

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeals of  
**FOSS MARITIME COMPANY AND  
PORT OF SEATTLE**  
from an interpretation issued by the Director,  
Department of Planning and Development

Hearing Examiner File Nos.  
S-15-001; S-15-002  
**FOSS MARITIME’S POST-HEARING  
BRIEF**  
(Code Interpretation No. 15-001)

**I. INTRODUCTION**

The issue in this appeal is straightforward. Do Foss Maritime’s activities at Terminal 5, which include loading and unloading goods, cargo, provisions and equipment onto vessels on hire for Shell Offshore Inc. (“Shell”), and the subsequent transfer of those goods, cargo, provisions, and equipment to other locations in the Arctic, constitute “cargo terminal” activities as that term is defined in Section 23.60A.906 of the Seattle Municipal Code (“SMC,” “City Code” or “Code”)? Based on the undisputed evidence presented in the hearing, the only answer is an unequivocal yes. Indeed, the City’s only witness on this issue – Andy McKim – admitted at hearing that Foss’s activities at Terminal 5 meet each and every element of that cargo terminal definition. Mr. McKim further acknowledged that his initial evaluation of the issues in this

**MCCULLOUGH HILL LEARY, P.S.**

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

1 matter led him to conclude that Foss’s activities, including idle moorage of the oil rig Polar  
2 Pioneer, were legal and consistent with the cargo terminal use designation of Terminal 5. The  
3 Hearing Examiner’s inquiry must end here. Under the plain language of the City Code and the  
4 uncontested evidence at hearing, the Foss activities at Terminal 5 constitute a permitted cargo  
5 terminal use.  
6

7 Faced with this unpalatable result – that Foss’s activities at Terminal 5 are entirely  
8 consistent with the language of the cargo terminal definition -- the City manufactured a tortured  
9 and illogical test that imposes a variety of new requirements not found in the Code definition.  
10 This contrived set of requirements – which the City refers to as the new “primary function” test –  
11 incorporates at least three novel conditions not actually found anywhere in the Code. The test, as  
12 explained by Mr. McKim for the first time at hearing, precludes any vessel from mooring at a  
13 cargo terminal for any purpose (a) if the vessel’s “primary function” is not to transfer goods in  
14 the stream of commerce; (b) if the vessel is not actually loading or unloading “cargo,” defined as  
15 materials to be transported and delivered to a different location; and (c) if the transfer location is  
16 something other than a place on the ocean floor or to another vessel.  
17  
18

19 At hearing, the City failed to present any evidence or any witness explaining this new  
20 test; how it would be applied in fact; or how it possibly fits the cargo terminal definition. The  
21 City conceded that these new requirements were never before articulated or applied by the City  
22 in any context, were never adopted by the City Council, were never presented to or approved by  
23 the Department of Ecology, and were never articulated to any member of the public so that  
24 public comment on them could be received. Indeed, the unworkable nature of the new primary  
25 function test is highlighted by the confusion among the City witnesses as how to apply the new  
26 test in this or any other context. Nevertheless, Mr. McKim applied this new test to a number of  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 factual “assumptions” (themselves unwarranted) to reach a predetermined conclusion. The  
2 City’s novel “primary function” test improperly conflicts with the plain statutory language of the  
3 City’s Shoreline Master Program (“SMP”) and the City’s past interpretation and application of  
4 cargo terminal uses.

5  
6 The Hearing Examiner should reverse the code interpretation (“Interpretation”) in this  
7 case because it is not supported by the law or the facts and is clearly erroneous. Neither the City  
8 nor Intervenor Puget Soundkeeper Alliance (“Intervenor PSA”) provided any credible evidence  
9 to contradict witness testimony presented by Foss Maritime Company (“Foss”), the Port of  
10 Seattle (“Port”), and the T-5 Intervenor. Most tellingly, after hearing all of the evidence  
11 presented by Foss, the Port, and the T-5 Intervenor regarding the actual activities at Terminal 5  
12 and the activities at other cargo terminals in the City, no witness testified that the Interpretation  
13 remains correct as applied to the activities at Terminal 5. Mr. McKim, present during the entire  
14 hearing, instead testified only briefly in support of the City’s case, and did not at any time  
15 address the merits of the case.  
16

17  
18 The Hearing Examiner must also reject the Interpretation because it is contrary to the  
19 plain meaning of the City Code and leads to absurd results, constraining the term “cargo  
20 terminal” so narrowly that legal activities freely and openly conducted at cargo terminals around  
21 Seattle for nearly a century are now transformed into unpermitted uses.

