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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** ) DEPARTMENT OF PLANNING AND  
) CONSTRUCTION'S CLOSING  
) ARGUMENT  
from an interpretation by the Director, )  
Department of Planning and Development. )  
\_\_\_\_\_ )

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1 I. INTRODUCTION

2 The Hearing Examiner should uphold DPD's Interpretation because Appellants have  
3 failed to demonstrate it is clearly erroneous, as required by Seattle Municipal Code (SMC)<sup>1</sup>  
4 23.88.020.G.5. In fact, even if the burden were on DPD, the preponderance of the evidence  
5 demonstrates the Interpretation is correct. The hearing provided more detail, but no facts that  
6 would lead to a different determination.

7 The Port's practice of treating its various City-permitted cargo terminal facilities like a  
8 "checkerboard" to move around cruise ships, large recreational vessels, fish processing boats,  
9 cargo vessels, and government vessels, may make good business sense, but does not absolve the  
10 Port from securing the correct land use permits for the specific types of use at each facility.  
11 Offering moorage to any vessel, regardless of the permitted use at the site, ignores the Shoreline  
12 Management Act (SMA or Act) use requirements on uses.

13 The City is required to regulate uses of the shoreline through its Shoreline Master  
14 Program (SMP), and the Port is required to comply with the Act.<sup>2</sup> The "shoreline" is not just the  
15 land, it includes the waters where moorage occurs, and the City's permits, and the uses  
16 authorized through them, apply to the moorage over the water that is part of a use. This is a  
17 basic tenet of the Act.

18 The Port's business practices do not determine what "cargo terminal" means; the City's  
19 reasoned determination of its SMP controls. DPD's permitting decisions show a circumscribed  
20 range of approvals for Terminal 5, strictly consistent with its cargo terminal function. Even with  
21 respect to one of the Port's most varied terminals, Terminal 91, DPD's land use decisions

22 <sup>1</sup> Cited sections of the Seattle Municipal Code are in Attachment A. Attachment A is divided into Attachment A-1,  
23 all code sections except the Seattle Master Program; Attachment A-2, cited sections of Chapter 23.60; and  
Attachment A-3 cited sections of Chapter 23.60A.

<sup>2</sup> RCW 90.58.280

1 approve distinct additional uses, such as a public facilities use for mooring fire and rescue boats,  
2 a passenger terminal use for mooring cruise ships, and a new refrigeration manufacturing plant  
3 for refitting ships moored at the pier for that purpose. Nothing in these decisions creates general  
4 moorage as an inherent or accessory (incidental and intrinsic) part of a cargo terminal as the Port  
5 claims.

6 The Port's real position is that "moorage is moorage" regardless of the permit that  
7 authorizes the moorage. Ultimately, the Port's "checkerboard" practice, treating a cargo terminal  
8 permit as an "umbrella permit" for moorage of any vessel, created the situation leading to this  
9 Interpretation and the need for Foss and the Port to try to prove that overwintering and  
10 provisioning an exploratory oil rig are consistent with a "cargo terminal" use.

11 Appellants cannot make that showing. The definition of "cargo terminal" turns on the  
12 purpose of transferring goods to other locations. Cargo (what is loaded onto ships) is divided into  
13 subsets of cargo: stores, provisions and gear - common to all vessels, including recreational  
14 vessels, such as a motorboat - and a fourth type of cargo - paying cargo, cargo for hire, or cargo  
15 for carriage: what "someone has paid you to put on your vessel and move it to another location and  
16 take it off." Foss's witness Gallagher called that the "mission" of a cargo ship. Stores, provisions  
17 and gear are not the "goods" referred to in the City's "cargo terminal" definition; if they were,  
18 then cargo terminal would be no different from other uses that include moorage (passenger  
19 terminal, recreational marina, commercial moorage, tugboat services), because vessels that moor  
20 at these facilities take these on, too. The definitions in the Land Use Code and SMP would be  
21 meaningless, violating the Shoreline Management Act.

22 The key distinction between a cargo terminal and other uses is found in the specific  
23 purpose for the presence goods at the site: "in order to transfer them to other locations." The

1 exploratory oil rig and its accompanying vessels take on stores, provisions and gear – what the  
2 rig and the ships consume and use themselves for their mission. They are not loading such cargo  
3 “in order to transfer them to other locations.” The “goods” required for a cargo terminal use are  
4 paying cargo - the fourth type of cargo.

5 Since the presence of the oil rig and its accompanying vessels at Terminal 5 is not for a  
6 cargo terminal use, they cannot moor there for loading or lay berthing. What the Port needs is an  
7 additional permit for Terminal 5, as the Interpretation concludes.

8 Appellants’ additional arguments concerning DPD approvals and Appellants’ legal  
9 arguments concerning accessory uses, approval of permits, authority to regulate vessel operation,  
10 and consistency with the City’s Comprehensive Plan are also unavailing. They have not  
11 demonstrated by clear and convincing evidence that DPD has erred.

12 DPD’s Interpretation, and the City’s zoning and SMP permitting scheme the  
13 Interpretation reflects, should be upheld. A construction of the Land Use Code and SMP that  
14 broadens definitions of “cargo terminal” and “accessory use” outside their intended context  
15 destroys the function of the definitions. An interpretation allowing moorage to be used  
16 interchangeably by vessels without regard to the use permitted on the moorage site is  
17 inconsistent with the Land Use Code, violates the Shoreline Management Act, and should be  
18 rejected.

19 **II. ISSUES AND STANDARD OF PROOF**

20 The scope of this appeal is narrow: what activities are within the SMP definition “cargo  
21 terminal” at Terminal 5<sup>3</sup> and do Appellant Foss’s proposed activities at Terminal 5 fit within  
22

23 \_\_\_\_\_  
<sup>3</sup> SMC 23.88.020.A.

1 either that definition or the City's Shoreline Management Program definition of an "accessory  
2 use" to a cargo terminal.

3 The meaning of the term "cargo terminal," including the activities it authorizes, is a  
4 question of law. What activities are being carried out on the exploratory oil rig and  
5 accompanying vessels at Terminal 5 is a question of fact de novo. Whether those activities are  
6 within the definition of the principal use "cargo terminal" or are accessory to it, because they are  
7 both "incidental" and "intrinsic" to the cargo terminal use, are mixed questions of law and fact.

8 The Hearing Examiner's jurisdiction is limited to the scope of review specifically set out in  
9 the Seattle Municipal Code.<sup>4</sup> For interpretations, "Appeals shall be considered de novo, and the  
10 decision of the Hearing Examiner shall be made upon the same basis as was required of the  
11 Director."<sup>5</sup> The basis for the Director's interpretation is limited to the provisions of Title 23, which  
12 in this case also direct the Director to consider the provisions of the Shoreline Management Act and  
13 the City's Comprehensive Plan provisions for the Shoreline District.<sup>6</sup>

14 The decision of the Director "shall be given substantial weight, and the burden of  
15 establishing the contrary shall be upon the appellant."<sup>7</sup> The Examiner construes this to mean that  
16 the appellant must demonstrate that the Interpretation is clearly erroneous.<sup>8</sup> Under this standard  
17 of review "the Director's decision may be reversed only if the Examiner, on review of the entire  
18 record, and in light of the public policy expressed in the underlying law, is left with the definite  
19 and firm conviction that a mistake has been made."<sup>9</sup>

20 \_\_\_\_\_  
21 <sup>4</sup> *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

22 <sup>5</sup> SMC 23.88.020.G.5 (emphasis added).

<sup>6</sup> SMC 23.88.020.A; SMC 23.60.004/ 23.60A.004; *see also*, SMC 23.60.016/23.60A.012.

<sup>7</sup> SMC 23.88.020.G.5.

<sup>8</sup> In the Matter of the Appeal of *Alliance For Livable Denny Triangle and Unite Here Local 8*, Hearing Examiner File: MUP-14-016/S-14-001, July 14, 2015, Conclusion ¶ 1, citing *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).

<sup>9</sup> *Id.* at ¶ 1, citing *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001) (emphasis added).

1 The Hearing Examiner may “affirm, reverse or modify the Director’s interpretation either in  
2 whole or in part or may remand the interpretation to the Director for further consideration.”<sup>10</sup>

### 3 III. STATUTORY CONSTRUCTION

4 The Hearing Examiner follows customary rules of statutory construction as set out in  
5 numerous Hearing Examiner decisions:

6 In interpreting a statute, or code, the primary objective is to  
7 ascertain and carry out the intent of the legislative body that  
8 adopted it. *Fraternal Order of Eagles, Tenino Aerie No. 564 v.*  
9 *Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239,  
10 59 P.3d 655 (2002) (citations omitted). One looks first to the  
11 language of the code to determine legislative intent, and if the code  
12 is unambiguous, the meaning is derived from the plain language of  
13 the code alone. *Id.* Definitions provided in code are controlling, but  
14 if undefined, a term should be given its “plain and ordinary  
15 meaning by reference to a standard dictionary.” *Id.* The words of a  
16 statute should not be read in isolation, *Markham Advertising Co. v.*  
17 *State*, 73 Wn.2d 405, 439 P.2d 248 (1968), and a code section  
18 should be construed so the each part is given effect with every  
19 other part. *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 275 P.2d  
20 933 (1954).<sup>11</sup>

21 The Hearing Examiner appropriately looks uniquely to the legislation itself, for it is well  
22 established law that “the intention of the Legislature is to be deduced from what it said.”<sup>12</sup>

23 In addition, the Examiner has adopted the Washington State Supreme Court’s  
determination that plain meaning includes the context of the entire statutory scheme.

The Washington Supreme Court has determined that the "plain  
meaning rule" cited by the Appellants requires an [adjudicative  
body] to “construe and apply words according to the meaning that  
they are ordinarily given, taking into account the statutory context.  
. . . So defined, the plain meaning rule requires [an adjudicative

<sup>10</sup> SMC 23.88.020.G.6.

<sup>11</sup> In the Matter of the Appeal of *Phinney Ridge Community Council, et al.*, Hearing Examiner File: MUP-07-022(W)/W-06-003, October 29, 2007, Analysis, ¶ 3.

<sup>12</sup> *In Re Sanborn*, 159 Wn.112, 118, 922 Pac. 259 (1930).

1 body] to consider legislative purposes or policies appearing on the  
2 face of the statute as part of the statute's context. . . .<sup>13</sup>

3 The case cited by the Examiner, above; continues, explaining that the adjudicative body should  
4 determine legislative intent within the context of the entire legislation, in this case the SMP:

5 [T]he plain meaning is still derived from what the Legislature has  
6 said in its enactments, but that meaning is discerned from all that  
7 the Legislature has said in the statute and related statutes which  
8 disclose legislative intent about the provision in question. Upon  
9 reflection, we conclude that this formulation of the plain meaning  
10 rule provides the better approach because it is more likely to carry  
11 out legislative intent.<sup>14</sup>

12 In this case, consideration of the intent of the Shoreline Management Act and Shoreline Master  
13 Program is key to determining the meaning of the definition of cargo terminal in this appeal.

#### 14 IV. STATEMENT OF FACTS

##### 15 A. Approvals for Terminal 5 exclude general or commercial moorage

16 The permit history for Terminal 5 is clear that DPD's approval of a cargo terminal use at  
17 Terminal 5 does not include general moorage there, regardless of what the Port claims about permits  
18 issued for Terminal 91. When DPD issued cargo terminal approvals for Terminal 5, the City  
19 classified commercial moorage separately from cargo handling facilities and specifically did not  
20 approve commercial moorage for Terminal 5.

21 \_\_\_\_\_  
22 <sup>13</sup> In the Matter of the Appeal of *Keith D. and Lynnette Y. T. Senzel*, Hearing Examiner File: MUP-05-036 (P),  
23 February 6, 2006, Applicable Law, ¶ 23, citing "*State Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146  
Wn.2d 1, 9-10, 43 P.3d 4 (2002), citing 2A Norman J. Singer, *Statutes and Statutory Construction* section 48A:16,  
at 809-10 (6th ed. 2000) (extracts from R . Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by  
Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited*, 33 Hastings L.J. 187 (1981)).

<sup>14</sup> *State Department of Ecology v. Campbell & Gwinn, L.L.C.*, at 11-12.



1 A permit issued in 1977, shortly after the amendment of the City's earliest Shoreline Master  
2 Program (SMP),<sup>15</sup> is to "expand container facilities on existing pier per plan."<sup>16</sup> In that SMP cargo  
3 terminals were classified under "transportation facilities," separate from "public marinas," which  
4 were classified under "commercial boating."<sup>17</sup> Permits issued between then and 1992 were all for  
5 the container facility use.<sup>18</sup>

6 In 1995 the City issued a land use decision for the premises, including the water portion,  
7 under the Shoreline Master Program set out in Chapter 23.60,<sup>19</sup> the decision for Projects 9404118  
8 and 9404124 identified in the Interpretation.<sup>20</sup> The decision authorized a major "future expansion of  
9 an existing cargo terminal, including container storage, intermodal railroad yard and approximately  
10 180,000 square feet of new structures with a new overpass from the Spokane Street low level  
11 bridge."<sup>21</sup> This decision included the overwater area of the premises for a "400-foot berth extension  
12 to accommodate 3 ships,"<sup>22</sup> expansion of the shipping berths and wharfing areas, including  
13 dredging,<sup>23</sup> and the impacts included ones that were water and shipping related, such as impacts  
14 from ships using the facility<sup>24</sup> and impacts to ship traffic.<sup>25</sup> The decision authorized cargo terminal  
15 activities, terminal support facilities, landscaping, and public shoreline access.<sup>26</sup>

16  
17 <sup>15</sup> DPD Ex. 6, Ordinance 106200 (1976 amendment), p. 1.

