if necessary, shall further sort such waste and shall place the waste into the properly designated COMPANY containers for disposal. COMPANY will contract for disposal of COMPANY trash and other non-hazardous solid waste generated from offshore operations as well as trash and other solid waste generated by COMPANY at the Terminal. COMPANY will be responsible for such disposal.
6. CONTRACTOR shall be solely responsible for generation, transportation, storage and disposal, and for the cost of transporting the trash and other solid waste generated by the CONTRACTOR or any other Terminal customers of CONTRACTOR.
7. CONTRACTOR shall not be responsible for the segregation of COMPANY solid waste from COMPANY hazardous waste and hazardous material at COMPANY's offshore locations and which are generated by the offshore operations of COMPANY, COMPANY's contractors or COMPANY contracted vessels. CONTRACTOR shall be responsible for maintaining the segregation of COMPANY labeled solid waste, from COMPANY labeled hazardous waste and hazardous material wherever generated. Further, CONTRACTOR shall be responsible for any mixing or mis-labeling of said waste, which may occur after waste has been properly segregated and labeled prior to delivery to CONTRACTOR.

8. CONTRACTOR shall at all times keep COMPANY's hazardous waste and hazardous materials segregated from the hazardous waste and hazardous material of other customers of CONTRACTOR at the TERMINAL.
9. CONTRACTOR shall comply with all state and federal laws and regulations applicable to the TERMINAL and pertaining to storage and training required to handle hazardous waste and hazardous material, including but not limited to the use of a Hazardous Waste Area. CONTRACTOR shall identify and segregate the COMPANY Hazardous Waste Area so that it is used solely and exclusively for COMPANY hazardous waste and hazardous materials during the entire term of this AGREEMENT.

COMPANY's onsite personnel shall have the right to provide further reasonable clarification of work to CONTRACTOR.

## **ADDITIONAL SPECIFICATIONS AND REQUIREMENTS**

### Vehicle Access Roads

1. CONTRACTOR will provide a secure, gated entrance at the South entrance to the facility. Changes to this arrangement shall not be made without prior written notice to and consent of) the COMPANY.
2. CONTRACTOR will provide a vehicle access road throughout the terminal facility and adjacent land. This roadway, which will be at least 30-feet wide, will be maintained in a reasonable condition to ensure safe passage for vehicle and equipment at the account of CONTRACTOR. COMPANY agrees that the vehicle access road behind COMPANY's leased properties will be a common access road (i.e. to be use by all CONTRACTOR tenants). COMPANY stipulates that traffic flow through any COMPANY leased slip shall be at the sole discretion of COMPANY. Written permission granting access to COMPANY leased terminal land (including storage) or slips must be received in writing from the COMPANY terminal manager, which will not be unreasonably withheld.

### Marshalling Area

1. CONTRACTOR will provide a dedicated area for marshalling COMPANY's equipment.
2. CONTRACTOR will provide a receiving and backhaul station/facility within the Marshalling area.

### Forwarding Equipment

CONTRACTOR will provide any additional forklifts or trailers required to move COMPANY equipment from the marshalling area to COMPANY's slips at rates in accordance with Section IV – Schedule of Rates.

### Specifications of Marshalling Area

1. Outdoor storage will be managed and organized such that each COMPANY project, as defined by the COMPANY terminal Manager has a clearly defined and self-contained area ("project area"). Each "project area" must be managed to allow for expansion and contraction of storage requirements within the square footage.

Modifications/Change Orders

1. Changes to the CONTRACTOR terminal facility (from the time of the contract initiation) or the layout or usage of said facility as it applies to COMPANY's leased properties and/or as it immediately impacts COMPANY's operations must be communicated to COMPANY in writing with 30 days notice to the COMPANY.
2. Requests by COMPANY for changes or modifications to the contract facilities or services as discussed herein, must be made in writing and directed to CONTRACTOR contract manager. Costs and payment terms of requested changes and/or modifications to be mutually agreed upon.

**2. EXTRA WORK**

In the event CONTRACTOR is required by COMPANY to perform work that would fall outside of the activities commonly associated with the provision of a marine terminal and material handling services, a change in contract agreement must be executed and signed by an authorized representative of both CONTRACTOR and COMPANY prior to performance of the extra work. Any proposed changes to the existing contract agreement will be sent to COMPANY representative where an alteration to this agreement will be issued.