22  
23 The Examiner should reverse the Interpretation and determine that the use of Terminal 5  
24 to load and unload vessels and to moor those vessels is a cargo terminal use or, in the alternative,  
25 a use accessory to a cargo terminal use.  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## II. FACTS

### A. The Activities at Terminal 5

Pursuant to the lease between Foss and the Port (Foss Exh. F036) (the “Lease”), Foss has provided and will provide a variety of services to Shell and its contractors in support of Shell’s Arctic operations. The activities conducted at Terminal 5 include receiving and storing goods, cargo, equipment, supplies, stores, gear, provisions and other materials (in bulk and in containers); loading and unloading goods, cargo, equipment, supplies, stores, gear, provisions and other materials on to and off of vessels associated with the operations, for those vessels to use and to transport to other locations; staging, arranging and storing these materials on the terminal to facilitate loading them onto vessels; packing some of the materials into containers; idle moorage of vessels; and other related activities, including standard routine “run and maintain” activities (collectively, “Foss Operations”). *See* F036, § 5.1 (Lease); F021 (Foss letter to McKim).

Paul Gallagher was the only witness who addressed the activities that have occurred, and that will occur, at Terminal 5. First, Mr. Gallagher confirmed that the activities described above were in fact those planned by Foss when the City inquired in April 2015. Transcript of Paul Gallagher 82:2-15. Second, Mr. Gallagher confirmed the preliminary activities that occurred from February to May 2015 were consistent with what was previously disclosed to the City. Specifically, Foss prepared the facility; trained employees and contractors’ representatives; mobilized equipment; brought in cranes, rigging, and shackles; received goods at Terminal 5 such as pipe, wire, food, fuel, container cargo, bayrite, cement, equipment, provisions, and other supplies, primarily by truck; and organized and stored them at the terminal in preparation for the arrival of the vessels in May 2015. Gallagher 25:9-30:13; Foss Exh. 061.

**MCCULLOUGH HILL LEARY, P.S.**

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

1 Third, Mr. Gallagher described the several vessels that were loaded at Terminal 5 in May  
2 and June of 2015: the mobile offshore drilling unit (Polar Pioneer); the four offshore supply  
3 vessels (Harvey Champion, Harvey Supporter, Harvey Explorer and Harvey Spirit); two ice-  
4 class vessels (Tor Viking II and Aiviq); and the two barges (American Trader and KRS 286-6).  
5 Gallagher 20:13-24:20. As the photos introduced at the hearing demonstrated, these vessels  
6 were loaded with the goods and containerized cargo described above. Gallagher 20:13-24:20,  
7 41:15-69:16; Exhs. F063 to F085 (photos of loaded cargo, stowage plans, cargo manifests).

9 Fourth, Mr. Gallagher testified that all of these vessels left Terminal 5 with the materials  
10 aboard and transported the materials to other locations. Gallagher 30:1-13. This is one of the  
11 functions of each of these vessels – to transport materials from one location to another location.  
12 The Polar Pioneer is designed to load and unload cargo, as demonstrated by the two cranes it  
13 used to load and unload at Terminal 5. Gallagher 37:15-24. It is designed to store and carry  
14 cargo on board – Mr. Gallagher identified the dedicated cargo spaces on the vessel and the  
15 photos showed those spaces, as did the loading plans. *Id.* The Polar Pioneer, which Shell  
16 chartered from its owner, was loaded with and transported the goods to the Arctic, where they  
17 were used in the Arctic exploratory effort. Gallagher 35:3-37:24. Some of the materials loaded  
18 onto the Polar Pioneer, such as “tubulars,” cement, and mud, will be left in in a specific, licensed  
19 location on the ocean floor as part of the well in the exploratory drilling operation, in accordance  
20 with permits issued by the Federal government. *Id.* Other material, including pipe, wire, and  
21 heavy equipment, will be offloaded via one of the Polar Pioneer’s cranes onto an offshore supply  
22 vessel while the vessels are at sea. *Id.*

23 Similarly, the offshore supply vessels, the barges, and the ice-breaker vessels are all  
24 designed and were used to carry goods and containerized cargo to the Arctic, where those  
25  
26  
27  
28

1 materials will be transferred to the Polar Pioneer or other vessels. Gallagher 21:17-24:20. All of  
2 these vessels are indisputably “cargo vessels,” as Mr. McKim acknowledged. Testimony of  
3 Andy McKim 74:15-22.<sup>1</sup> Some of the vessels, such as the Aiviq, loaded material at Terminal 5  
4 and transferred the material to the Port of Everett, while other vessels, such as the Harvey  
5 Champion and Harvey Supporter, also transferred goods from Terminal 5 to Port Angeles,  
6 Washington. Gallagher 59:5-10, 56:2-25; Exh. F066.