18 <sup>16</sup> DPD Ex. 1, p. RFP2000021.

19 <sup>17</sup> DPD Ex. 6, Ordinance 106200 (1976 amendment), p. 2.

20 <sup>18</sup> DPD Ex. 1, p. RFP2000022-30: "repair apron - replace piling," "demolish exiting transfer dock and construct new  
21 dock per plans," "est [establish] use for fut [future] const of offices and pier apron; shoreline sub [substantial  
22 development permit] for container terminal offices/apron," "addition of 200 ft to existing concrete apron," "repair  
23 apron," "est/chng use for fut const of whse (w5) & guard hses," "est/chng use dredge sediment material from navigable  
24 waterway," "est/chng use for the installation of container handling equip. (crane)." DPD Ex. 1, p. RFP2000022-30.

25 <sup>19</sup> SMC Ch. 23.60 was adopted in 1987 in Ordinance 113466. DPD Ex.8, first page and last page.

26 <sup>20</sup> Finding of Fact 2.

<sup>21</sup> Foss Ex. 33, Decision, starting at W-15.

<sup>22</sup> Foss Ex. 33, Decision, p. 3, (W-1).

<sup>23</sup> Foss Ex. 33, Decision p. 4 (W-19), p. 47 (W-62) and p. 68 (W-83)..

<sup>24</sup> Foss Ex. 33, Decision, p. 21 (W-36).

<sup>25</sup> Foss Ex. 33, Decision, p. 33 (W-46)

<sup>26</sup> Foss 33, Decision, p. 3 (W-18), last paragraph.

1 This decision did not authorize general moorage at Terminal 5. The decision does not  
2 identify that as a use that is approved. In addition, the decision identifies provisions authorizing a  
3 different use, "cargo handling facilities," as the basis for the decision. The decision states that SMC  
4 23.60.004 requires consideration of the "Shoreline Policies," which include the "Shoreline  
5 Implementation Guidelines, set forth in Resolution 27618."<sup>27</sup> The decision cites Implementation  
6 Guideline E8: to "allow fulfillment of City-wide objectives for *different types* of water-dependent  
7 businesses and industries."<sup>28</sup> The decision determines the proposal is consistent with the specific  
8 type of business listed in E8 "a) Cargo Handling Facilities."<sup>29</sup> That type of business does not  
9 include "moorage" independent of the cargo terminal activity.<sup>30</sup> General moorage is set out as a  
10 different type of business in a different Guideline, E8(d). The decision does not cite Guideline  
11 E8(d) as a basis for approving the Projects. Guideline E8(d) states, in part:

12 d) Moorage. Meet long-term and transient needs of all of Seattle's  
13 ships and boats including fishing transport, recreation and military.  
14 Locate long-term moorage in sheltered areas, close to services, and  
15 short-term moorages in more open areas. Support the efficient use of  
16 Fishermen's Terminal, the Shilshole Marina and other public  
17 moorage facilities.

18 By excluding Guideline E8(d), the decision clearly extinguishes any argument that DPD  
19 authorized general moorage as part of the use at Terminal 5. Nothing in the record shows that DPD  
20 approved such moorage at Terminal 5.

21 Not only did the City create separate guidelines for "different types" of water dependent  
22 businesses and industries and segregate "cargo handling facilities" from "moorage facilities," the

23 <sup>27</sup> Foss 33, Decision, p. 73 (W-88).

<sup>28</sup> Foss 33, Decision, p. 79 (W-94) (emphasis added).

<sup>29</sup> Foss 33, Decision, p. 79 (W-94).

<sup>30</sup> DPD Ex. 4, Resolution 27618, Attachment A, pp. 26-27.

1 City also adopted different definitions of the two activities in Ch. 23.60,<sup>31</sup> continuing the distinction  
2 created in the 1976 SMP.

3 Nothing in the record shows that Terminal 5 has ever been used previously by the Port as  
4 open moorage similar to Terminal 91. The only instance of non-cargo terminal moorage at  
5 Terminal 5 is when the Coast Guard asked that a ship that could not travel be moored there  
6 temporarily for repairs.<sup>32</sup>

7 **B. Approval for Terminal 5 bollard work did not approve an oil rig as a cargo**  
8 **terminal use**

9 In February 2015, DPD approved an exemption from a shoreline substantial development  
10 permit so that bollards at Terminal 5 could be restored to their previous size. Ben Perkowski, the  
11 DPD Sr. Land Use Planner issuing the exemption, testified he did not need to determine what the  
12 bollards would be used for, because the specific exemption criteria for “repair and maintenance”  
13 does not require that.<sup>33</sup> With respect to the approval form, the box marked “compliance” is checked  
14 automatically for an approval, and he adds conditions to ensure that is correct.<sup>34</sup> In this case he  
15 added above the box that the “project is subject to zoning review and approval for consistency with  
16 applicable development standards.”<sup>35</sup> SMC 23.60.020.B.5 authorizes using conditions to ensure  
17 compliance with the Shoreline Management Act and the provisions of the SMP. He testified that  
18 one of the possible times that zoning review could occur would be in obtaining a building permit for  
19 the repair.<sup>36</sup>

21 <sup>31</sup> DPD Ex. 8, Ordinance 113466, pp. 172 (cargo terminal) and p. 173 (commercial moorage).

22 <sup>32</sup> Attachment D Englin, p. 201:2-24.

23 <sup>33</sup> SMC 23.60.020.C.1 and Testimony 8/24, Tape 4 at 7:50 to 10:01.

<sup>34</sup> Foss Ex. 55; Testimony 8/24, Tape 4 at 29:57 to 30:57.

<sup>35</sup> Foss 55, Exemption p. 1 (RFP 40000330); see also, p. 3 (RFP 4000332) “conditions” second bullet. Testimony 8/24, Tape 4 at 29:57 to 30:57.

<sup>36</sup> Testimony 8/24, Tape 4 at 32:52 to 33:06.

1           Perkowski testified he asked the Port about what uses might occur at the site, because he  
2 read a newspaper article that described possible manufacturing on the site, which is not allowed  
3 under the cargo terminal definition;<sup>37</sup> however, it would not have prevented his issuing the  
4 exemption, it would have led him to advise the applicant to apply for an additional permit.<sup>38</sup>  
5 Blomberg, the Port applicant, concurred this information was not necessary for the substantial  
6 development permit exemption.<sup>39</sup> Nothing Perkowski received from the Port as part of the  
7 application materials,<sup>40</sup> including the Port's informal response to his question,<sup>41</sup> and the Port's  
8 formal response to his correction notice,<sup>42</sup> said that the oil rig would be moored at the site. He  
9 testified he did not intend this decision to say he was approving the oil rig as consistent with the  
10 cargo terminal use, and he lacked the authority to make that determination.<sup>43</sup>

11           George Blomberg, the Port applicant for the exemption, testified he knew the oil rig required  
12 the bollard replacement,<sup>44</sup> he determined the oil rig moorage was not a change in use for SEPA  
13 purposes but did not mention the oil rig in the determination,<sup>45</sup> he had engineering drawings  
14 showing an oil rig identified as Polar Pioneer using the bollards<sup>46</sup> (which Perkowski did not see<sup>47</sup>),  
15 and that he did not provide any materials to Perkowski showing the oil rig would be using the  
16 bollards or stating that the oil rig would be present at Terminal 5.<sup>48</sup> He testified he did not expect  
17  
18

19 <sup>37</sup> Testimony 8/24, Tape 4 at 13:08 to 15:12.

20 <sup>38</sup> Testimony 8/24, Tape 4 at 15:13 to 16:38.

21 <sup>39</sup> Attachment I, p. 32:11-14.

22 <sup>40</sup> Foss 47, Application; Testimony 8/24, Tape 4 at 10:55 to 11:54.

23 <sup>41</sup> Foss 49, email exchange.

<sup>42</sup> Foss 53, Correction Notice response; Testimony 8/24, Tape 4 at 22:35 to 22:57.

<sup>43</sup> Testimony 8/24, Tape 4 at 31:25 to 32:50.

<sup>44</sup> Attachment I, p. 25:9 to 26:1.

<sup>45</sup> Attachment I, p. 24:8-22; 26:8-10.

<sup>46</sup> DPD 26, drawing marked S3 and S4; Attachment I, p. 27:15 to 28:8.

<sup>47</sup> Testimony 8/24, Tape 4 at 25:00 to 25:40.

<sup>48</sup> Attachment I, p. 28:24 to 29:11;30:3-8; 30:25 to 31:7; 32:22 to 33:8.

1 Perkowski to determine whether the oil rig was allowed as part of the cargo terminal use.<sup>49</sup> He  
2 testified that at the time Perkowski issued the shoreline substantial development permit exemption  
3 he (Blomberg) believed Perkowski had simply issued an exemption.<sup>50</sup>

4 **C. Foss Activities at T 5**

5 **1. Types of vessels**

6 The Interpretation states that the Polar Pioneer, an oil drilling rig, was expected at  
7 Terminal 5.<sup>51</sup> This occurred.<sup>52</sup>

8 Paul Gallagher, Vice-President for Terminal Services at Foss Marine, testified the Polar  
9 Pioneer is classified as a mobile offshore drilling unit that is a “highly specialized vessel” for the  
10 purpose of offshore drilling.<sup>53</sup> He testified that the principal purpose of the Polar Pioneer is to  
11 drill holes for exploration, that is “her job.”<sup>54</sup> Gallagher testified that the “mission” of the Polar  
12 pioneer was the offshore drilling operation.<sup>55</sup> He also testified, the Polar Pioneer is “not a carrier  
13 and she doesn’t get paid by a third party to move cargo from port to port.”<sup>56</sup>

14 The Interpretation states the Polar Pioneer would be moored at Terminal 5 for several  
15 months. Gallagher confirmed that it would.<sup>57</sup>

16 The Interpretation also states that, based on the information from the Port and Foss, the  
17 drill rig would be accompanied by two tugboats that also would be moored at Terminal 5 for  
18 several months.<sup>58</sup> Gallagher testified that seven or eight vessels came to the site, including “off

19 \_\_\_\_\_  
20 <sup>49</sup> Attachment I, p. 33:14-18.

<sup>50</sup> Attachment I, p. 33:19-24.

<sup>51</sup> Interpretation, p. 2, Finding 4.

<sup>52</sup> Attachment J, p. 20:13-22.

<sup>53</sup> Attachment J, p. 124:1-18; p. 125:1-4, identifying Picture 1 PSK 46 p. 1-17.

<sup>54</sup> Attachment J, p. 128:2-7; p.21:2.

<sup>55</sup> Attachment J, p. 117:25 to 118:24.

<sup>56</sup> Attachment J, p. 128:8-13.

<sup>57</sup> Attachment J, p.30:34 to 31:18.

<sup>58</sup> Interpretation, p. 2, Finding 4.

1 shore supply vessels.”<sup>59</sup> In addition, the TOR Viking came, which has a “different mission”  
2 from the off shore supply vessels – it has a large tow and tends large anchors and supports  
3 vessels in ice.<sup>60</sup> The Aiviq also came; it is a bigger version of the TOR Viking and has a  
4 helicopter pad, two tow winches, and a skimmer and oil boom.<sup>61</sup> In addition, three different  
5 barges came;<sup>62</sup> they are “platforms that you load things onto.”<sup>63</sup> Gallagher was not certain how  
6 many vessels would come back to Terminal 5 over the winter, and testified that, under the  
7 contract with Shell, all the vessels in the Artic drilling fleet could return, including the oil spill  
8 response vessels.<sup>64</sup>

## 9 2. Classification of cargo

10 The Interpretation states that Foss represented that it intended to receive and move goods,  
11 cargo, equipment, supplies, stores, provisions, and other materials onto the vessels associated with  
12 the drilling rig “for transportation to other locations.”<sup>65</sup> The Interpretation does not address whether  
13 goods might be loaded onto the oil rig, itself. The testimony showed that a variety of items were  
14 loaded onto the drilling rig, itself, as well as onto accompanying vessels.<sup>66</sup>

15 The Interpretation states that neither the oil rig nor the tugboats would carry “container  
16 cargo.”<sup>67</sup> “Containerized cargo” is a defined term in SMC 23.60.906.<sup>68</sup> Although the evidence  
17  
18

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19 <sup>59</sup> Attachment J, p. 20:13-17.

20 <sup>60</sup> Attachment J, p. 22:24 to 23:8.

21 <sup>61</sup> Attachment J, p. 23:12-29.

22 <sup>62</sup> Attachment J, p. 24:5-10.

23 <sup>63</sup> Attachment J, p. 24:18-20.

<sup>64</sup> Attachment J, p. 141:24 to 142:9

<sup>65</sup> Interpretation, p. 2, top of the page.

<sup>66</sup> Attachment J, p. 47:18-25.

<sup>67</sup> Interpretation, p. 4, ¶5.