# **EXHIBIT 41**



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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of:

**FOSS MARITIME COMPANY**

from an interpretation of the Director,  
Department of Planning and Development.

Hearing Examiner File:  
**S-15-001 and S-15-002**

DEPARTMENT OF PLANNING AND  
DEVELOPMENT'S FIRST SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS  
TO PORT OF SEATTLE AND  
**RESPONSES THERETO**

TO: APPELLANT, PORT OF SEATTLE;

AND TO: PATRICK SCHNEIDER and TRACI GOODWIN, Counsel for Appellant

Pursuant to Hearing Examiner Rule of Practice and Procedure ("Rule") 3.11, The City of Seattle Department of Planning and Development (DPD) requests Appellant to respond to the following interrogatories and requests for production.

You are being served with the original of the interrogatories. To facilitate preparation of answers and responses, the City will additionally provide an electronic copy of the document to you by electronic mail. Please insert your answers on the original in the space provided following each request, or use additional pages if necessary. Please serve the completed original on the undersigned. Each interrogatory is to be answered fully and separately, in writing and under oath, within 30 days of service upon you.

1           DPD further requests that the Appellant, within 30 days of the service hereof, produce for  
2 inspection and copying the documents described below at the Office of the City Attorney, 701  
3 Fifth Ave., 20th Floor, Seattle, Washington 98124, or at such other time and place as agreed  
4 upon by counsel.

5           If any interrogatory cannot be answered in full, please answer it to the extent possible,  
6 specify the reasons for your inability to answer the remainder, and, as to information in response  
7 thereto which becomes known or available to you after service of your original answers, you are  
8 requested to submit promptly supplemental answers setting forth such additional information in  
9 full. In answering these interrogatories, please furnish such information as is available to you  
10 regardless of whether this information is obtained directly by you, through your agents or other  
11 representatives, or by your attorney.

12           In responding to each request for production, if you do not produce a document in whole  
13 or in part because you are unable to do so, or for any other reason, you are requested to identify  
14 each person whom you believe has custody, possession or control of the document.

15           If you object in part to any interrogatory or request for production, please indicate which  
16 objections or claims of privilege are asserted with regard to each discovery request. If only part  
17 of a discovery request is objected to, you should indicate which objections or claims of privilege  
18 are asserted with regard to each such part and respond to the remainder completely.

19           With regard to each document withheld upon a claim of attorney-client privilege or work  
20 product doctrine, prepare a document-by-document privilege log stating the type of document  
21 (i.e., letter, memorandum, notes, etc.), date, preparer(s), intended recipient(s), subject matter(s),  
22 persons who have received the document or have been told about the contents thereof, and other  
23 information which would permit the Hearing Examiner to adjudicate the validity of the claim or  
24 privilege. This privilege log must be produced contemporaneously with the documents produced  
25 in response to these requests.

1 In responding to each request for production, please identify by number each and every  
2 request to which the documents are responsive.

### 3 DEFINITIONS

4 1. "DOCUMENT" as used herein means all original writings of any nature  
5 whatsoever whether handwritten, typed, printed, or otherwise visually reproduced, all electronic  
6 media of any type, and all non-identical copies thereof, in your possession, custody, or control,  
7 or the possession, custody or control of your authorized agent, regardless of where located, and  
8 includes, but is not limited to, contracts, agreements, and other official documents and legal  
9 instruments, memoranda, journals, emails, books of account, vouchers, ledgers, orders, checks,  
10 invoices, receipts, bills, records, tape recordings, letters, correspondence, communications, diary  
11 entries, reports, studies, summaries, minutes, notes, jottings, tabulations, charts, manuals,  
12 brochures, schedules, computer print-outs, data processing input and output, microfilm,  
13 telephone logs, telephone toll records, telegrams, teletypes, records, and invoices, reflecting  
14 business operations and other records kept by electronic, photographic or mechanical means, and  
15 any other documents as defined in Washington Court Rule 34. In all cases where originals  
16 and/or non-identical copies are not available, "documents" also means identical copies of  
17 original documents and copies of non-identical copies.