8 Finally, Mr. Gallagher testified about the planned activities when the vessels return.  
9 Specifically, Foss plans to offload materials, equipment, containers, and other materials, which is  
10 estimated to take a few months; will conduct routine maintenance and repair of the kind that  
11 which occurs every day at cargo terminals; will load stores and provisions each day; will assist  
12 the crew; and will ultimately repeat the loading operation of the vessels as it occurred in May.  
13 Gallagher 30:18-31:25. The vessel would moor during these activities, whether engaged in  
14 active loading or unloading on any particular day. Gallagher 32:1-34:14. As Mr. Gallagher and  
15 other witnesses testified, these types of activities are exactly the same as activities occurring on  
16 other vessels that call at the Port of Seattle and all other cargo ports in the world. Gallagher  
17 33:9-19, 87:2-8; Testimony of Mark Knudsen 64:5-20; Testimony of Jim Johnson 41:12-25.

20 At the hearing, Mr. McKim admitted, upon reviewing photographs of activities at  
21 Terminal 5, that the tubulars, pipes, and other materials loaded onto the Polar Pioneer and other  
22 vessels, are “goods” under the definition DPD used in the Interpretation. McKim 53:14-54:12.  
23 Mr. McKim further agreed that the goods were stored at Terminal 5 without undergoing any  
24 manufacturing processes. McKim 65:14-23. Most significantly, Mr. McKim admitted that if  
25 tubulars or pipes were loaded onto the Polar Pioneer, taken to a specific location in the Arctic  
26

27 <sup>1</sup> The relevant transcript excerpts of the witnesses’ testimony cited in this brief are included in the Declaration of  
28 John C. McCullough.

**MCCULLOUGH HILL LEARY, P.S.**

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

1 that is licensed by the federal government, and were installed in the ocean, DPD would consider  
2 that the goods were transferred to another location. McKim 77:15-23; 156:18-157:2.

3 **B. Information DPD Received from Foss and the Port**

4 In early February 2015, DPD granted a shoreline exemption to the Port for bollard  
5 replacement at Terminal 5 in support of the Foss Operations. Exh. F055. As part of the City's  
6 consideration of that request, the City investigated the proposed use that is currently at issue  
7 here. Exh. F053. The Port provided information describing the intended activities (*i.e.*, the Foss  
8 Operations), *id.*, and Ben Perkowski testified he was aware of Foss's plans due to media reports  
9 describing the Shell fleet overwintering in Seattle. Testimony of Ben Perkowski Day 3, Tape 4  
10 of 4, 55:38 – 56:41. The City then approved the shoreline exemption. Exh. F055.

11  
12  
13 In order to obtain additional information for this first-time Interpretation, DPD met with  
14 the Port on March 13, 2015. Exh. F017. At the meeting, as reflected in Mr. McKim's notes, the  
15 Port specifically told the City that fishing vessels overwintered at Terminal 91, and that moorage  
16 of commercial vessels without cargo operations was a "typical component" of cargo terminal  
17 operations. McKim 22:2-19; Foss Exh. F017. After the meeting, the Port provided DPD with  
18 additional written information responding to questions from the City concerning the expected  
19 uses at Terminal 5, dated March 13, 2015 (Exh. F018); a letter from Foster Pepper on behalf of  
20 the Port, dated April 3, 2015, answering the City's request for information from the Port about  
21 the activities that occur at the Port's cargo terminals (Exh. F019); and an April 6, 2015  
22 memorandum from Linda Styck, the then-Managing Director of the Port's Maritime Division,  
23 describing activities at cargo terminals (Exhs. F019 and F020). DPD also received the  
24 declarations of George Blomberg and Paul Meyer (Exhs. F023 and F024).  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 For its part, Foss responded to DPD's inquiries with a detailed letter dated April 6, 2015  
2 explaining the operations that were to occur at Terminal 5. Exh. F021. The letter mirrors the  
3 activities described by Mr. Gallagher in his testimony. Gallagher 82:2-15.