<sup>68</sup> “ ‘Cargo, containerized’ means cargo packed in a large (typically eight (8) feet by eight (8) feet by twenty (20) feet trunklike box and loaded, stored and unloaded as a unit.”

1 shows material will be in containers,<sup>69</sup> this is not “containerized cargo” as that term is defined or as it  
2 is used in the trade.<sup>70</sup>

3 The Interpretation states that the tugboats would not be carrying goods that are being  
4 transferred to other locations; they would be carrying goods for provisioning.<sup>71</sup>

5 Andy McKim, DPD Planner and the author of the Interpretation, testified that the same items  
6 loaded onto a vessel might either be provisions, which are not a transportation/cargo terminal use, or  
7 be “goods” within the meaning of a cargo terminal use. If the items were used by the crew (coffee)  
8 or for vessel operations (fuel filters for the ship engines and pipe that is to be laid by the ship), they  
9 would not be a cargo terminal use; if the same items were delivered to another place where the items  
10 are sold, that would be a cargo terminal use.<sup>72</sup> This is consistent with the testimony of all the  
11 maritime professionals.

12 Vince O’Halloran has been the Seattle branch agent (the executive officer) of the Sailor’s  
13 Union of the Pacific for the past 18 years. In addition, he has been a seaman from 1969, starting as a  
14 scullion and obtaining a small master’s license.<sup>73</sup> He has worked on passenger ships, U.S. flagged  
15 tankers, breakbulk freighters, containerships, and in Alaska on fishing boats.<sup>74</sup> As part of his work for  
16 the Sailor’s Union, he assigns gangs to work at Terminal 5 and Terminal 91, among others, to work  
17 on containerships, tankers and barges.<sup>75</sup>

18 O’Halloran described stores, provisions and gear in terms that are “common” to the  
19 maritime trade.<sup>76</sup> He defined stores this way:

20 \_\_\_\_\_  
21 <sup>69</sup> Foss Ex. 61; Attachment J, p. 43:5-18.

<sup>70</sup> Attachment H, p. 74:20 to 75:10.

<sup>71</sup> Interpretation, p. 4, ¶7.

<sup>72</sup> Attachment D, McKim, p. 146:2 to 148:6.

<sup>73</sup> Attachment H, pp. 6:13 to 7:13 and 13:3-4.

<sup>74</sup> Attachment H, p. 12:11-14.

<sup>75</sup> Attachment H, p. 14:4-15

<sup>76</sup> Attachment H, 2015, p. 28:3-21.

1 [S]tores generally are [sic] would be items that the vessel would need  
2 to operate. It could be lube oils, engine room parts, radar, you know,  
3 electronic parts, whatever operational necessities the vessel needs.  
Any time a ship docks it has to load stores. No ship ever docks and  
does not load stores.<sup>77</sup>

4 He also described provisions:

5 Provisions would be items that the crew would use for the necessary  
6 operation of the vessel: Food, laundry, you know, blankets, milk.<sup>78</sup>

7 And, he described gear:

8 [Y]ou would normally refer to gear as items that are necessary to the  
9 operation of the vessel. It could be mooring lines, again, lubrication  
greases, paint, anything that the vessel needs to operate.<sup>79</sup>

10 O'Halloran testified that every boat will have stores, provisions and gear, even pleasure craft, such  
11 as a motorboat.<sup>80</sup>

12 He testified these are cargo and that vessels "carry cargo" in addition to stores, provisions  
13 and gear,<sup>81</sup> and that what is being carried for revenue purposes, such as fuel that is not "stores," is  
14 just called "cargo."<sup>82</sup>

15 Jim Johnson, President of Glacier Fish Company and chief operating officer of its ground  
16 fish division,<sup>83</sup> also testified that as "cargo" they have "supplies and provisions in support of the  
17 vessel" and there is the "production of the vessel which is the frozen fish that we produce from  
18 harvest."<sup>84</sup>

20 \_\_\_\_\_  
21 <sup>77</sup> Attachment H, p.15:8-13 (emphasis added).

22 <sup>78</sup> Attachment H, p. 15:15-18 (emphasis added).

23 <sup>79</sup> Attachment H, p. 16:4-7 (emphasis added).

<sup>80</sup> Attachment H, p. 21:21 to 22:22.

<sup>81</sup> Attachment H, p. 29:6-10.

<sup>82</sup> Attachment H, p. 24:5 to 25:4.

<sup>83</sup> Attachment H, p. 30:25 to 31:1.

<sup>84</sup> Attachment H, p. 33:6-20 (emphasis added).



1 Mark Knudsen, President, Conventional Cargo, at SSA Marine, concurred with  
2 O'Halloran's description of cargo as everything moving on or off a ship, with "subsets" that include  
3 stores, provisions and gear and "other material loaded onto the ship," such as "a piece of steel or a  
4 box or whatever," which he called "paying cargo,"<sup>85</sup> "cargo for hire,"<sup>86</sup> and "cargo for carriage."<sup>87</sup>  
5 This is cargo "someone has paid you to put on your vessel and move it to another location and take  
6 it off."<sup>88</sup>

7 Paul Gallagher, Vice-President for Terminal Services at Foss Marine, concurred that cargo  
8 is stores, provision and gear, plus paying cargo.<sup>89</sup> "Paying cargo" is what pays for the crew and the  
9 expenses of transporting cargo from one place to another.<sup>90</sup> That is the "mission of that ship," he  
10 testified.<sup>91</sup>

### 11 3. What was loaded

12 Gallagher identified what was loaded onto the vessels at T-5, including the Polar Pioneer,  
13 was stores,<sup>92</sup> provisions<sup>93</sup> and other things that were material, such as drill bits and drill pipe, to  
14 be used as part of the enterprise, "so they could be used as part of the mission of the vessel."<sup>94</sup>  
15 Gallagher testified that the "mission" of the Polar Pioneer was the offshore drilling operation,  
16 that the materials loaded onto it were loaded for that mission,<sup>95</sup> and that the materials loaded onto  
17 the other vessels were solely to be used for the off shore drilling.<sup>96</sup>

18  
19 <sup>85</sup> Attachment H, p. 51:23-52:15.

<sup>86</sup> Attachment H, p. 73:1-2 (emphasis added).

<sup>87</sup> Attachment H, p. 73:9-10; 54:14-17: "containers, or yachts, or logs or whatever it is."

<sup>88</sup> Attachment H, p. 73:708 (emphasis added).

<sup>89</sup> Attachment J, p. 40:7 to 41:5; p. 93:23 to 94:4.

<sup>90</sup> Attachment J, p. 100:6 to 101:5.

<sup>91</sup> Attachment J, p. 101:2.

<sup>92</sup> Attachment J, p. 143:16-25

<sup>93</sup> Attachment J, p. 143:8-15

<sup>94</sup> Attachment J, p. 144:10-14

<sup>95</sup> Attachment J, p. 117:25 to 118:24.

<sup>96</sup> Attachment J, p. 118:25 to 119:13

1           **D.     Activities at cargo terminals**

2           Gallagher testified that “the job” of the terminal is to get the vessel loaded so it can make  
3 money away from the dock:

4                     So the job of the terminal is to take things in by rail or by truck or by  
5 other vessel, store them, and get everything ready so that when the  
6 vessel comes, we limit the time that the vessel is actually at the dock. So  
7 everybody wants to limit the time at the dock so that she – the vessels  
8 can go to work.<sup>97</sup>

9           Knudsen contrasted what happens at a cargo terminal with the activity Foss planned for  
10 Terminal 5 and the oil rig: vessel support.

11                     We didn’t know particularly for what client necessarily, but it wasn’t  
12 -- it wasn’t a use that we – we’re not that kind of company. If we  
13 could lease it for a car operation or, you know, that sort of thing,  
14 that’s what we do, but leasing it for a general vessel support is not --  
15 while we try to do everything, that’s not what we do.<sup>98</sup>

16 Vessel support is how Foss originally described its activities at Terminal 5 in negotiating the lease  
17 with the Port.<sup>99</sup> Mr. Stevens, CEO of Foss Marine, described the operation at Terminal 5 as being  
18 “staging, loading, outfitting or marine assets planned for Shell’s Artic Exploration Endeavor.”<sup>100</sup>

19           In addition, Knudsen testified that sometimes a cargo ship will moor for months in  
20 between trips, if it is used in the winter months:

21                     Currently at Terminal 25, we have a Matson ship that used to be in  
22 service and has been tied up at Terminal 25 for the last ten months  
23 probably.

24                     Q. What kind of ship is it?

25                     A. It’s a cargo ship. It’s a Matson containership. . . Carries autos,  
26 carries containers, carries break bulk cargo, carries a mix of things.  
27 And it's between seasons, it usually becomes -- gets put into  
28 service in the winter when their -- or when one of their other

29 <sup>97</sup> Attachment J, 25:20 to 26:1

30 <sup>98</sup> Attachment H, 78:23 to 79:4.

31 <sup>99</sup> PSK Ex. 29; Foss Ex. 39; Attachment J, p. 158:22 to 161:2.

32 <sup>100</sup> DPD Ex. 23, p.21:3-5.

1 vessels is out in dry dock. And that's -- that ship came in empty,  
2 it's been there, they have been doing minor maintenance and  
repairs and provisioning and that type of thing on it . . .<sup>101</sup>

3 Knudsen also testified it is industry practice to provide moorage for cargo ships that are not  
4 loading or unloading if there is space for it:

5 [T]here is a large difference between the different types of vessels  
6 that call in, but some of the ones that aren't on -- you know, the high  
7 profile, big containerships are going to be pretty tight on their  
8 schedules. A lot of the other ships have, you know, the opportunity  
9 or maybe need the opportunity to stay for a day or two to make up  
10 their schedule or wait for crew or wait for parts or whatever.<sup>102</sup>

11 He also testified that cargo ships carrying one kind of cargo (sulfur) may clean the vessel  
12 before picking up another kind of cargo (grain) at a grain terminal.<sup>103</sup> He testified he never  
13 considered whether layberthing activities are consistent with the cargo terminal permit.<sup>104</sup>

#### 14 **E. Activities at Pier 91**

15 Pier 91 has a varied permit history quite different from that of cargo terminals such as  
16 Terminal 5 and Terminal 18. There is no evidence this permit history has ever been analyzed  
17 through an interpretation or "permit to establish a use for the record" to determine what is allowed  
18 there, particularly for the fishing fleet. McKim testified that Interpretations are specific to a  
19 particular site because the history of approved uses varies from site to site.<sup>105</sup>

#### 20 **1. Permits and land use decisions**

21 Andy McKim testified that to determine what uses are established for a site he looks at  
22 permits and Land Use (MUP) decisions. The documents in record show that Terminal 91 has  
23 permits and decisions for freight storage, auto import, office, refrigerated cargo warehouse, seafood

<sup>101</sup> Attachment H, p. 58:1-13.

<sup>102</sup> Attachment H, 64:10-17.

<sup>103</sup> Attachment H, p. 58-18 to 59:2.

<sup>104</sup> Attachment H, p. 61:3-15.

<sup>105</sup> Attachment D, McKim, p. 139:18 to 140:7.

1 processing and cold storage warehouse, outdoor vehicle storage, manufacturing for fish processing,  
2 passenger terminal, a public facility to accommodate fire and rescue vessels.<sup>106</sup> But McKim  
3 testified that in order to accurately determine what uses are established for Terminal 91, it would  
4 take considerable research.<sup>107</sup>

5 McKim does not rely on the information in the background data of a land use (or MUP)  
6 decision to determine what uses have been approved;<sup>108</sup> he looks at the middle part of a permit,  
7 where it says what the permit is doing, and he looks at the “summary of proposed action” at the  
8 beginning of a MUP decision.<sup>109</sup>

9 Nothing in the record shows a permit or land use decision approving commercial moorage.  
10 McKim testified that the MUP decision 8400945<sup>110</sup> would require research to determine whether  
11 the vessel moorage referred to is general moorage or cargo terminal moorage<sup>111</sup>.

12 Ben Perkowski testified the background statements are for context.<sup>112</sup> He testified that in  
13 issuing land use decisions the zoning review is for the proposed project, is done by a planner other  
14 than the land use decision writer, and is done before the land use decision writer writes the decision  
15 that contains the background statement, so that the zoning review planner would not be reviewing  
16 what is written in the background statement in the land use decision.<sup>113</sup>

17 Paul Meyer, the Port’s Manager of the Environmental Permitting and Compliance section  
18 since 2008, testified that he believes that “idle moorage, provisioning and other activities [that] do  
19 not involve loading necessarily of cargo” are legal activities for the fishing fleet at a cargo terminal

20 \_\_\_\_\_  
21 <sup>106</sup> DPD Ex. 11, pp. DPD\_0001, 2-3, 29, 44, , 47-48 (proposal), 67,80; Foss Ex. 89; Foss Ex. 90.

<sup>107</sup> Attachment D, McKim, p. 137:18 to 138:19.

<sup>108</sup> Attachment D, McKim, p.136:21 to 137:17.

<sup>109</sup> Testimony 8/25, Tape 4 at 2:99 to 4:57.

<sup>110</sup> DPD Ex. 11, p. DPD11\_0029.

<sup>111</sup> Attachment D, McKim, p. 138:20 to 139:17.