18 2. "Identity" or "identify" means:

- 19 a) when used with reference to a natural person, to state his or her full name,  
20 business affiliation, present business address, present or last known  
21 position;
- 22 b) when used with reference to any entity, such as a partnership, joint  
23 venture, trust, or corporation, to state the full legal name of such entity, the  
24 entity's street address, the entity's telephone number, the identity of the  
25 officer, manager, trustee, other principal representative, or employee who  
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1 is known or is believed to possess the knowledge or information  
2 responsive to the interrogatory and for which the entity was identified;

3 c) when used with reference to documents, to state specifically: the type of  
4 documents involved, together with information sufficient to enable the  
5 City to locate the document, such as its date, the name of any addressee  
6 and/or signer, the title or heading of the documents, and the approximate  
7 number of pages; in lieu of identifying documents, copies may be  
8 provided;

9 d) when used with reference to a vessel or floating structure to state  
10 specifically: its name, state or federal registration number, type of vessel  
11 or function of floating structure, and its dimensions.

12 3. The phrase "RELATING TO" means describing, reflecting, concerning,  
13 summarizing or referring to in any way.

14 4. "YOU" and "YOUR" refers to the Port of Seattle, as well as each of its current  
15 and former consultants, accountants, officers, directors, employees, attorneys and other agents.

## 16 INTERROGATORIES

17 **INTERROGATORY NO. 1:** Identify all persons participating in the preparation of  
18 your answers and responses to these Interrogatories and Requests for Production, and for each  
19 such person state the answers or responses for which that person provided information or  
20 documents.

### 21 **ANSWER:**

22 *As these are contention interrogatories that are objectionable for the reasons stated*  
23 *below, the answers have been prepared by the undersigned attorney.*

1           **INTERROGATORY NO. 2:** If you contend that mooring an oil rig, such as the Polar  
2 Explorer, and its assisting vessels at Terminal 5 is “inherent” to the permitted use of cargo  
3 terminal, please

- 4           a.       state all facts that relate to, support, or refute your contention,
- 5           b.       Identify all persons with knowledge of those facts, and
- 6           c.       Identify all documents that support, refute or relate to the contention.

7 For the purpose of this interrogatory, “inherent” has the meaning intended in your Appeal to the  
8 Hearing Examiner filed on or about May 15, 2015, page 6, line 14.

9           **ANSWER:**

10           *The Port objects to this interrogatory as improper. As stated in Weber v. Biddle, 72*  
11 *Wn.2d 22 (1967): “. . . the opposing arty cannot be required to put on a dress rehearsal of the*  
12 *trial. While it is proper to elicit information as to evidentiary facts, nevertheless it is improper to*  
13 *ask a party to state evidence upon which he intends to rely to prove any fact or facts.”*

14           *The Port also objects because the questions are overbroad and unduly burdensome,*  
15 *particularly since they were propounded so late in this appeal that the answers are due three*  
16 *days before the hearing begins, and after each party’s witness and exhibit lists are due. Many*  
17 *employees of the Port’s maritime division have knowledge of these facts, and there are countless*  
18 *numbers of documents that are relevant to this contention. The witnesses that the Port has*  
19 *identified for this hearing are persons with knowledge of the relevant facts, and DPD has not*  
20 *sought to depose any of them.*

21           *Without waiving these objections, the Port states that moorage is inherent in the use of*  
22 *all marine facilities, including cargo terminals, because moorage is an inherent aspect of*  
23 *navigation. A ship must moor in order to use a marine facility of any description. To treat such*  
24 *moorage as a separate use rather than an inherent use of a marine facility is nonsensical as well*  
25 *as inconsistent with the Shoreline Management Act and the City’s SMP.*

1           **INTERROGATORY NO. 3:** If you contend that mooring an oil rig, such as the Polar  
2 Explorer, and its assisting vessels at Terminal 5 is “intrinsic” to the permitted use of cargo .  
3 terminal, please

- 4           a.       state all facts that relate to, support, or refute your contention,  
5           b.       identify all persons with knowledge of those facts, and  
6           c.       identify all documents that support, refute or relate to the contention.

7 For the purpose of this interrogatory, “intrinsic” has the meaning in Seattle Municipal Code  
8 23.60.940 (“use, accessory”).