4 After receiving these materials, Mr. McKim asked the Port asked whether moorage of  
5 vessels that are not actively loading or unloading materials is normal and customary at cargo  
6 terminals, and whether this activity occurred historically at the Port. Foss Exh. F022. In a letter  
7 dated April 15, 2015, Ms. Styrk answered "yes" to both of Mr. McKim's questions, and supplied  
8 a substantial number of detailed examples. *Id.*

### 10 **C. The First Draft of the Interpretation**

11 After receipt of these materials, Mr. McKim turned to his first draft of the Interpretation.  
12 McKim 31:8-24. He reached the following conclusions: moorage of the drilling rig and two tugs  
13 were cargo terminal uses; the drilling rig is considered "goods"; transporting and storing these  
14 goods at Terminal 5 is completely consistent with the definition of cargo terminal; moorage of  
15 the drilling rig and two tugs were also accessory uses at a cargo terminal; and that moorage  
16 would remain a legal activity based on the use of the property before "cargo terminal" was  
17 defined or regulated under the Code. Exh. F002.

### 20 **D. Facts Assumed in the Interpretation without Support**

21 The draft described above was authored at some date after April 15, 2015. The final  
22 Interpretation was published on May 4, 2015. McKim 31:8-24. The differences between the two  
23 documents are striking. Despite the copious information provided by the Port and Foss about the  
24 operations of Terminal 5 and activities at cargo terminals generally, the Interpretation resorts to  
25 media reports and various bald assumptions about a number of critical matters, often ignoring the  
26 information provided to the City. This is especially curious since Mr. McKim testified that no  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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



1 one at DPD has expertise with regard to the operations of cargo terminals, and that he himself  
2 has no expertise in moorage, the operation of cargo vessels, or the operation of commercial  
3 vessels. McKim 60:17-61:4. Mr. McKim further agreed that interpretations should not be based  
4 upon assumptions. McKim 77:5-6. Nevertheless, Mr. McKim did not seek to verify the facts he  
5 “assumed” in the Interpretation, despite every opportunity to do so. McKim 77:7-13. Where  
6 these assumed “facts” were inconsistent with or contradicted by the information provided by the  
7 Port and Foss, Mr. McKim made no effort to investigate or resolve such inconsistencies. *Id.*  
8 Instead, Mr. McKim chose to ignore the factual information provided by the Port and Foss and  
9 limit the factual background of the Interpretation to news reports and his admittedly uninformed  
10 “general understanding” of the Polar Pioneer and cargo terminals in general. McKim 55:14-  
11 57:22; 116:19-117:7.

12  
13  
14 For instance, Mr. McKim incorrectly assumed (but did not seek to verify) that the drilling  
15 rig would not carry container cargo. Exh. F062. At the hearing, Mr. McKim admitted that the  
16 materials on the dock were loaded in containers (McKim 52:21-53:9) and he agreed that he did  
17 not know if those containers were loaded onto the Polar Pioneer. McKim 54:13-16. Mr. McKim  
18 incorrectly assumed that only two drilling rigs and tugboats would moor at Terminal 5, even  
19 though Foss’s letter to him (Exh. F021) said otherwise. *See* F001. Mr. McKim never sought  
20 information regarding the other vessels that would moor at Terminal 5, instead choosing to rely  
21 on “news reports” about the drill rigs. McKim 56:18-57:6. He did not inquire whether any other  
22 vessels would load and unload goods and container cargo, either at Terminal 5 or at other  
23 locations. McKim 57:11-14. Mr. McKim admitted at the hearing that several vessels moored at  
24 Terminal 5 conducted cargo loading activities. McKim 74:13-75:25. In fact, Mr. McKim  
25  
26  
27  
28

MCCULLOUGH HILL LEARY, P.S.

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

1 admitted the offshore supply vessels and support barges not only conducted cargo loading  
2 activities, but also meet his newly-minted “primary function” test. *Id.*

3 Mr. McKim concluded that the primary function of the Polar Pioneer was to drill, even  
4 though he admitted he had no knowledge of drill rig operations, McKim 116:19-21, and without  
5 asking Foss about the Polar Pioneer’s functions in the Arctic or at Terminal 5. McKim, 81:8-11.  
6 Mr. McKim admitted that he discredited Foss’s statements that the goods loaded at Terminal 5  
7 were being transferred to another location, even though (i) he had no other information that  
8 would support such a contrary conclusion, and (ii) he never inquired about the disposition of the  
9 goods loaded onto the eight vessels at Terminal 5 once they departed the City of Seattle. McKim  
10 55:14-57:14. Mr. McKim similarly rejected Foss and the Port’s statements that lay berthing is  
11 normal, customary, and an essential practice at marine cargo terminals (whether or not the vessel  
12 is loading and unloading cargo), even though he neither possessed nor sought any evidence to the  
13 contrary. McKim 57:16-22.