<sup>112</sup> Testimony 8/24, Tape 4 at 40:24 to 41:10.

<sup>113</sup> Testimony 8/24, Tape 4 at 42:32 to 43:05.

1 based on background statements of land use decisions.<sup>114</sup> He read the analysis of a 1984 land use  
2 decision, describing the uses at T-91 as “chill cargo handling, vehicle importing, vessel moorage,  
3 fish processing, ship fueling and tank farm operations” under the “overall” cargo terminal use to  
4 mean that vessel moorage is allowed for any vessel without being restricted to the cargo terminal  
5 use.<sup>115</sup> However, he conceded that the description could be read to mean vessel moorage is allowed  
6 only to the extent of the cargo terminal uses described.<sup>116</sup> And, with respect to a decision issued in  
7 1988, Meyer testified that the Background Data section reading, “the entire complex is developed as  
8 a cargo terminal by definition in the Seattle Shoreline Master Program and includes accessory large  
9 ship moorage, warehousing, offices and outdoor cargo storage,”<sup>117</sup> means to him that large vessel  
10 moorage is allowed at a cargo terminal for all vessels;<sup>118</sup> but again, he conceded that it could be read  
11 to mean that the moorage is limited to cargo terminal ships as set out in the Interpretation.<sup>119</sup>

12 Meyer repeated this testimony with several permits for Terminal 91, each time referring to  
13 the “Background Data” section as the source for DPD approval of moorage that is not limited to  
14 cargo terminal vessels as set out in the Interpretation. Meyer never referred to any specific permit  
15 approval or to the summary of the proposed action in a land use decision.

16 The evidence shows that the source of these background descriptions Meyer relies on is  
17 sometimes the Port’s own SEPA documents. For example, the decision for moving the cruise ship  
18 operations from Terminal 30 to Terminal 91 has a unique background statement that is word for  
19 word the description of activities in the Port’s own SEPA document.

21 \_\_\_\_\_  
<sup>114</sup> Attachment E, p. 21:17 to 22:5.

22 <sup>115</sup> DPD Ex. 11 at p. 11\_030; Attachment E, p. 23:11 to 24:15.

23 <sup>116</sup> Attachment G Meyer, p.20:22 to 25:24.

<sup>117</sup> DPD Ex. 11, at p. 11\_0044 (emphasis added).

<sup>118</sup> Attachment E, p. 25:7 to 26:3.

<sup>119</sup> Attachment G Meyer, p. 25:25 to 28:5.

1                   **2.     Photographs**

2                   The Port introduced photographs of naval vessels moored at Terminal 91 and Pier 66 as  
3 evidence that DPD has approved mooring large ships at all cargo terminals. All they show is that the  
4 Port allowed them to moor, or that the Coast Guard directed them to moor there. Lack of  
5 enforcement, as a matter of law is not evidence of approval. In addition, Faith Lumsden, DPD's  
6 Code Compliance Director, testified that due to lack of staff enforcement generally is initiated by a  
7 compliant or an observed public safety hazard.<sup>120</sup> If no complaint is made, no enforcement  
8 investigation occurs.

9                   The Port included photographs of oil rigs moored at Terminal 91 in 1977, 1983 and 1985.  
10 Nothing in the record shows the City approved of their moorage. Nothing in the record shows how  
11 long they were at the site and for what purpose. Lumsden testified that she was a Code Compliance  
12 liaison for DCLU and the City Attorney's office in 1987-88, and enforcement was initiated at that  
13 time on the same basis as now – by a complaint – and that she understood this had been the policy  
14 prior to that time, as well.<sup>121</sup> There is no basis to conclude that the City considered mooring the oil  
15 rigs as a lawful part of a cargo terminal. Moreover, there has been no determination of whether  
16 other permits for Terminal 91 or Pier 66 (for which the Port produced no permit history) or prior  
17 lawful moorage of these rigs would have authorized this moorage.

18                   **F.     How port assigns berths**

19                   The Port's mooring practices are a reflection of the Port's indifference to the City's  
20 permitting scheme, rather than a reflection of how the Port construes the permits they have. The  
21 Port simply disregards the permits.

22  
23 <sup>120</sup> Testimony 8/14, Tape 3 at 1:26:39 to 1:27:07; 1:28:04 to 1:28:35.

<sup>121</sup> Testimony 8/14, Tape 3 at 1:29:20 to 1:30:34.

1 Greg Englin, the Port's Manager of Maritime Operations, admits that the Port will assign  
2 moorage for any kind of vessel at any of the Port's facilities,<sup>122</sup> that assigning a berth is not  
3 dependent on the City permits for the facility,<sup>123</sup> he has never denied moorage based on the type  
4 of permit for the facility,<sup>124</sup> and that there are no legal constraints on what vessels can moor or  
5 what activities can occur at Terminal 91, at Terminal 5, or at a facility that has just a cargo  
6 terminal use permit.<sup>125</sup>

7 Paul Meyer, the Port's Manager of Seaport Environmental Programs (acquiring federal,  
8 state and City permits and doing SEPA review), admitted that he doesn't know how the business  
9 side of the Port operates with respect to permits.<sup>126</sup> He, too, claimed that a cruise ship could  
10 moor at a cargo terminal without even the most minimal "cargo" loading activity, such as  
11 provisioning.<sup>127</sup>

12 To George Blomberg, a Port permit analyst, "moorage is moorage," regardless of the  
13 permits.<sup>128</sup>

14 In sum, the Port's position is that all of its properties with a pier for any principal use can  
15 provide moorage to any vessel, even if the activity occurring while the vessel is moored is  
16 inconsistent with the specific allowed use: moorage is moorage.

#### 17 V. REGULATION OF USES AND PORT ISSUE 4 AND FOSS ISSUE 4

18 The fundamental principles underlying the Interpretation are that the City's Shoreline  
19 Master Program identifies different uses in the Shoreline District and that activities on a site must be  
20 approved by the City via a permit establishing a "use" on the site. The Shoreline Management Act

21 <sup>122</sup> Attachment F, Englin, p. 10:23 to 11:2.

<sup>123</sup> Attachment F, Englin, p. 12:20-23.

<sup>124</sup> Attachment F, Englin, p. 19:13-15.

<sup>125</sup> Attachment F, Englin, p., 19:20 to 20:6; 21:5 to 21:22.

<sup>126</sup> Attachment G Meyer, p. 11:5-17.

<sup>127</sup> Attachment G, Meyer p. 13:16 to 14:13.

<sup>128</sup> Attachment I, Blomberg, p. 25:2-3

1 requires activities be consistent with allowed uses. To meet the goals of the Act, activities that are  
2 *permissible* under the City's Land Use Code use provisions must nevertheless be *permitted* through  
3 the City's approval process.

4 Port Issue 4 and Foss Issue 4 contend that "moorage" is allowed at Terminal 5 independent  
5 of the cargo terminal permit issued for Terminal 5 and independent of any City determination. But  
6 Appellants' arguments misconstrue the Shoreline Management Act, the Shoreline Master Program,  
7 and the Land Use Code and should be rejected.

8 **A. The Shoreline Management Act's regulation of uses**

9 The Shoreline Management Act is the state's expression of the Public Trust Doctrine. The  
10 SMA applies to all "shorelines of the state,"<sup>129</sup> which are the land 200 feet from the ordinary  
11 high water mark<sup>130</sup> and all the water areas.

12 The Act is particularly concerned with uses of the shoreline,<sup>131</sup> as expressed in RCW  
13 90.58.020 (emphasis added):

14 The legislature finds that the shorelines of the state are among the  
15 most valuable and fragile of its natural resources and that there is  
16 great concern throughout the state relating to their utilization,  
17 protection, restoration, and preservation. In addition it finds that  
18 ever increasing pressures of additional **uses** are being placed on the  
19 shorelines necessitating increased coordination in the management  
20 and development of the shorelines of the state. . . .

21 It is the policy of the state to provide for the management of the  
22 shorelines of the state by planning for and fostering all reasonable  
23 and appropriate **uses**. . . .

In the implementation of this policy the public's opportunity to  
enjoy the physical and aesthetic qualities of natural shorelines of  
the state shall be preserved to the greatest extent feasible consistent

<sup>129</sup> RCE 90.58.040.

<sup>130</sup> RCW 90.58.030(2)(d)("shorelands"),(e)("Shorelines" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them"), and (g).

<sup>131</sup> *Clam Shacks v. Skagit County*, 109 Wn.2d 91, 95, 743 P.2d 265 (1987).



1 with the overall best interest of the state and the people generally.  
2 To this end **uses** shall be preferred which are consistent with  
3 control of pollution and prevention of damage to the natural  
4 environment, or are unique to or dependent upon use of the state's  
5 shoreline. . . .

6 Permitted **uses** in the shorelines of the state shall be designed and  
7 conducted in a manner to minimize, insofar as practical, any  
8 resultant damage to the ecology and environment of the shoreline  
9 area and any interference with the public's use of the water.

10 The Act directs local governments to develop "master programs" for all uses and their  
11 regulation.<sup>132</sup> Master programs are required to include "a use element which considers the  
12 proposed general distribution and general location and extent of the use on shorelines and  
13 adjacent land areas."<sup>133</sup> State approved master programs "constitute use regulations for the  
14 various shorelines of the state."<sup>134</sup> Ignoring uses violates the Act.

15 The City's Shoreline Master Program (SMP) is part of the City's Land Use Code, located in  
16 SMC Ch. 23.60/.60A;<sup>135</sup> it is an "overlay district"<sup>136</sup> called the "Shoreline District." The SMP is  
17 adopted by the City and approved by the Washington State Department of Ecology, pursuant the  
18 Act. In this overlay district the SMP regulations, including procedures, standards, and  
19 definitions, are "superimposed upon and modify the underlying land use zones."<sup>137</sup> Thus, the  
20 procedures and standards for both the SMP and the underlying zone apply (unless those for the

21 <sup>132</sup> RCW90.58.080(1): "Local governments shall develop or amend a master program for regulation of uses on  
22 shorelines of the state . . .";

23 <sup>133</sup> RCW 90.58.100(2)(e).

<sup>134</sup> RCW 90.58.100.

<sup>135</sup> After the Interpretation was issued Chapter 23.60 was superseded by Chapter 23.60A effective June 15, 2015.

<sup>136</sup> Chapter 23, Division 3, Overlay Districts, SMC 23.59.010.

<sup>137</sup> SMC 23.59.010.B: "Property located within an overlay district . . . is subject both to its zone classification  
regulations and to additional requirements imposed for the overlay district." See also, SMC 23.60.014;  
23.60A.016.A.

1 zone are specifically modified by the SMP). In particular, uses must be permitted in both the  
2 Shoreline District and the underlying zone.<sup>138</sup>

3 **B. No moorage use at Terminal 5 is currently lawful except as part of cargo**  
4 **terminal use – Port Issue 4 and Foss Issue 4**

5 The permits for Terminal 5 authorize a cargo terminal use, the cargo terminal permit for  
6 that site excluded general moorage,<sup>139</sup> and there is no permit allowing moorage independent of  
7 the cargo terminal use. Port Issue 4 and Foss Issue 4 contend that moorage not associated with  
8 the cargo terminal use is allowed without additional permits because provisions of the SMP  
9 authorize moorage outright and the SMA only regulates “substantial development” and no permit  
10 is required for activity that is not substantial development, or because the SMA preempts local  
11 permits other than a substantial development permit. If these arguments were correct, the  
12 Interpretation would be superfluous, but all of these arguments are wrong.

13 The SMP allows “boat moorage” over water if it is allowed in the shoreline  
14 environment;<sup>140</sup> commercial moorage is allowed as a principal use in the UI environment and in  
15 the IG1 zone.<sup>141</sup> The Port claims this is sufficient to authorize the use because no “substantial  
16 development permit” is required to use an existing structure, since there is no new substantial  
17 development. DPD agrees there is no new substantial development and so no substantial  
18 development permit is required;<sup>142</sup> however, the law is clear that the SMA and SMP still regulate  
19 the proposed use and that a City permit (not a substantial development permit) is required.

20 <sup>138</sup> SMC 23.60.014.A; 23.60A.016.B.

21 <sup>139</sup> See, Statement of Facts Subsection A.

22 <sup>140</sup> SMC 23.60A.090.A.1.

23 <sup>141</sup> SMC 23.60A.482 and Table A; SMC 23.50.012.A. and B. and Table A for 23.50.012.

<sup>142</sup> A “substantial development permit” a special permit created by SMA for “development” in the shorelines of the state. This permit is issued by the local government in which the property is located and sent to the Washington Department of Ecology when “substantial development” occurs, as defined by the SMA and the Washington Administrative Code for the Department of Ecology. (RCW 90.58.140.) Such a permit is appealable to the Shoreline Review Board. (RCW 90.58.180.)

