HEARING EXAMINER: Thank you.

Well I think then that we are ready to hear from the first witness, and I guess Mr. West?

MR. WEST: We call Mr. McKim.

At this point we are going to steal one of the microphones and slide it over to --

(Brief Pause in Proceedings)

HEARING EXAMINER: As soon as he gets his water, I will swear him in.

All right, if you would raise your right hand?

ANDY McKIM IS SWORN

HEARING EXAMINER: All right, and your witness, Mr. West?

MR. WEST: Thank you.

* * * * *

DIRECT EXAMINATION

BY MR. WEST:

Q. Mr. McKim, in front of you, you have a number of binders there to your right as you can see, and those contain a number of exhibits that have tabs on them that are numbered, and as we go through the testimony today, I will be referring to some of those documents, just to orient you.

All right?
A. Where use is already established or?

Q. Yes.

A. I look to -- I look to permits, in particular, and I will
look to -- if we have a permit that clearly is -- lists the
uses established per land use code. That is generally on
the face of the permit.

Something that -- you know in some circumstances the
permits are -- you know, I can't say that the department has
always perfectly filled those forms out. Occasionally they
will list some use that is not an actual land-use code
category in -- and in some cases it won't even list a use
where work is being done that isn't changing a use.

So we will look at, first of all, what uses are listed,
and then we will also look at what is happening under that
permit because sometimes if the permit is -- you know, some
sort of minor repairs or something like that, often that
won't involve analysis of established uses, it will just
involve somebody coming in to make minor changes to some
physical thing that -- you know, it is not -- it is not an
important consideration for work under that permit.

Q. In order to determine what uses are established at a
particular site, do you rely on the background statement of
a master use permit decision?

A. No, and you know the -- the background statement is just --
provides a context for the analysis, so my assumption is
that things that are provided in that area that -- largely rely on the applicants or what we are able to glean from looking at maps and photos and so forth about what is actually there.

I don't believe that anybody, any of our planners actually have time to fully research permitted established uses on a site for purposes of -- of filling out that statement.

Q. So would you rely on background -- description in the background in order to make a formal determination as to what use is allowed and is permitted at a particular site -- when use has been established at a particular site?

A. Right.

We don't rely on the things listed under project, or I would not rely on the things listed under the project background to talk about what is actually being formally established by permit.

Q. Looking at the documents that are in Exhibit 11, would you be able to -- in order to determine what uses have been established at the site, do you have to do an analysis of those permits?

A. I would -- yeah I would review these permits. I would certainly look at the permits, both what they -- if they actually specify a use, but I would also do that in the context of what was done under that permit.
Q. And do there appear to be many different kinds of uses that might be established at terminal 91?

A. Yes.

Q. So in order to determine whether a particular activity was already established at terminal 91, you would have to do a significant amount of analysis?

A. We would have to -- yes, definitely do a fair amount of analysis, and actually in some circumstances, and you know, I don't know if we had it here, but I think we ran into it -- in some circumstances you might have multiple tenant spaces. I don't know if we have that going on at terminal 91, but in some cases there are, so even if you do find a use -- for example historically establishing a particular space as a retail space, or a fast food restaurant, it may be that a later permit changed the use of that space, and so sometimes you actually have to go to the plans, as well, to find out what space was affected by that permit to find out if it -- if the use that had historically been listed was still there.

Q. I hate to go back to DPD 11 and permit 8400945, but if we could take a moment and find it, and I think maybe it is easier to find it from the back rather than the front.

(Brief Pause in Proceedings)

Q. (By Ms. Baxendale) I think you counted 21 pages from the --

HEARING EXAMINER: Exhibit 28.
MS. BAXENDALE: 28?

UNIDENTIFIED: Someone gave me that number. I did not --

UNIDENTIFIED: 29, I think.

Q. (By Ms. Baxendale) So you are looking at page 2?
A. Yeah.

Q. And Mr. West called out to you that there was language there that described that there was vessel mooring on that site?
A. Yes.