14 Accordingly, in the Interpretation, DPD improperly limited its inquiry to a fraction of the  
15 activities occurring pursuant to the lease on Terminal 5 – namely, the proposed overwintering  
16 moorage of a drilling rig and two accompanying tugboats – rather than considering the full scope  
17 of the Foss Operations.  
18

19  
20  
21 **E. DPD Reverses Course between Interpretation Drafts**

22 At the hearing, Mr. McKim testified that the final Interpretation, issued just over two  
23 weeks later, amazingly reversed each and every key conclusion of the initial draft, with the  
24 exception of its conclusion that Terminal 5 is a transportation facility. McKim 49:12-14;  
25 *compare* Exhs. F001 to F002. The conflicting conclusions from the draft and final  
26 interpretations are outlined in the following table.  
27  
28

<b>Draft Interpretation (written after April 15, 2015) (Foss Exhibit F002)</b>	<b>Final Interpretation (issued May 4, 2015) (Foss Exhibit F001)</b>
The drilling rig and two tugboats can moor and conduct activities at a cargo terminal	The drilling rig and two tugboats cannot moor or conduct activities at a cargo terminal
“Goods are something that has economic utility or satisfies an economic want.”	“‘Good’ is defined as “personal property having intrinsic value” or “wares, commodities, merchandise.”
“A broad range of items, including exploratory drilling equipment, can fall under the definition of goods”; “The drilling rig is within the range of items that might be managed at a cargo terminal”	“The exploratory drilling equipment affixed to the drilling rig, however, would not fall under the definition of ‘goods’ as it is used under the code, nor could the drilling rig itself be considered ‘quantities of goods or container cargo.’”
“[T]ransporting an item or items to a site, and storing the item or items at that site for a period, is completely consistent with the definition of cargo terminal.”	“Terminal 5 would not serve as a stop where the rig or the equipment on it would be stored or transferred in the course of transit from a starting location to an ultimate destination”
“The words ‘in order to transfer them to other locations’ is meant to modify only the words ‘stored outdoors.’ This is clarified by the addition of a comma after ‘carriers’ in the updated version of the code currently being adopted.”	“The unifying theme is that the goods are at the cargo terminal in order to transfer them to other locations.”
“Moorage of a vessel such as the Shell Oil barge with drilling equipment is permissible as an accessory use at a cargo terminal.”	While “lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal,” . . . “provision of moorage to other vessels and equipment, not used for transfer of goods to other locations, is [not] intrinsic to the function of a cargo terminal.”
Moorage or lay berthing “still would remain a legal activity based on the use of the property before ‘cargo terminal’ was defined or regulated as a use category under Seattle’s codes.”	[Issue is deleted entirely from the final interpretation]

In merely two weeks, Mr. McKim abandoned his initial interpretation, each of the tenets supporting it, normative tools for understanding and applying English grammar, and all the evidence from the Port and Foss on which it was based, substituting in its place a “final” interpretation based on supposition and assumptions. The City never explained what transpired

**MCCULLOUGH HILL LEARY, P.S.**

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

1 in these two weeks to cause DPD to reverse course on each and every significant conclusion in  
2 the Interpretation. Mr. McKim recalled that colleagues at DPD reviewed the draft interpretation,  
3 but he could not recall who, other than the Director, reviewed the interpretation, when they may  
4 have done so, or any specific comments or thoughts. McKim 72:6-20, 63:3-65:8. His only  
5 memorable exchange was trading several drafts with counsel in the City Attorney's office, and  
6 "arguments" with those lawyers regarding the clause "in order to transfer them to other  
7 locations." McKim 72:18-74:12, 63:3-65:8. Given Mr. McKim's initial draft of the  
8 Interpretation, one can infer his position; he apparently lost these arguments, as the final  
9 Interpretation reverses his position entirely.  
10

11 **F. The New "Primary Function" Test**

12 In the Interpretation, DPD created a new standard for cargo terminals not found in the  
13 language of the Code or ever previously applied in the application of the Code. Specifically,  
14 while the Interpretation accepted that "lay berthing of vessels otherwise used for transporting  
15 goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a  
16 cargo terminal," it concluded that, "moorage of vessels not used for transport of cargo in the  
17 process of being transferred to other location is not intrinsic to the function as a cargo terminal."  
18 Exh. F001, *emphasis added*. Mr. McKim explained that the underlined words – identifying a  
19 subclass or category of vessels "used for transporting goods in the stream of commerce" or  
20 vessels "used for transport of cargo in the process of being transferred to other locations" created  
21 a new test for evaluating the limited types of vessels that could legally load, unload, or moor at  
22 cargo terminals. McKim 70:1-25. Mr. McKim explained that this new standard focused on the  
23 "primary function" of the vessel, as well as its actual use in a given situation, and its later use in  
24 some instances. *Id.*; McKim 74:13-76:16. As first articulated at the hearing, the new primary  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 function test apparently requires that, in order for a vessel to moor, load, or unload goods at a  
2 cargo terminal, the primary function of the vessel must be to move cargo in commerce. McKim  
3 49:25-50:7.