1 Uses are regulated by the SMA and master programs even when no substantial development  
2 is required, due to the Act's particular focus on regulating uses. The Washington Supreme Court has  
3 held: "[The] statutory language evinces a policy which allows regulation of uses on shorelines,  
4 not just regulation of statutorily defined 'developments' on shorelines."<sup>143</sup> Thus, the Port's  
5 argument that "use" in the SMA is limited to "use" in the definition of "development"<sup>144</sup> is  
6 wrong. The Court specifically held that regulating uses that do not require substantial  
7 development permits is a requirement of the Act:

8 Thus, Clam Shacks concludes there can be no use control,  
9 regardless of the master program, unless the activity involved  
10 constitutes a development. We disagree. Such construction would  
11 frustrate the declared policy of the SMA.<sup>145</sup>

12 The City's SMP implements this stating:

13 No development shall be undertaken and no use, including a use  
14 that is located on a vessel, shall be established in the Shoreline  
15 District unless the Director has determined that it is consistent with  
16 the policy of the Shoreline Management Act and the regulations of  
17 this chapter. This restriction shall apply even if no substantial  
18 development permit is required.<sup>146</sup>

19 The SMP further states: "A . . . use that does not meet the definition of substantial  
20 development . . . shall comply with the Shoreline Management Act, the provisions of this Chapter  
21 23.60A, and any other regulatory requirements."<sup>147</sup>

22 The "other regulatory requirement" is that a use permit be obtained, including zoning review  
23 to ensure that the use is consistent with the regulations of the SMP and other applicable  
development standards. This is reflected in SMC 23.40.002, SMC 23.76.004 Table A and SMC

<sup>143</sup> *Clamshacks v. Skagit County*, 109 Wn.2d 91, 95, 743 P.2d 265 (1987) (emphasis added).

<sup>144</sup> Port's Opposition to DPD's Motion to Dismiss Claims, p. 8, lines 15-20.

<sup>145</sup> *Clamshacks v. Skagit County*, 109 Wn.2d at 95.

<sup>146</sup> SMC 23.60.016/SMC 23.60A.012 (emphasis added).

<sup>147</sup> SMC 23.60A.020.A.2.b (emphasis added).

1 23.76.006. The procedure for obtaining a permit is generally provided in Chapter 23.76. And since  
2 requirements for both the underlying zone and the SMP overlay district apply,<sup>148</sup> compliance with  
3 the regulations of the underlying zone to establish the commercial moorage use under SMC 23.  
4 50.012, the standards for the underlying IG1 zone, would require application of SMC 23.40.002,  
5 even if the SMP did not.

6 SMC 23.40.002.A. requires obtaining a standard Master Use Permit, the DPD permit  
7 required to establish or change a use:

8 A. The establishment or change of use of any structures, buildings or  
9 premises, or any part thereof, requires approval according to the  
10 procedures set forth in Chapter 23.76, Procedures for Master Use  
Permits and Council Land Use Decisions [listing exceptions  
inapplicable here].<sup>149</sup>

11 Where a use is permitted outright under the applicable zoning, the approval is a “Type I” decision.  
12 Even uses approved as Type I decisions require permits.<sup>150</sup> Therefore, the Port needs an additional  
13 permit to establish any use that is not part of the cargo terminal use already permitted. Paul Meyer,  
14 the Port’s Manager of Seaport Environmental Programs (permit acquisitions), agreed that the City  
15 can require use permits when there is no construction.<sup>151</sup>

16 The Port has previously argued that this provision does not apply to navigable waters,<sup>152</sup> but  
17 this is wrong. The water adjacent to the pier is part of “the premises,” as evidenced by the SMA  
18 definition of shorelines regulated by the Act,<sup>153</sup> by the land use permit for Terminal 5, which  
19

20 \_\_\_\_\_  
21 <sup>148</sup> SMC 23.59.010.B and 23.60A.016.B.

22 <sup>149</sup> SMC 23.40.002.A and B.

23 <sup>150</sup> Table A for SMC 23.76.004, Type I, second entry “uses permitted outright”; 23.76.006.B.2 (“Establishment or  
change of use for uses permitted outright”).

<sup>151</sup> Attachment G, Meyer, p. 6:22-24.

<sup>152</sup> Port’s Opposition to DPD’s Motion to Dismiss Claims, p. 8, lines 8-13.

<sup>153</sup> RCW 90.58.030(2) (e) “Shorelines” means all of the water areas of the state, including reservoirs, and their  
associated shorelands, together with the lands underlying them . . . .” (emphasis added).

1 includes “shipping berths [in the water] and wharf structures, including work in the waterway,<sup>154</sup>  
2 and the lease to Foss describing the “premises.”<sup>155</sup>

3 And even if “the premises” did not include the water controlled by the Port, the “use of the  
4 structure” – the pier – triggers SMC 23.40.002.A so that what ties up to the pier is consistent with  
5 the existing permit for the use of the pier. Therefore, this Port argument is meritless.

6 The Port also claimed this permit process was preempted by the SMA.<sup>156</sup> Not only does the  
7 *Clam Shacks* decision refute this, but the Act expressly states it does not preempt local permitting  
8 requirements:

9 Nothing in this chapter shall obviate any requirement to obtain any  
10 permit, certificate, license, or approval from any state agency or  
local government.<sup>157</sup>

11 Therefore, this argument is meritless, too. The Port must apply for a use permit to  
12 establish uses not authorized under the cargo terminal permit for Terminal 5.

13 **VI. THE MEANING OF THE CARGO TERMINAL DEFINITION - FOSS ISSUES 1,  
14 2 AND 3 AND PORT ISSUE 1**

15 Determining the meaning of the City’s cargo terminal definition requires both defining  
16 the terms of the definition and setting them in context within both the definition and the SMP.  
17 The cargo terminal definition describes what happens to “goods” and container cargo. “Goods”  
18 is a broad term in common parlance, and becomes narrower in the context of its maritime  
19 definition. Determining what happens to the goods at the site of the cargo terminal aids in  
20 refining the definition and shows the City’s definition is similar to the general definitions of  
21 cargo: goods that are transported. Comparing “goods” to the term “container cargo” and to the

22 <sup>154</sup> Ex. F33, Analysis and Decision p. 4 (W-19); *see also*, the bollard location in the waterway for the cargo terminal  
use.

23 <sup>155</sup> Ex. F 36, including the exclusive use berth area in Ex. B and DNR agreement Ex.C to lease. *See also*,

<sup>156</sup> Opposition to DPD’s Motion to Dismiss, p. 9, lines 5-6.

<sup>157</sup> RCW 90.58.360 (emphasis added).

1 definitions of cargo in SMC 23.60.906 and applying the meaning cargo in the maritime trade  
2 helps further refine the nature of the goods in the context of “cargo terminal.” Finally, “goods” as  
3 it is used in “cargo terminal” must be set in the context of the SMP to differentiate the cargo  
4 terminal use from other uses – “goods” at a cargo terminal means paying cargo, not stores,  
5 provisions or gear, because those are common to all moorage sites.

6 **A. Identifying the definition**

7 The Shoreline District is an “overlay district.” Property in an overlay district is subject  
8 “both to its zone classification regulations and to additional requirements imposed for the overlay  
9 district.”<sup>158</sup> The Shoreline District regulations are found in the Shoreline Master Program, Ch.  
10 23.60/23.60A.<sup>159</sup> As a result, the Land Use Code has two definitions of cargo terminal, one in SMC  
11 23.84A.038 and one in SMP 23.60.906/ 23.60A.906. Foss’s Appeal<sup>160</sup> asserts all these definitions  
12 apply, and the Hearing Examiner concurred, ruling that 23.60A.906 “does not differ materially from  
13 that in SMC 23.84A,” so it is appropriate to consider the definition in SMC 23.84A.038, as well as  
14 2360.906/23.60A.906.<sup>161</sup> The Port does not dispute this: Paul Meyer admitted (twice) that the  
15 definition of cargo terminal in SMC 23.84A is “the same” as the definition in the SMP, and he  
16 relied on it in making his own determinations for the Port.<sup>162</sup>

17 The definitions state:

18 **23.84A.038 – “T”**

19 \* \* \*

20 “Transportation facility” means a use that supports or provides a  
means of transporting people and/or goods from one location to

21 <sup>158</sup> SMC 23.59.010.B.

22 <sup>159</sup> The regulations in SMC 23.60 were in effect when the Interpretation was written and the regulations in SMC Ch.  
23.60A are currently in effect.

23 <sup>160</sup> Amended and Restated Notice of Appeal, page 5, lines 23-25 (Issue 1).

<sup>161</sup> Order on Motion to Dismiss, page 1, ¶ 6.

<sup>162</sup> Hearing Examiner Record, Day 3, Tape 2 starting at 40:25 and through 44:20; Attachment G Meyer, p. 68:4-19  
and 69:19 to 70:8.

1 another. Transportation facilities include but are not limited to the  
2 following:

3 1. "Cargo terminal" means a transportation facility in which  
4 quantities of goods or container cargo are, without undergoing any  
5 manufacturing processes, transferred to carriers or stored outdoors  
6 in order to transfer them to other locations. Cargo terminals may  
7 include accessory warehouses, railroad yards, storage yards, and  
8 offices.

9 **23.60A.906 - Definitions — "C"**

10 "Cargo terminal" means a "transportation facility" use in  
11 which quantities of goods or container cargo are stored without  
12 undergoing any manufacturing processes, transferred to other  
13 carriers, or stored outdoors in order to transfer them to other  
14 locations. Cargo terminals may include accessory warehouses,  
15 railroad yards, storage yards, and offices.

16 **23.60.906 - Definitions — "C"**

17 "Cargo terminal" means a "transportation facility" use in  
18 which quantities of goods or container cargo are stored without  
19 undergoing any manufacturing processes, transferred to other  
20 carriers or stored outdoors in order to transfer them to other  
21 locations. Cargo terminals may include accessory warehouses,  
22 railroad yards, storage yards, and offices.

23 **B. What are "Goods"**

"Goods" are not defined in Title 23. The definition cited in the Interpretation uses the plural of the word "good," which is how the word is used in the definition of cargo terminal:

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

This is consistent with the fuller definition in Webster's Third New International Dictionary,<sup>163</sup> which is the source for the dictionary used in the Interpretation:

**3 . . . b goods pl** : tangible movable personal property having intrinsic value usu. excluding money and other choses in action but

<sup>163</sup> The dictionary used by the Washington Supreme Court; Appendix to GR 14.

1 sometimes including all personal property and occas. including  
2 vessels and even industrial crops or emblements, buildings, or  
3 other things affixed to real estate but agreed to be severed :  
chattels, wares, merchandise, food products, chemical compounds,  
and agricultural products < household ~s> <baked ~s>.

4 The *Dictionary of Maritime and Transportation Terms*<sup>164</sup> is more nuanced and includes the idea  
5 of shipping:

6 Common term indicating moveable property, merchandise, or  
7 wares. All materials that are used to satisfy demands. Whole or  
8 part of the cargo received from the shipper, including any  
equipment supplied by the shipper.

9 All of these definitions include the more restrictive term “merchandise.” Determining  
10 whether the scope of “goods” in “cargo terminal” is so restricted requires further analysis of the  
11 definition.

### 11 C. What must happen with the goods

12 What happens with the goods is the key to determining whether the use is a cargo  
13 terminal use. Reading the City’s definitions of cargo terminal, it is clear that the goods must be  
14 on the site “in order to transfer them to other locations.” Each of the definitions says this.

15 Foss’s argument that a new comma in SMC 23.60A.906 creates a material difference in  
16 the meaning of that definition is meritless. The Hearing Examiner has ruled that all definitions  
17 apply, as Foss itself admits.<sup>165</sup> Therefore, the activity in the Shoreline District must comply with  
18 the definitions for the underlying zone, as well as the definitions in the SMP, so the definition in  
19 23.84A.038 must be applied. That definition most clearly reflects that transferring goods to  
20 other locations is the central purpose of the cargo terminal use.

22 \_\_\_\_\_  
23 <sup>164</sup> PSK Ex. 6 Jeffrey W Monroe, *Dictionary of Maritime and Transportation Terms*, Cornell Maritime Press (2005).

<sup>165</sup> Foss Opposition to Motion to Dismiss p. 4:23 to 5:1 and note 3: definitions in 23.84A and the SMP (23.60.906 and 23.60A.906) “cannot be said to differ in any material way.”



1 Furthermore, in statutory construction the “last antecedent rule” Foss cites does not  
2 override statutory context.<sup>166</sup> The basic rule of statutory construction is to consider a definition in  
3 its context: if the phrase “in order to transport them [the goods] to other locations” did not apply  
4 to the phrase “in which quantities of goods or container cargo are stored,” then merely storing  
5 goods would be sufficient to be a “cargo terminal” use. This is not consistent with the structure  
6 of the Land Use Code and the SMP for three reasons:

7 First, a cargo terminal is a “transportation facility” use, whereas storage is a separate use  
8 category – “storage.”<sup>167</sup> The same activity cannot be in two use categories. In order to  
9 differentiate the uses, the phrase “in order to transfer them to other locations” must apply to  
10 “storage” in the transportation facility use.

11 Second, a transportation facility is one that “supports or provides a means of transporting  
12 people and/or goods from one location to another.” “Storage” per se<sup>168</sup> does not support  
13 transporting goods, so the phrase “in order to transfer them to another location” must apply to the  
14 storage; mere colocation of moorage with a storage facility is not sufficient.

15 Third, to be a cargo terminal in the UI environment, the cargo terminal must be water-  
16 dependent (a use that cannot exist without a waterfront location) or water-related (e.g., the use  
17 has a functional requirement to be on the water due to shipment of materials by vessel, storage of  
18  
19

---

20 <sup>166</sup> “We do not apply the [last antecedent] rule if other factors, such as context and language in related statutes,  
21 indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation.”  
*State v. Bunker*, 169, Wn.2d 571, 578, 238 P.2d 487 (2010).