Q. Does it say what kind of vessel mooring?
A. No.

Q. Does it say whether it is general mooring or mooring that is consistent with a cargo terminal?
A. It doesn't say.

Q. So in order to determine what kind of mooring is being referred to, we do have to do some research?
A. Yes.

Q. When Mr. Schneider was asking you about how to determine whether something was allowed at a particular site, would you also have to -- and he was asking whether a particular vessel could moor at a particular site -- would you also have to look at what permits were allowed for that site?
A. Yes.

Q. And does the interpretation that -- that is at issue in this case, does that apply to every site?
A. No.

For one thing, by code interpretations -- are applicable to a specific site and the facts at that site, so it wouldn't be directly applicable to a different site.

Q. And is part of the reason for that because different sites have different land-use permits?

A. That's correct.

MR. WEST: I object to the leading nature of several of these questions.

HEARING EXAMINER: Overruled.

Q. (By Ms. Baxendale) Mr. West asked you about interpretations and the fact that DPD was required to give a response to a request for interpretation. Is that correct?

A. Yes.

Q. And Mr. West said would DPD be bound to apply the logic of this interpretation to a request for an interpretation on another site; is that -- and you answered yes?

A. I guess I don't remember that specific question and answer.

Q. What is it that DPD is required to apply when making a determination on an interpretation request?

A. Well again similar to the one that we wrote here, we would have to do an analysis based on the available facts, so we -- we strive to be consistent.

I believe that if we had a situation where -- you know,
into, the interpretation, for example, was the -- the
general nature of the shoreline code.

The shoreline code is -- the way it is worded, there is
actually a code provision near the beginning of it.

When I talk about the shoreline code, I mean chapter
23.60, the Seattle Shoreline Master Program; that there is
language at the front of it that says it is supposed to be
liberally construed to achieve its intent and its effect,
which we read as, you know, apply it strictly to achieve,
you know, particular things specific to the shoreline, so we
are more stringent in how we apply the code standards in the
shoreline because of that -- so in that context -- you know,
for example.

Q. Going back and looking at the definition of cargo terminal,
which is in Foss 1 -- which is your interpretation -- and
page 2, paragraph 7 --
(Brief Pause in Proceedings)

Q. (By Ms. Baxendale) You concluded ultimately that the phrase
"in order to transfer them to other locations" applied to
the list of actions where -- that preceded it in that
sentence; is that correct?

A. That is correct.

Q. What happens if that phrase is not applied to the first
part, which is "stored without undergoing any
manufacturing"?
If you just read it as "stored without undergoing any manufacturing"?

A. Well I think that would really be no different than warehoused -- whatever kind of goods -- and I think what we intend to regulate by cargo terminal is actually something that is associated with being transferred to other locations.

I think this is -- particularly -- that is ultimately what we concluded in the interpretation.

This is particularly the case in the shoreline where in order to even be in that location, as a general rule under the shoreline, you need uses that are water dependent, or water related, so if you had something that, you know, wasn't there, in order to be transferred to another location, and presumably either arriving or leaving by water, then it wouldn't be consistent with what is desired under the shoreline code.

Q. Is a storage use different from a transportation use in terms of how they are regulated? Are they --

A. Oh, well yes, certainly. Yeah, storage would be a warehouse. You know if it were -- or else outdoor storage. On its own, it wouldn't be water related or water dependent because on its own if all you're doing is storing, then you are not -- you don't need to be water --

Q. Historically different category views from transportation?
A. Yes.

Q. You and Mr. West spent some time talking about goods, and I want to go back through and maybe see if we can parse it so that it is more crystal-clear.

So cargo terminal -- so a cargo terminal warehouse is a transportation use?

A. Yes.

Q. And is it a transportation use that involves goods?

A. Yes.

Q. Do the goods need to be connected to transportation?

A. Yeah. I mean in order to qualify here, and as we have read the interpretation, it has to be stored in order to be transferred to another location, and also -- yeah.

Q. So might coffee be goods?

A. It might.

Q. If coffee is put on the vessel, and the vessel delivers the coffee to a place where it is sold, is that a transportation use?

A. Yes.

Q. And if the coffee is put on a vessel, and the vessel delivers the coffee to a place where it is put on a train and taken away, is that a transportation use?