4           Based on this new primary function test, Mr. McKim testified that offshore supply  
5 vessels and barges, which load pipe, wire, provisions, stores, and equipment and transfer those  
6 materials to the drilling rig in the Arctic, could moor and operate at a cargo terminal because  
7 their “primary function” is to transfer goods. McKim 74:15-76:5. Notably, this means that  
8 much of the activity conducted by Foss at Terminal 5, and expected over the winter, is entirely  
9 legal. However, the drilling rig, which loads the exact same pipe, wire, containers, provisions,  
10 stores and equipment at Terminal 5, cannot moor or load and unload at Terminal 5 because the  
11 “primary function” of the vessel (as apparently determined by DPD) is exploratory drilling that  
12 will occur approximately 2,000 miles away. McKim 76:6-16, 79:8-11.

15           The recent birth of the “primary function” test meant that it remains an unfinished  
16 product, uncertain in its applications and even in its requirements. This was evident by Mr.  
17 McKim’s uncertainty at hearing. For example, Mr. McKim changed his mind as to whether  
18 fishing vessels delivering fish they had caught would satisfy the test. McKim 80:18-81:23. The  
19 hypotheticals posed to Mr. McKim at the hearing revealed that the primary function test has at  
20 least three requirements (though one is not sure, because the test is not in the statute and the  
21 requirements have only been elicited by questioning on cross-examination). One requirement  
22 relates to the nature of the vessel itself – what the vessel’s “primary” function is. McKim 49:25-  
23 50:7. A second requirement relates to the activities of the vessel at the terminal – *i.e.*, whether  
24 the vessel is loading or unloading cargo at the terminal on the particular occasion at issue. 58:3-  
25 13. A third requirement pertains to activities of the vessel outside of the City of Seattle –  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 whether the vessel transfers cargo to a “location” elsewhere, or does not. 127:12-20. Mr.  
2 McKim testified that a vessel that fails to meet all of these requirements may not even call or  
3 moor at a cargo terminal in the City. 58:15-19. In other words, the only vessels that can moor,  
4 even for an hour, at a cargo terminal, are vessels that (a) primarily function as a cargo vessel; (b)  
5 are loading or unloading cargo on the specific occasion at that terminal; and (c) will in fact  
6 deliver that cargo to what the City deems to be a “location,” somewhere out of the City. This  
7 assumes, of course, that there are no other unwritten requirements that the City has not yet  
8 articulated.  
9

10 Notably, Mr. McKim developed the elements of this new test without any knowledge of  
11 or experience with the operations of vessels, cargo terminals, or the maritime industry. McKim  
12 60:17-61:4. When asked what standards the Port or other cargo terminal operators should apply  
13 when attempting to administer the new primary function test, a test now necessary to determine  
14 the legality of cargo terminal operations, Mr. McKim candidly admitted that he did not know.  
15 McKim 118:20-120:8.  
16

17 Even if it embodied a clear and articulable standard, the real-world effects of applying the  
18 new primary function test would fundamentally change the operation of cargo terminals, and  
19 cripple the Port of Seattle as a competitive commercial cargo enterprise. Mr. McKim testified  
20 that the following would be the new rules at Terminal 5 or other cargo terminals:  
21

- 22 • An empty “cargo vessel” or “container ship” cannot moor at a cargo terminal unless it is  
23 loading or unloading goods that would be delivered to some other location. Such vessels  
24 that need repairs, or which need to moor for a month or two between seasons or voyages,  
25 or while waiting for repairs, cannot come to the Port’s cargo terminals, even though they  
26 have done so for decades. 58:3-13.
- 27 • Vessels whose primary function is deemed not to transfer cargo cannot moor at a cargo  
28 terminal for any reason, including loading and unloading goods. This includes scores of

1 fishing vessels; oil spill response vessels; seismic vessels; and government vessels that  
2 have moored at the Port's cargo facilities for decades. 58:15-60:16.