22 Norman Singer, *2A Sutherland on Statutory Construction*, § 47:33 (p. 501) (7<sup>th</sup> ed. 2014): “The last antecedent rule  
is merely another aid to discover legislative intent or statutory meaning, and is not inflexible or uniformly binding.  
In general, then, where the sense of an entire act requires that a qualifying word or phrase apply to several preceding  
or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent.”

23 <sup>167</sup> SMC 23.84A.036; compare Table A for 23.60A.482, subsection M with subsection N.2.

<sup>168</sup> SMC 23.84A.036.

1 material that is transported by vessel).<sup>169</sup> The only way that will occur is if the goods being  
2 stored are also being transferred by a vessel.<sup>170</sup>

3 Finally, if there were any doubt, the legislative history of SMC 23.60A.906 shows that  
4 adding the comma was not intended to alter the meaning of cargo terminal from the prior  
5 meaning.<sup>171</sup>

6 Thus, the Interpretation correctly states the “unifying theme” of the cargo terminal  
7 definition is that “the goods are at the cargo terminal in order to be transferred to other  
8 locations.”<sup>172</sup>

9 Transferring goods is also consistent with the standard definitions of “cargo.” Webster’s  
10 Third New International:<sup>173</sup>

11 The lading or freight of a ship, airplane, or vehicle: the goods,  
12 merchandise or whatever is conveyed.

13 Dictionary of Maritime and Transportation Terms:<sup>174</sup>

14 Merchandise or goods accepted for transportation by ship. The  
15 commodities or goods that are transported in commercial  
16 enterprise, domestic trade or international trade by a common  
17 carrier.

18 Black’s Law Dictionary:<sup>175</sup>

19 Goods transported by a vessel airplane, or vehicle; FREIGHT  
20 - General cargo – goods and materials of various types  
21 transported by carriers . . .

22 <sup>169</sup> SMC 23.60.840.D.5/23.60A.482.A.2.a and Table A for 23.60A.482, subsection N.2; SMC 23.60A.944.

23 <sup>170</sup> See also, Attachment D, McKim, p. 144:14 to 145:24.

<sup>171</sup> DPD Ex. 31 (showing that version 2 of the draft ordinance was submitted to Council without the comma) and  
DPD Ex. 33 (a memo stating in ¶ 4 that the changes shown on the substitute bill are housekeeping and not intended  
to be substantive, and showing the addition of the comma).

<sup>172</sup> Interpretation, p. 4, ¶ 6.

<sup>173</sup> Attachment C.

<sup>174</sup> PSK Ex. 6, p. 72.

<sup>175</sup> PSK Ex. 7, p. 1.

1           Therefore, the Interpretation is correct that goods must be transferred by a  
2 vessel to be a cargo terminal use in the Shoreline District.

3           **D.     The purpose of transferring goods at a cargo terminal**

4           As set out in the statement of facts, Foss loaded the exploratory oil rig and accompanying  
5 vessels with food, supplies for the ship, instruments, drills, and pipe that the exploratory oil rig  
6 will use in its mission by placing it into the sea bed. Appellants claim that what they loaded (and  
7 intend to load in the future) are the type of “goods” the City intends to be transported from cargo  
8 terminals. The City’s definitions of other types of cargo, the common usage of maritime trade,  
9 and the legislation taken as a whole show Appellants are wrong; the Interpretation correctly  
10 determines that loading only these materials is not a cargo terminal use.

11           **1.     City cargo definitions**

12           The Shoreline Master Program in effect when the Interpretation was written defined three  
13 types of cargo:

14                     “Cargo, breakbulk” means cargo packed in separate  
15 packages or individual pieces of cargo and load, stored and  
unloaded individually.

16                     “Cargo, containerized” means cargo packed in a large  
17 (typically eight (8) feet by eight (8) feet by twenty (20) feet  
trunklike box and loaded, stored and unloaded as a unit.

18                     Cargo, neobulk” means cargo which has historically been  
19 classified as generalized cargo, such as grain, oil, and automobiles,  
but now is moved in bulk movements usually in specialized  
20 vessels.<sup>176</sup>

21           These are the types of cargo the City expected to be loaded at a cargo terminal. The definitions  
22 were enacted as part of the major revision of the SMP in 1987, Ordinance 113444,<sup>177</sup> creating

23           <sup>176</sup> SMC 23.60.906.

<sup>177</sup> DPD Ex. 8, p. 1 and 171-172.

1 Chapter 23.60, when “cargo terminal” was added to the SMP. The Examiner may consider these  
2 definitions and this ordinance in determining the meaning of the cargo terminal definition  
3 because they are part of the SMP’s context and subject to judicial notice:

4 In addition, background facts of which judicial notice can be taken  
5 are properly considered as part of the statute’s context because  
6 presumably the legislature also was familiar with them when it  
7 passed the statute.<sup>178</sup>

8 As part of that update, in 1983 City prepared *An Assessment of the Future Needs of Water-*  
9 *dependent Uses in Seattle - Seattle Shoreline Master Program Revision Project*  
10 (“Assessment”),<sup>179</sup> which is also part of the context of the SMP that was in effect when the  
11 Interpretation was written, and relates to the terms used in the 1987 revision. The Assessment  
12 specifically identified the uses classified as water-dependent in the SMP, including:

13 Cargo handling facilities [sic] including container terminal, general  
14 cargo facilities (breakbulk, neobulk, dry and liquid bulk), and tug  
15 and barge operations.<sup>180</sup>

16 These are examples of the nature of the goods the City anticipated being transferred at a cargo  
17 terminal – they are commercial goods, rather than goods used by the ship itself. For example, in  
18 describing cargo handling facilities, the Assessment notes, “A majority of consumer goods  
19 destined for Alaska passes through Seattle.”<sup>181</sup> The report refers to the “commerce” and “world  
20 trade” that is enabled through cargo handling facilities<sup>182</sup> and sets out the “types of cargos” that  
21 are handled: containerized, breakbulk, grain, petroleum, automobiles, steel and barge traffic

22 <sup>178</sup> In the Matter of the Appeal of *Keith D. and Lynnette Y. T. Senzel*, Hearing Examiner File: MUP-05-036 (P),  
23 February 6, 2006, Applicable Law, ¶ 23, citing “*State Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146  
24 Wn.2d 1, 9-10, 43 P.3d 4 (2002), citing 2A Norman J. Singer, *Statutes and Statutory Construction* section 48A:16,  
25 at 809-10 (6th ed. 2000) (extracts from R. . Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by*  
26 *Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited*, 33 Hastings L.J. 187 (1981)).

<sup>179</sup> DPD Ex. 9.

<sup>180</sup> DPD Ex. 9, p. I-1. See also, p. II-1.

<sup>181</sup> DPD Ex. 9, p. II-1 ¶ 3 (emphasis added).

<sup>182</sup> DPD Ex. 9, p. II-1 and *passim*.

1 (dry).”<sup>183</sup> It has a special section on container terminals, such as Terminal 5, which is  
2 specifically noted.<sup>184</sup> Breakbulk cargo is described as “commodities.”<sup>185</sup> Neobulk is described  
3 as “autos on auto ships” and “steel in steel ships,” and “lumber in lumber ships.”<sup>186</sup> These are  
4 the types of goods the City anticipated would be loaded at cargo terminals when the City first  
5 defined a cargo terminal.

6 And, the Assessment differentiates cargo handling from moorage for fishing vessels.<sup>187</sup>  
7 The Assessment identifies fishing vessel moorage as occurring at a “general cargo terminal” only  
8 when there is accessory cold storage and otherwise is located at “commercial moorage.”<sup>188</sup>

9 These types of cargo, identified by the City in the mid-1980s, are same types of cargos  
10 identified by Linda Styrk, Managing director of the Maritime Division of the Port, in 2015, as  
11 part of the description of non-containerized cargo she provided to DPD as part of the  
12 interpretation.<sup>189</sup> She also identified breakbulk, and ro-ro (roll-on/roll-off automobile cargo) to  
13 the Port commissioners 2014 in connection with possible interim uses for Terminal 5 while it is  
14 not being used for containerized cargo.<sup>190</sup> She, too, distinguished these cargo uses from  
15 “commercial moorage,” which she noted is being provided for the fishing fleet at Terminal 91.<sup>191</sup>  
16 And she distinguished cargo uses, such equipment for a LNG plant construction, from a “home  
17 porting opportunity that links to moorage and provisioning of commercial vessels that are  
18  
19

20 <sup>183</sup> DPD Ex. 9, Table 2 page 11-6.

<sup>184</sup> DPD Ex. 9, p. II-7.

<sup>185</sup> DPD Ex. 9, p. 11-8.

<sup>186</sup> DPD Ex. 9, p. II-10.

<sup>187</sup> As does Resolution 27618 (adopted in 1987), DPD Ex. 4, Attachment A, pp.26-27; *compare*, Guideline E8(a)  
(cargo handling) with Guideline E8(d) (moorage)

<sup>188</sup> DPD Ex. 9, p.IV-4¶ 1 (under Existing Conditions) and IV-5, ¶ 1.

<sup>189</sup> Foss Ex. 20, p.1.

<sup>190</sup> DPD Ex. 23 p. 4:6 to 5:12

<sup>191</sup> DPD Ex. 23, p. 5:22 to 6:2.

1 involved in the off-shore activity up in Alaska,”<sup>192</sup> and which she described as an opportunity to  
2 “moor multiple vessels from this exploration activity up in Alaska.”<sup>193</sup>

3 That fleet of vessels would include exploration, icebreakers,  
4 provisioning, environmental response tugs, barges, again for  
5 seasonal operations in Alaska.”<sup>194</sup>

## 6 2. “Cargo” in Maritime Usage

7 All of the maritime professionals, O’Halloran, Johnson, Knudson, and Gallagher, agree  
8 that “cargo” is a broad term for what is loaded or unloaded on a vessel, with a subset of stores,  
9 provisions and gear, which serve the ship; O’Halloran testified that every boat will have stores,  
10 provisions and gear, including pleasure craft, such as a motorboat. Gallagher agreed. Knudson and  
11 Gallagher agree there is a fourth cargo category: paying cargo, which pays for the operation of  
12 the ship. Styck the Director of the Maritime Division, differentiated that cargo from the  
13 “provisions and supplies for the ship’s crew and the vessel’s work, which may be packaged  
14 similarly, but are loaded into a different area.”<sup>195</sup>

## 15 3. “Cargo terminal” definition meaning

16 If “cargo terminal” just means a place where goods that are stores, provisions and gear  
17 are put on a vessel and carried somewhere, then a cargo terminal is indistinguishable from every  
18 other use that includes moorage, because boats moored at passenger terminals, commercial  
19 moorages, and even at recreational marinas also load and carry stores, provisions and gear,  
20 Englin and Gallagher agreed. The only difference will be a difference in scale, as Gallagher  
21

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22 <sup>192</sup> DPD Ex. 23, p. 6:8-12.

<sup>193</sup> DPD Ex. 23, p. 14:14-16.

<sup>194</sup> DPD Ex. 23, p. 14: 16-18.

<sup>195</sup> Foss Ex. 20, p.1.

1 conceded.<sup>196</sup> The Interpretation (Conclusion 7) found that what occurs at moorages generally is  
2 not sufficient to be a cargo terminal use.

3         Something other than scale must be different to create a cargo terminal, and that  
4 difference is the phrase in the definition: “in order to transfer them [the goods] to other  
5 locations.” This states the purpose of the cargo terminal use, and makes it different from other  
6 uses. Transfer has several meanings:

7                 **1a** : to carry or take from one person or place to another:  
8                 TRANSPORT, REMOVE . . . **b** : to remove or send to a different  
9                 location esp. for business, vocational or military purposes . . . **c** : to  
10                 cause to pass from one person or thing to another : TRANSMIT<sup>197</sup>

11         If the purpose, or mission, or job of the vessel must be to transfer the goods, rather than  
12 to use them for the vessel’s own purpose, then the goods that are transferred must be different  
13 from what is used or consumed for the vessel’s own purposes. Gallagher agreed that the  
14 “mission” of a cargo vessel is to carry the fourth type of cargo – paying cargo.

15         But the primary purpose of a drilling rig is drilling, Englin testified.<sup>198</sup> Gallagher testified  
16 that the Polar Pioneer is a “highly specialized unit” and that its “mission” and its “job” is to drill  
17 for oil. He testified the stores, provisions and goods that are loaded on it and on the  
18 accompanying vessels are there for that mission. So the goods on the oil rig and its  
19 accompanying vessels are not for the mission of transferring goods to another location. Even  
20 though the stores, provisions and gear on the oil rig and accompanying vessels may be  
21 transferred among them, these goods will be used for the operation of all the vessels on their

22 <sup>196</sup> Gallagher, p. 94:18 to 95:9.

23 <sup>197</sup> Attachment C, *Webster’s Third New International Dictionary*. According to the explanatory notes (included in the Attachment), the sequence of the senses of a word are listed in order from earliest historical use.

<sup>198</sup> Attachment F, Englin, p. 26:14-16.