A. Yes.

Q. If the coffee is put on the vessel and the crew consumes it, is that a transportation use?
A. I would say no. We regard that, or at least not a cargo terminal use. We would regard that activity as provisioning, so for example you might put coffee on a vessel at a commercial moorage. You might put coffee on a vessel -- or a commercial marina, as it is now categorized, and I don't recall whether that is under the definition of transportation use or not, but it would not be a cargo terminal use.

Q. So might fuel filters be goods?
A. They could.

Q. And if the fuel filters are put on a vessel, and the vessel delivers the fuel filters to a place where it is sold, is that a cargo terminal use?
A. Yes, it would be.

Q. And if the fuel filters are put on a vessel, and the vessel uses the fuel filters to maintain the vessel function, is that a cargo terminal use?
A. On its own, it would not be, no.

Q. And if there are pipes, those could be goods, couldn't they?
A. They can.

Q. If the pipes are loaded onto a vessel, and the vessel delivers the pipes to a place where they are loaded onto a truck and taken away, is that a cargo terminal use?
A. Yes.

Q. And if the pipes are loaded on a vessel, and the operation
of the vessel is to lay the pipe, and the pipes are used for
the operation of laying the pipes -- the pipes are actually
put into that function -- would that be -- the loading of
the pipes on the vessel be a cargo terminal use?
A. No, if the vessel were used to lay the pipe, then that would
not be.

MS. BAXENDALE: I have no further questions at
this time.

HEARING EXAMINER: All right.

Ms. Goldman, did you have questions for Mr. McKim?

MS. GOLDMAN: Mr. Baca --

HEARING EXAMINER: Mr. Baca?

MR. BACA: Yes.

** ** ** **

CROSS-EXAMINATION

BY MR. BACA:

Q. Good afternoon, Mr. McKim.

A. Good afternoon.

Q. It has been a long afternoon. I am Matt Baca. I represent
the environmental intervenors, just to remind you.

I want to return to a few lines of questioning that you
and Mr. West were engaged in.

First of all, he asked you whether certain items in
container type boxes were container cargo, and he showed you
some photos of those.
HEARING EXAMINER: We will just call it port Exhibit 1, port exhibit --

MR. SCHNEIDER: Right. Thank you.

And just for orientation, these are port exhibits 23 and 24, 23 being on the right, and we will talk about those shortly.

* * * *

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. So Mr. Englin, would you state your name and spell it?

HEARING EXAMINER: I will swear him in.

GREG ENGLIN IS SWORN

HEARING EXAMINER: Your witness, Mr. Schneider.

MR. SCHNEIDER: Thank you.

Q. (By Mr. Schneider) Mr. Englin, would you spell your name for us, please?

A. E-N-G-L-I-N.

Q. And what is your position?

A. Manager of maritime operations for the Port of Seattle.

Q. Port of Seattle?

What are your responsibilities in a general way as manager of maritime operations?

A. Basically I manage the outer harbor for assets that we manage directly on behalf of the Port of Seattle, including some assets up the Duwamish River.
maintain everything.

Q. And give us examples of commonplace maintenance of vessels at these cargo facilities?

A. Well, for instance -- well we had to bring in the Hanjin Copenhagen, and that was as a result of the -- a US Coast Guard captain of the port order.

   Basically they had a -- they had what looked like to be a potential breakdown on a pump or something -- some piece of equipment on board.

Q. Before you go ahead, what is the Hanjin Copenhagen?

A. That is a container ship that was offloading containerized cargo over at terminal 46, and then while they were there, the Coast Guard conducted an inspection and they found that there was a piece of equipment, a pump on board that looked like it had malfunctioned, but it was a critical, critical pump, and so the Coast Guard made the decision, the captain of the port, who is the top person in this region, made the decision you can't leave port until I make sure that this is fixed and inspected.

   So we shifted that vessel over to terminal 5 in order to conduct that inspection, that repair.

Q. So it was at terminal 5 purposes entirely unrelated to cargo?

A. Correct.

Q. And what kind of repair was done there?
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