- 3 • A fishing vessel may not moor, or even load/unload its nets, at a cargo terminal. 59:10-  
4 21.
- 5 • An empty fish trawler cannot moor at a cargo terminal; the same fish trawler that has  
6 goods might be able to moor, even though its primary function has not changed, as long  
7 as it unloads those goods. 80:10-16.
- 8 • U.S. and foreign navy vessels cannot moor at cargo terminals in Elliott Bay during  
9 Seafair, or at any other time. 124:6-13.
- 10 • Seismic research vessels, the UW vessel Tommy Thompson, diving vessels, and NOAA  
11 vessels could not load or unload their equipment at a cargo terminal because their  
12 primary function is research. 59:22-60:5; 128:5-13.
- 13 • Oil spill response vessels cannot load and unload their boom and absorbents at a cargo  
14 terminal because their primary purpose is to assist in responding to oil spills. 60:7-16.
- 15 • A marine construction vessel cannot load construction materials or equipment at a cargo  
16 terminal because its primary purpose is not to transfer goods in the stream of commerce.  
17 122:14-123:5.

18 These are just some examples of the dramatic changes this new, unwritten test will impose.

19 Many different types of vessels other than "cargo vessels" will no longer have any place to moor;  
20 cargo vessels without goods will be barred from the Port's cargo terminals; the Alaskan fishing  
21 fleet, which has called Terminal 91 its homeport for more than 25 years, will be left to find  
22 another home in Puget Sound or elsewhere; businesses supporting the Alaskan fishing fleet will  
23 have no local customers; vessels critical to maritime commerce such as oil spill response vessels  
24 will have to leave. These are long-time historic uses in Elliott Bay that would continue to be  
25 permitted under the initial draft of the interpretation, and under a plain-sense reading of the  
26 definition of "cargo terminal." But the final Interpretation, and the strained, illogical arguments  
27 that gave birth to it, are responsible for these absurd results.

1 **G. Cargo Terminal Operations**

2 The City has historically viewed the activities described above as well within the scope of  
3 the definition of cargo terminal use, as reflected in the City’s permitting decisions on Port  
4 projects at cargo terminals. *See, e.g.*, Exh. DPD 11. Terminal 91, a cargo terminal, routinely  
5 hosts all types of vessels for short and long term moorage, including icebreakers, research  
6 vessels, oil spill response vessels, naval vessels (U.S. and foreign), fishing vessels, fire boats,  
7 police boats, tugs, barges, and cargo vessels, and loads and unloads all sorts of goods and  
8 materials onto and off of such vessels. *Id.*; Testimony of Greg Englin 195:11- 200:16. As part of  
9 these activities, providing seasonal moorage at cargo terminals is an intrinsic and necessary  
10 aspect of the Port’s mission to support maritime business in Seattle. Gallagher 33:6- 34:14.  
11  
12

13 For example, in a land use decision approving demolition of buildings and to change the  
14 use of a portion of an existing warehouse to an office use, DPD stated that “[t]he primary uses at  
15 T-91 which exist and are unchanged by this proposal are chill cargo handling, vehicle importing,  
16 vessel moorage, fish processing, ship fueling, and tank farm operations.” DPD then concludes  
17 that “[t]he overall ‘use’ classification for T-91 is that of a cargo terminal.” DPD Exh. 11 at p.  
18 30. Terminal 91 now has several established uses, including a cargo terminal use, a public  
19 facility use, and a fish processing use. *Id.* Even Mr. McKim testified that he was not aware of  
20 any permit or use approval at Terminal 91, besides the cargo terminal use, that would allow long-  
21 term moorage of fishing boats and tugs and other large vessels. McKim 115:5-13.  
22  
23

24 The City’s permitting decisions describing cargo terminal uses align with the maritime  
25 industry’s understanding of cargo terminals and the term, “cargo.” A number of witnesses  
26 testified to the various activities that have occurred for decades at cargo terminals in Seattle,  
27 including idle moorage. Jim Johnson, the President of Glacier Fish Company, testified that  
28

**MCCULLOUGH HILL LEARY, P.S.**

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



1 Glacier Fish’s fishing fleet homeports at Terminal 91, conducts routine maintenance and repair,  
2 training activities, unloads fishing gear, and backloads supplies at provisions at the terminal.  
3 Johnson 31:20- 32:5. On average, its larger fishing boats moor at Terminal 91 for 125 to 150 days  
4 each year. Johnson 32:17-20. Mr. Johnson testified that loading and unloading fish constitutes  
5 less than five percent of its activities in Seattle. 35:10-22. Mr. Johnson testified that American  
6 Seafoods and other companies operate similarly at Terminal 91. 41:1-25.  
7