1 collective mission to drill for oil. They are not the goods intended for the mission of being  
2 transferred to another location under the cargo terminal definition.

3 Therefore, the Interpretation (Conclusion 7) is correct that merely putting provisions on  
4 tugs is not sufficient to be a cargo terminal use. The additional detail that stores, provisions and  
5 gear were loaded onto the Polar Pioneer and several other accompanying vessels adds  
6 information, but does not change the result of the Interpretation.

7 **E. “Historic actions” do not alter the definition of cargo terminal**

8 Appellants argue that “historic actions” by DPD expand the definition of “cargo  
9 terminal” to include moorage or lay berthing for vessels that are not engaged (currently or  
10 recently) in cargo terminal activity. The Examiner’s Order on DPD’s Motion to Dismiss allowed  
11 this line of argument for limited purposes. The Order states:

12 Evidence and argument concerning past activities deemed by the  
13 City to be a cargo terminal use may be offered at hearing for this  
purpose.<sup>199</sup>

14 Similarly, on Issue 7, rejecting Foss’s claim that under *Nykreim* the City’s failure to  
15 appeal a bollard replacement permit barred the City from issuing the Interpretation, the Order  
16 states:

17 Foss also argues that the City’s prior permitting actions are  
18 relevant to the appeal, and as noted above, the City’s past  
determinations of what constitutes a cargo terminal use may aid the  
19 Examiner’s understanding.<sup>200</sup>

20 The evidence shows that the City has approved permits for a variety of activities at  
21 Terminal 91, some in connection with the cargo terminal there and others as new uses (passenger  
22

23 <sup>199</sup> Order, p. 3, paragraph 14(emphasis added).  
<sup>200</sup> Order, p. 2, paragraph 10 (emphasis added).



1 terminal, public facilities for fire and rescue boats). However, no evidence exists of  
2 “determinations” by DPD approving the general moorage the Appellants claim.

3 McKim testified that approvals on permits are shown on the face of the permit describing  
4 the permitted work, and approvals on land use decisions are found in the summary of the proposed  
5 action. The Appellants adduced no evidence showing such an approval for general moorage  
6 broader than what the Interpretation authorized as an accessory use: “lay berthing of vessels  
7 otherwise used for transporting foods in the stream of commerce.”<sup>201</sup>

8 Instead, Port permit manager Meyer testified about his understanding of a series of land  
9 use decisions in which the background description of activities on the site included large vessel  
10 moorage as part of the cargo terminal use. While he claimed this authorized general moorage as  
11 a part of the cargo terminal use, he conceded that these background statements could be read as  
12 confined to the meaning in the Interpretation. And indeed, this is the better reading of the  
13 language.

14 In addition, there is no evidence that the DPD writer of any of the decisions determined that  
15 the background statements represent approved uses; planner Perkowski testified he did not do so  
16 when he wrote decisions.<sup>202</sup> In at least one instance, it is clear that the distinctive wording of the  
17 background description in the decision for the passenger terminal permit came from the Port’s  
18 SEPA determination.<sup>203</sup> Nor is there any evidence that a zoning reviewer reviewed these  
19 background statements to verify their accuracy: the evidence is that the zoning reviewer reviews the  
20 standards for the proposed use, and the background statements in the land use decision are written  
21

22  
23 <sup>201</sup> Interpretation, Conclusion 11.

<sup>202</sup> Testimony August 24, Tape 4 at 42:12 to 42:30.

<sup>203</sup> Compare Foss Ex. 89, p. 2, Project Background ¶1, and DPD Ex. 36, DEIS p. 1-3 ¶ 2 and p. 2-3, ¶¶ 2 and 3.

1 after zoning review was done.<sup>204</sup> No basis exists for relying on these descriptions as evidence that  
2 DPD actually approved the use of general moorage at Terminal 91, much less at Terminal 5.

3 Similarly, there is no basis to conclude that the photographs produced by the Port show that  
4 DPD “deemed” the activities depicted were a cargo terminal use. DPD Code Compliance Manager  
5 Lumsden testified that in carrying out her code compliance responsibilities both in 1987-88 and  
6 currently, she understood that DPD investigates based on complaints or observed public safety  
7 hazards. If no one question naval ships or oil rigs, DPD does not independently investigate, unless  
8 DPD is aware of a health or safety issue – there is not enough staff. In addition, the naval vessels  
9 may have been authorized to moor by the Coast Guard based on a claim of sovereign imunity form  
10 SMP regulations.<sup>205</sup> Appellants adduced nothing more than pictures, from which no inferences can  
11 be made.

12 Most importantly, none of the photographs are of moorage of non-cargo terminal vessels at  
13 Terminal 5, the actual site that is subject to the Interpretation.<sup>206</sup>

14 In addition, the evidence shows that the land use decision actually issued for Terminal 5,  
15 approving a major expansion of the cargo terminal use, expressly relied on SMP Guidelines for  
16 cargo handling facilities and do not cite to or rely on Guidelines for general moorage. Nothing in  
17 the record supports transferring background remarks or photos with respect to Terminal 91 to  
18 Terminal 5.

19 Lastly, the evidence clearly shows that in approving the substantial development permit  
20 exemption for repair and maintenance of the bollards at Terminal 5 in February, planner Perkowski  
21

22 <sup>204</sup> Testimony August 24, Tape 4 at 42:32 to 43:05.

<sup>205</sup> See, *Friends of the Earth v. U.S. Navy*, 841 F2d 927 (1988) (rejecting the Navy’s sovereign immunity claim only with respect to the environmental provisions in a shoreline master program).

23 <sup>206</sup> SMC 23.88.020.A: “A decision by the Director as to the meaning, application, or intent of any development regulation in Title 23 . . . as it relates to a specific property. . . .” (emphasis added).

1 was not approving the oil rig as a cargo terminal use. Perkowski testified that is not a part of the  
2 exemption decision and that he lacked authority to make such a use determination. Use  
3 determinations were a condition of the approval that would be made as part of the building permit  
4 process, he said. The Port never submitted documents to him that said the oil rig would be there,  
5 Blomberg, the Port applicant, did not ask Perkowski to make such a determination, and at the time  
6 Perkowski issued the exemption, Blomberg did not think that Perkowski had made such a  
7 determination.

8 No record of past actions shows approval of general moorage as part of a cargo terminal use,  
9 especially at Terminal 5.

10 **VII. GENERAL MOORAGE IS NOT ACCESSORY TO A CARGO TERMINAL**  
11 **UNDER THE SMP - FOSS ISSUES 5 AND 6 AND PORT ISSUES 5 (PART RE**  
12 **INHERENT MOORAGE), 7 (PART) AND 8**

13 **A. Accessory uses**

14 The definition of an accessory use in the SMP is a “use which is incidental and intrinsic  
15 to the function of a principal use and is not a separate business establishment.”<sup>207</sup> The definition  
16 of incidental is “subordinate, nonessential or attendant in position of significance.”<sup>208</sup> The  
17 definition of intrinsic is “belonging to the inmost constitution or essential nature of a thing.”<sup>209</sup>

18 The Interpretation accepts that “lay berthing of vessels otherwise used for transporting  
19 foods in the stream of commerce may be regarded as incidental and intrinsic to the function of a  
20 cargo terminal.”<sup>210</sup> However, the Interpretation excluded vessels that were not of this type

21  
22 <sup>207</sup> SMC 23.60.940/23.60A.940.

23 <sup>208</sup> *Webster’s Third New International Dictionary.*

<sup>209</sup> *Id.*

<sup>210</sup> Interpretation, Conclusion 11.

1 because that would be a separate principal use, which is defined as a use that “has a separate and  
2 distinct purpose and function from other use on the lot.”<sup>211</sup>

3 The Port argues (Issue 7, part ) that the Interpretation’s logic means that cargo vessels  
4 could not in fact moor as an accessory use because that would not be “incidental” to the cargo  
5 terminal use. If the Port means mooring for the purpose of actually loading or unloading, DPD  
6 would concur that this is not incidental, that moorage is an inherent part of the cargo terminal use  
7 itself, otherwise the goods could not be transferred by a vessel to other locations – so it is part of  
8 the principal use, not an accessory use.

9 But the Interpretation addresses lay berthing before or after loading. This activity is  
10 “subordinate” to the purpose of the cargo terminal storing goods or transferring them to other  
11 carriers “in order to transport them to other locations.” Lay berthing of such vessels is also  
12 “intrinsic” to the extent that vessels that are there for this purpose may stay while they await their  
13 next load. However, it is not intrinsic for other vessels to lay berth at a cargo terminal because  
14 their presence is not part of the “essential nature” of the cargo terminal use to store goods or  
15 transfer them to other carriers “in order to transfer them to other locations.”

16 Since the Polar Pioneer and the accompanying vessels are not vessels engaged in cargo  
17 terminal activities, the Interpretation correctly determines that their lay berthing at Terminal 5  
18 cannot be considered an accessory use and this part of Port Issue 7 and Foss Issues 5 and 6  
19 should be rejected.

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<sup>211</sup> *Id.*, and SMC 23.60.960/23.60A.940.

1           **B. SMC 23.60A.090.B does not obviate the need to meet the standards for**  
2           **accessory use – Port issue 8**

3           The Port Issue 8 contends that pending SMC 23.60A.090.B obviates demonstrating a  
4 proposed accessory use meets the SMP definition of “accessory use” – “incidental and intrinsic”  
5 to the principal use. This claim misreads the Code and should be dismissed.

6           SMC 23.60A.090.B states (emphasis added):

7                   B. Any principal use allowed, allowed as a special use, allowed as  
8 a shoreline conditional use, or allowed as a Council conditional use  
9 in a specific shoreline environment may be an accessory use using  
10 the same process as if the use were the principal use, unless the use  
11 is prohibited as an accessory use in the shoreline environment. For  
12 the purposes of this subsection 23.60A.090.B, water-based  
13 airports, heliports, and helistops shall not be considered to be  
14 accessory to a principal use and are allowed pursuant to the  
15 applicable shoreline environment.

16           This means a use that meets the SMP accessory use definition can be allowed in the  
17 particular shoreline environment via the appropriate use process for that type of use in the zone. If  
18 the use is a “special use,” it can be an accessory use if it (1) meets the SMP definition of accessory  
19 use and (2) is approved as a special use, just meeting the accessory use standard is not enough.  
20 Under the Port’s reasoning, any use permitted outright in the shoreline environment could  
21 automatically qualify as an accessory use, even if that use were entirely unrelated to the principal  
22 use. If this section were interpreted as the Port proposes, the definition of “accessory use” would be  
23 surplusage throughout the SMP. “[A] code section should be construed so that each part is given  
effect with every other part. *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 275 P.2d 933  
(1954);”<sup>212</sup> Port issue 8 should be rejected.

24 \_\_\_\_\_  
<sup>212</sup> In the Matter of the Appeal of **Phinney Ridge Community Council, et al.**, **Hearing Examiner File: MUP-07-022(W)/W-06-003**, October 29, 2007, Analysis, ¶ 3.

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**VIII. FOSS ISSUE 15**

Foss Issue 15 asserts an error in the Interpretation concerning the Director’s authority to define unlisted uses, but does not refer to a specific section of the Interpretation, and for this reason the Examiner declined to grant DPD’s Motion to Dismiss Foss Issue 15. DPD assumes that Foss Issue 15 refers to Interpretation, Conclusion ¶ 8. The legal analysis in that paragraph is self-explanatory: the authority granted to the Director in SMC 23.42.010 expressly does not apply to regulations in SMC Chapter 23.60/60A, because those provisions are in Subtitle III, Division 3 of the Code, and the authority in SMC 23.42.010 applies solely to Subtitle III, Division 2. This issue should be dismissed.

**IX. THE INTERPRETATION DOES NOT IMPROPERLY CONSIDER THE  
ACTIONS OF VESSELS AWAY FROM THE SITE OR INTERFERE WITH THE  
OPERATION OF VESSELS - PORT ISSUES 5 (PART) AND 7 (PART) AND  
FOSS 18**

Appellants assert the City cannot regulate which vessels use the moorage that is created when a cargo terminal use is authorized, because it improperly makes a “vessel’s right to moor” dependent on what the vessel does when it is away from the pier and interferes with the operation of vessels under SMP 23.60.018 and 23.60A.018. Both arguments are wrong.

The SMA and the City’s SMP regulate what use its owner makes of Terminal 5 – it is a cargo terminal, and only activities consistent with that use are allowed there. The owner cannot use the property for moorage that is inconsistent with the cargo terminal use without obtaining an additional permit for mooring other types of vessels: commercial moorage, or passenger terminal, or recreational moorage or public facility moorage, etc. The Port’s argument is like saying if a grocery store owner has a permit allowing accessory parking for the grocery store, she should be able to also rent out the parking stalls for general paying parking for all cars whose

1 owners are not shopping at the store without getting an additional permit for principal use  
2 parking; otherwise, under the Port's argument the City's regulations would compromise a  
3 "driver's right to park" or a "driver's right to shop," because the lawfulness of the parking  
4 depends on what the car's owner intends to do, shop at the grocery store or do business  
5 elsewhere.

6 But in fact, the regulations regulate the use of the property, and it is the property owner's  
7 choice of use that affects what the users can do. Many types of facilities can have several  
8 different functions and different customers, depending on the owner's choice - the owner of a  
9 retirement home or a domestic violence shelter (both residential uses) might want to turn the  
10 facility into a hotel (a lodging use), which would require new use permits. The permit directs  
11 how the property can be used, at the owner's choice.