9           **ANSWER:**

10           *The Port objects to this interrogatory as improper. As stated in Weber v. Biddle, 72*  
11 *Wn.2d 22 (1967): “. . . the opposing party cannot be required to put on a dress rehearsal of the*  
12 *trial. While it is proper to elicit information as to evidentiary facts, nevertheless it is improper to*  
13 *ask a party to state evidence upon which he intends to rely to prove any fact or facts.”*

14           *The Port also objects because the questions are overbroad and unduly burdensome,*  
15 *particularly since they were propounded so late in this appeal that the answers are due three*  
16 *days before the hearing begins, and after each party’s witness and exhibit lists are due. Many*  
17 *employees of the Port’s maritime division have knowledge of these facts, and there are countless*  
18 *numbers of documents that are relevant to this contention. The witnesses that the Port has*  
19 *identified for this hearing are persons with knowledge of the relevant facts, and DPD has not*  
20 *sought to depose any of them.*

21           *Without waiving these objections, the Port states that moorage is intrinsic in the use of*  
22 *all marine facilities, including cargo terminals, because moorage is an intrinsic aspect of*  
23 *navigation. A ship must moor in order to use a marine facility of any description. To treat such*  
24 *moorage as a separate use rather than an intrinsic use of a marine facility is nonsensical as well*  
25 *as inconsistent with the Shoreline Management Act and the City’s SMP.*

1           **INTERROGATORY NO. 4:** If you contend the DPD Director's Interpretation 15-001 is  
2 inconsistent with the City of Seattle Comprehensive Plan policy LU 270, please

- 3           a.       state all facts that relate to, support, or refute your contention,  
4           b.       Identify all persons with knowledge of those facts, and  
5           c.       Identify all documents that support, refute or relate to the contention.

6           **ANSWER:**

7           *The Port does not contend that the Interpretation is inconsistent with policy LU-270. The*  
8 *reference to this policy in the Port's appeal is a typo, as is clear from the appeal itself, which*  
9 *says that the referenced policy ". . . states that it is the City's policy to retain Seattle's role as the*  
10 *Gateway to Alaska, and to meet the moorage needs of all vessels." The policy that includes such*  
11 *language about being the Gateway to Alaska and meeting the moorage needs of all vessels is*  
12 *LU-257.*

13           *The Port objects to this interrogatory as improper. As stated in Weber v. Biddle, 72*  
14 *Wn.2d 22 (1967): ". . . the opposing party cannot be required to put on a dress rehearsal of the*  
15 *trial. While it is proper to elicit information as to evidentiary facts, nevertheless it is improper to*  
16 *ask a party to state evidence upon which he intends to rely to prove any fact or facts."*

17           *The Port also objects because the questions are overbroad and unduly burdensome,*  
18 *particularly since they were propounded so late in this appeal that the answers are due three*  
19 *days before the hearing begins, and after each party's witness and exhibit lists are due. Many*  
20 *employees of the Port's maritime division have knowledge of these facts, and there are countless*  
21 *numbers of documents that are relevant to this contention. The witnesses that the Port has*  
22 *identified for this hearing are persons with knowledge of the relevant facts, and DPD has not*  
23 *sought to depose any of them.*

24           *Without waiving this objection, the Port states that it already has explained, in multiple*  
25 *documents filed with the Hearing Examiner, why the Interpretation is inconsistent with the City's*  
26 *policy to retain Seattle's role as the Gateway to Alaska and to meet the moorage needs of all*

1 vessels. Mr. McKim's deposition also demonstrates the inconsistency of the Interpretation with  
2 this policy. As explained by Mr. McKim, only vessels whose primary purpose is the transport of  
3 cargo may moor at cargo terminals, and then only when using the cargo terminal to load and  
4 unload cargo. This Interpretation prohibits the use of the Port's cargo terminals for  
5 overwintering by vessels that serve the Alaskan fishing fleet, and prohibits use of the Port's  
6 cargo terminals by countless other vessels including research vessels, naval vessels, ships of  
7 state, construction vessels, tugboats, icebreakers, and law enforcement vessels, all of which  
8 currently moor at the Port's cargo terminals.