12 The SMA and SMP regulate the use of the shoreline, not a "vessel's right to moor."  
13 Owners of property get the appropriate use permit to authorize certain types of vessels to moor at  
14 the site - nothing prevents the Port from getting the appropriate permits so their property can  
15 provide a variety of moorage opportunities, as the Port has done, somewhat, for Terminal 91.

16 SMC 23.60.018/23.60A.018 states in part:

17 Except as specifically provided otherwise, the regulations of this  
18 Chapter 23.60A do not apply to the operation of boats, ships and  
19 other vessels designed and used for navigation, other than moorage  
20 of vessels and uses on vessels unrelated to navigation . . . .

21 (Emphasis added.) This regulation does not apply to the operation of vessels. The SMP  
22 identifies what moorage opportunities the property owner may choose; this then affects where  
23 the vessel may moor, which is lawful under this provision. These issues should be dismissed.

1       **X.       THE INTERPRETATION IS CONSISTENT WITH COMPREHENSIVE PLAN**  
2               **POLICY LU 270 - ALASKA GATEWAY AND MOORAGE PROVISIONS OF**  
3               **THE CITY'S COMPREHENSIVE PLAN – PORT ISSUE 11**

4               The Port contends the Interpretation bars moorage for large commercial vessels and thus  
5 violates amended Comprehensive Plan provision LU 270.<sup>213</sup> Since the Interpretation expressly  
6 allows lay berthing at cargo terminals for vessels engaged in cargo terminal activity, this is  
7 consistent with that policy. With respect to other vessels, nothing in the Interpretation bars  
8 obtaining a permit for such use. If a question arises whether an existing use classification applies  
9 to mooring the oil rigs and accompanying vessels, the SMP says unlisted uses can be  
10 accommodated through the conditional use process.<sup>214</sup> The Examiner has already ruled that  
11 having to obtain a permit does not interfere with a port's "priority status" under RCW 90.58.020  
12 of the Shoreline Management Act.<sup>215</sup> Similarly, obtaining a permit to comply with the  
13 provisions of the Comprehensive Plan policies for moorage uses is not inconsistent with the  
14 Comprehensive Plan, because the provision encouraging moorage can still be accomplished.  
15 The state's Growth Management Hearing Board is the expert at determining consistency between  
16 comprehensive plan provisions and development regulations.<sup>216</sup> A provision is inconsistent with  
17 a comprehensive plan policy if it "thwarts" the policy.<sup>217</sup> The Western Growth Management  
18 Hearing Board ruled: "There is no inconsistency if it is possible for a particular development to  
19 meet the requirements of both sets of policies or regulations."<sup>218</sup> The Port cannot show the  
20 requirement to obtain a permit "thwarts" or makes it impossible to provide moorage for large  
boats.

21       <sup>213</sup> Attachment B.

22       <sup>214</sup> SMP 23.60.034; SMC 23.60A.034.

23       <sup>215</sup> Order on Motion to Dismiss, p. 6, ¶ 29.

<sup>216</sup> RCW 36.70A.280(1)(a).

<sup>217</sup> *Chevron USA, Inc. v. Central Puget Sound Growth Management Hearing Board*, 123 Wn. App. 161, 167-168, 93 P.3d 880 (2004).

<sup>218</sup> *Leenstra v. Whatcom County*, WWGMHB 03-2-0011, Final Decision and Order (Sep. 26, 2003), at 15.



1 Comprehensive Plan policies to be an Alaskan gateway similarly are not defeated. They  
2 specifically apply to “tug and barge facilities.” In fact, the basis for this policy is found in the  
3 1983 Assessment, describing the “wide variety of general cargo (containerized and non-  
4 containerized), dry and liquid commodities, and large specialized equipment” carried in the  
5 Puget Sound - Alaska routes, typically on “jumbo container barges,” and noting that “railroad  
6 barges are a common method of transporting cargos to Alaska.”<sup>219</sup>

7 The moorage needs for such tugs and barges are not thwarted by the Interpretation’s  
8 allowance of lay berthing for cargo terminal vessels or by requiring a use permit for general  
9 commercial moorage on a site that has a cargo terminal permit. This issue should be dismissed.

#### 10 **XI. REQUIRING AN ADDITIONAL PERMIT IS NOT AN ABSURD RESULT**

11 Appellants contend that upholding the Interpretation produces an absurd result because  
12 the Port will have to get an additional permit for Terminal 5 so Foss can provide the moorage  
13 and supplies to the oil rig and accompanying drilling fleet over the winter. This is not an absurd  
14 result. The Port has a permit staff of Paul Meyer and five other people, and they apply for 30 to  
15 50 permits every year.<sup>220</sup> The type of permit needed is likely a permit to establish a commercial  
16 moorage/marina permit use, an allowed use in the UI Environment and IG1 zone. Meyer is  
17 aware the Port can apply for a permit under protest during the appeal.<sup>221</sup>

18 Appellants also contend it is absurd to require a permit because the nature of the required  
19 permit is unclear and may be a conditional use permit rather a commercial moorage permit. This  
20 is based on Port manager Meyer contorted analysis of what a commercial moorage/marina use  
21 allows, due to his imposing the use restrictions for “commercial uses” on waterfront lots onto the

22  
23 <sup>219</sup> DPD Ex. 9, p. II-11.

<sup>220</sup> Attachment G Meyer, p. 35:2-7.

<sup>221</sup> Attachment G Meyer, p. 36:11-15.

1 “commercial moorage/marina” use,<sup>222</sup> which is a “transportation facility use” allowed in the UI  
2 Environment on waterfront lots, even though there is no authority for doing this in the Code.<sup>223</sup>  
3 DPD planner McKim testified this is not the correct construction of the commercial  
4 moorage/marina use. And though Meyer initially claimed that the SMP standards for a marina in  
5 SMC 23.60A.200.B could not possibly apply to a commercial marina,<sup>224</sup> he ultimately conceded  
6 that many of them did, including the requirement for a restroom.<sup>225</sup>

7 Meyer also claimed not to know what a commercial vessel is, but Gallagher and  
8 Knudson, a former Port manager, had no trouble describing what it is.<sup>226</sup> And McKim also noted  
9 that under the definition of commercial moorage/marina<sup>227</sup> not every vessel at a commercial  
10 marina needs to be a commercial vessel, as the new commercial marina definition requires only  
11 that 75 percent of the moorage be occupied by commercial vessels and the former commercial  
12 moorage definition only required a majority to be commercial vessels.<sup>228</sup>

13 To create their absurdity argument, Appellants have inflated the scope of the  
14 Interpretation to contend they may need to do an EIS for every cargo terminal facility to obtain a  
15 commercial marina permit, and asked their witnesses to testify as to the disastrous effect if  
16 general moorage, home porting or lay berthing were “prohibited.”<sup>229</sup> The Interpretation does not  
17 “prohibit” such activities, either at Terminal 5 or elsewhere. And as Johnson, President of  
18  
19

20 <sup>222</sup> Attachment G Meyer, p. 46:15 to 52:7.

21 <sup>223</sup> Attachment G Meyer, p. 33:6-14.

<sup>224</sup> Attachment G Meyer, p. 52:9 to 53:3.

<sup>225</sup> Attachment G, Meyer, p. 16:22 to 20:21.

<sup>226</sup> Attachment J, Gallagher, p. 90:3-12 (including fishing vessels); Attachment H, Knudsen, p. 70:18-24 (same).

<sup>227</sup> SMC 23.60.906 (commercial moorage) and 23.60A.926 (commercial marina).

<sup>228</sup> Testimony day 4, tape 4 at 8:42 to 9:50.

<sup>229</sup> Johnson, p. 42:14-20 (“prohibiting” home porting); Knudson, p. 63:6-16 (“prohibiting” idle moorage by cargo terminal vessels); O’Halloran, p. 19:20-25 (“prohibiting certain kinds of vessels”).

1 Glacier Fish Company, conceded, as long as there is a permit that allows the current access for  
2 the fishing fleet, it doesn't matter what type of permit it is.<sup>230</sup>

3 Moreover, even if the result of the Interpretation were expanded to require the Port or its  
4 operators to ask incoming vessels about their intended operations in order to assign them to a  
5 berth at a facility with the appropriate permit, this is no more than currently occurs when vessels  
6 seek berths now – the Port or the operator need to ask what loading/unloading and berthing  
7 services they need in order to determine whether an appropriate berth is available.<sup>231</sup> These  
8 arrangements are made in advance for both scheduled and unscheduled vessels.<sup>232</sup>

9 The true absurdity is that the Port has been assuming that every facility it controls can  
10 provide moorage for any type of vessel, regardless of the City permit for the facility.

## 11 XII. CONCLUSION

12 The Shoreline Master Program must be liberally construed to give full effect to the  
13 objectives and purposes of the Shoreline Management Act.<sup>233</sup> The Act's purposes and objectives  
14 are to protect the "shorelines of the state," which includes the waters of the state, by regulating  
15 the uses to which the shorelines are put. Appellants' argument that "moorage is moorage" and  
16 that vessels can be moved to different sites like a "checkerboard," regardless of the permits  
17 issued under the City's Shoreline Master Program, vitiates the Act's purpose of regulating uses.  
18 A construction of "cargo terminal" that opens Terminal 5 for moorage by any vessel loading  
19 stores, provisions and goods defeats the purpose of defining uses and differentiating between  
20 general moorage and a cargo terminal. The Interpretation appropriately rejects that construction

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21 <sup>230</sup> Johnson, p. 46:16-21.

22 <sup>231</sup> Attachment G Meyer, p. 28:12 to 29:7.

23 <sup>232</sup> Attachment H, Knudsen, p. 75:15 to 76:15.

<sup>233</sup> RCW 90.58.900; SMC 23.60.012 and 23.60A.014. *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) (Act to be broadly construed to protect the shorelines of the state as fully as possible).

1 and appropriately limits the use of Terminal 5 to vessels mooring there for cargo terminal  
2 purposes. The Polar Pioneer and its accompanying vessels are not at Terminal 5 for this purpose.  
3 The Interpretation should be upheld.

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

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6 Seattle City Attorney

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1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **Department Of Planning**  
3 **And Construction's Closing Argument** 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:

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

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

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APPENDIX

A. The Examiner's Order on DPD's Motion to Dismiss dismissed or modified Foss Issues 3, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17 and 19, leaving the following issues or arguments to be determined:

1. Foss Issues 1: allowable scope of principal and accessory uses associated with a "cargo terminal," as that term is defined in SMC 23.84A.038, SMC 23.60.906 and SMC 23.60A.906.
2. Foss Issue 2 –whether the operations fall within that cargo terminal as correctly defined
3. Concerning Foss Issue 3: DPD past actions are relevant to show whether Foss's operations here are no different than other activities that have been treated by the City as a cargo terminal use and past activities deemed by the City to be a cargo terminal use.
4. Foss Issue 4: Whether moorage, as carried out by Foss's operations, is a legally permissible use at Terminal 5 under current Code and existing approvals.
5. Foss Issue 5: Whether the Interpretation correctly applies SMC 23.60.940 (23.60A.940) concerning accessory uses in the Shoreline District (accessory use under SMC 23.84A.040 and 23.42.020 was dismissed).
6. Foss Issue 6: Whether the operations are an allowable accessory use.
7. Foss Issue 15: The Interpretation erroneously determines the Director lacks authority to interpret and define unlisted uses.
8. Foss Issue 18: Whether the Interpretation regulates activities on vessels in a manner that is outside the Director's authority.

B. The Examiner's Order on DPD's Motion to Dismiss dismissed or modified Port Issues 2, 3, 6, 10, 12, 13, 14 and 15, leaving the following issues or arguments to be determined:

9. Port Issue 1: Whether Foss's activities are consistent with the SMP, the existing permit for Terminal 5 and the historic use at Terminal 5 (not seeking to establish a use for the record) – Same as Foss 1-3.
10. Port Issue 4: Same as Foss issue 4. Whether no permit is required because moorage is permitted use overwater regardless of whether it is associated with a cargo terminal, if no shoreline substantial development permit is required, citing SMC 23.60A.090, 23.60A.484, and 23.60A.020A.2.b.
11. Port Issue 5: Same as Foss issue 18; and whether the Interpretation errs in finding that moorage is not inherent to a cargo terminal use.

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- 12. Port Issue 7: The Interpretation erroneously determines that vessels may moor at a cargo terminal only if they are otherwise used for transporting goods in the stream of commerce – related to Foss 18 and part of Port 8; and the Interpretation fails to properly apply the definition of accessory use: that the use be incidental and intrinsic to the cargo terminal use – related to Foss 5 and 6.
- 13. Port Issue 8: Whether SMC 23.60A.090.B means that accessory moorage does not have to be incidental and intrinsic to the principal use; and whether DPD has the authority to limit the duration of an accessory use or to prohibit provisioning at a moorage.
- 14. Port Issue 9: Is the Interpretation consistent with Public Trust doctrine as reflected in the state’s Shoreline Management Act and the City’s Shoreline Master Program.
- 15. Port Issue 11: Is the Interpretation consistent with Comprehensive Plan policy LU270.