9  
10 **INTERROGATORY NO. 5:** If you contend that the activity of mooring and  
11 provisioning an oil rig, such as the Polar Explorer, and its assisting vessels at Terminal 5 is "no  
12 different than other activities that have been treated by the City as a cargo terminal use" (Hearing  
13 Examiner Order on Motion to Dismiss, paragraph 8), please:

14 a. State all facts that relate to, support, or refute your contention, including but not  
15 limited to:

- 16 i. what activity occurred,  
17 ii. when it occurred,  
18 iii. where it occurred,  
19 iv. the nature of the City's action showing it treated the activity as a cargo  
20 terminal use;

21 b. Identify all persons with knowledge of facts that relate to, support, or refute your  
22 contention; and

23 c. Identify all documents that support, refute, or relate to your contention.  
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1           **ANSWER:**

2           *The Port objects because the questions are overbroad and unduly burdensome,*  
3 *particularly since they were propounded so late in this appeal that the answers are due three*  
4 *days before the hearing begins, and after each party's witness and exhibit lists are due.*

5           *This interrogatory quotes Hearing Examiner language characterizing a claim by Foss*  
6 *Maritime, not the Port, and Foss is in possession of the specific facts, not the Port. Foss's*  
7 *activities as described to the Port are in fact "no different than other activities that have been*  
8 *treated by the City as a cargo terminal use," and many employees of the Port's maritime*  
9 *division have knowledge of such activities, including the witnesses for the hearing identified by*  
10 *the Port, and DPD has not sought to depose any of these witnesses.*

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12           **INTERROGATORY NO. 6:** If you contend that during 2105 the Polar Explorer or  
13 attending vessels moored at Terminal 5 loaded and unloaded items that are within the definition  
14 goods or container cargo in SMC 23.60940/23.60A.940, please

15           a.       state all facts that relate to your contention, including type, quantity (or tonnage)  
16 and purpose for the items loaded,

17           b.       Identify all persons with knowledge of those facts, and

18           c.       Identify all documents that relate to, support, or refute your contention.

19           **ANSWER:**

20           *The Port objects because the questions are overbroad and unduly burdensome,*  
21 *particularly since they were propounded so late in this appeal that the answers are due three*  
22 *days before the hearing begins, and after each party's witness and exhibit lists are due. The*  
23 *questions also are unduly burdensome for the simple reason that the dictionary definition of the*  
24 *word "goods" is patently broad enough, as a matter of law, to encompass any type of cargo,*  
25 *including provisions, that pass through or are stored at a cargo terminal. No witnesses or*  
26 *exhibits are needed to establish the dictionary definition of "goods"*

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**REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** Produce a true, correct, accurate and complete copy of all documents identified in your answers to the preceding interrogatories.

**RESPONSE:**

*No documents are identified.*

DATED this 10<sup>th</sup> day of July, 2015.

PETER S. HOLMES  
Seattle City Attorney

By: s/Eleanore S. Baxendale, WSBA #20452  
Assistant City Attorney  
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*Attorneys for Respondent Department of  
Planning and Development*

**AFFIDAVIT**

STATE OF \_\_\_\_\_

ss.

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, being first duly sworn, upon oath deposes and says: I am \_\_\_\_\_ for the Port of Seattle, and as such am qualified to respond to the interrogatories and requests for production. I have read the above and foregoing DEPARTMENT OF PLANNING AND DEVELOPMENTS FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PORT OF SEATTLE, and the answers and responses thereto, know the contents thereof, and believe the same to be true and correct.

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
(Signature of Notary)

\_\_\_\_\_  
(Legibly Print or Stamp Name of Notary)

Notary public in and for the State of Washington,  
residing at \_\_\_\_\_

My appointment expires \_\_\_\_\_

**ATTORNEY'S CERTIFICATION**

I declare under the penalty of perjury under the laws of the State of Washington that I am the attorney for Appellant Port of Seattle herein and I am authorized to make the foregoing answers and responses. I declare that I have read the foregoing answers and responses, know the contents thereof, and believe them to be true and correct to the best of my knowledge.

DATED this 10<sup>th</sup> day of August, 2015

By 

Traci Goodwin, WSBA #14974  
Patrick J. Schneider, WSBA #11957  
Counsel for Port of Seattle