8 Mark Knudsen, the President of Conventional Cargo of SSA Marine (which operates  
9 Terminals 18, 25 and 30), explained that “[c]argo is everything that comes on and off the ship,  
10 including the subsets of stores and provisions and various, you know, paying cargo, if it's, you  
11 know, a piece of steel or a box or whatever. So we generally look at cargo as everything that  
12 moves on and off the ship, and it just has different subsets underneath.” Knudsen 52:8-15. The  
13 City did not provide any evidence that demonstrates an ability to distinguish between “cargo”  
14 and the different subsets of the term.  
15

16 Mr. Knudsen further testified that while Terminal 18 primarily caters to container cargo,  
17 the terminal also provides layberthing or long term moorage for various vessels. For instance,  
18 ships at Terminal 18 have offloaded pleasure boats from a vessel into the water while the vessel  
19 is moored at the terminal; a Matson container ship moored at Terminal 25 for several months  
20 while it awaited its next mission; heavy lift cargo, such as construction equipment, is often  
21 removed from a vessel and put onto barges; a specialized barge and sections of the SR 520  
22 floating bridge have moored at Terminal 25/30; and numerous navy vessels have moored at the  
23 terminals from time to time. Knudsen 52:19-59:2. Mr. Knudsen testified that moorage is part  
24 and parcel of what the maritime industry expects to do at a cargo terminal, and the allowance of  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 the various activities described above is standard industry practice that has been occurring for  
2 decades. Knudsen 60:10-64:20.

### 3 III. ARGUMENT

#### 4 A. The standards for granting relief under the Seattle Municipal Code are satisfied in 5 this case.

6 The City Code provides that “[a]ppeals [of DPD interpretations] shall be considered de  
7 novo, and the decision of the Hearing Examiner shall be made upon the same basis as was  
8 required of the Director.” SMC 23.88.020.G.5; *see also King County v. Central Puget Sound*  
9 *Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000) (“The court’s  
10 interpretation of a statute is inherently a question of law, and the court reviews questions of law  
11 de novo.”) “A trial or hearing ‘de novo’ means trying the matter anew the same as if it had not  
12 been heard before and as if no decision had been previously rendered.” *In re Disciplinary*  
13 *Proceeding Against Deming*, 108 Wn.2d 82, 88, 736 P.2d 639 (1987). Under this standard, the  
14 Hearing Examiner is to consider factual questions raised in the code interpretation entirely anew.  
15 This is especially appropriate here, where DPD admits that it did not investigate many of the  
16 facts that underlie its decision, rejected important factual information it received from the Port  
17 and Foss, and instead adopted numerous factual assumptions on matters on which it had neither  
18 expertise nor knowledge. McKim 60:17-61:4, 77:5-13.

19 The City Code also provides that “[t]he interpretation of the Director shall be given  
20 substantial weight, and the burden of establishing the contrary shall be upon the appellant.”  
21 23.88.020.G.5. The Hearing Examiner has interpreted this standard of review to be “clearly  
22 erroneous.” *See Order on Motion to Dismiss Claims*, p. 3. “An application of law to the facts is  
23 clearly erroneous when although there is evidence to support it, the reviewing court on the entire  
24 evidence is left with the definite and firm conviction that a mistake has been committed.”

25 MCCULLOUGH HILL LEARY, P.S.

1 *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295  
2 (2011), *citing Norway Hill Pres. and Prot. Ass'n. v. King County Council*, 87 Wn.2d 267, 274,  
3 552 P.2d 674 (1976) (internal quotations omitted).

4 As described in further detail below, Foss and the Port met this standard because DPD  
5 admitted it did not have “evidence to support” its application of law to the facts, admitted it  
6 ignored elements of the Code and statutory rules of construction, reached a conclusion that was  
7 contrary to the plain language of the Code, and made other errors in its analysis of the law. DPD  
8 made no effort to obtain important relevant facts; DPD ignored some key facts presented to it;  
9 and DPD misconstrued other facts in its decision. It is clear that a mistake has been made and  
10 the ineptitude of DPD’s approach should accordingly not be afforded substantial weight. *See*  
11 *infra* at Sections II.D-II.F.

12  
13  
14 The Hearing Examiner should reverse the Code Interpretation and determine that the Foss  
15 Operations are a cargo terminal use or accessory to such a use.

16 **B. The activities that have occurred, and will occur, at Terminal 5 constitute a cargo**  
17 **terminal use under the plain language of the Code.**

18 The City’s Shoreline Master Program, codified at City Code Chapter 23.60A, defines a  
19 cargo terminal as:

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

24 SMC 23.60A.906.

25 DPD *admits* in the Interpretation that Terminal 5 is a “transportation facility.” F001.  
26 The City *admitted* at hearing that the materials loaded on to the Polar Pioneer and other vessels  
27 were “goods or container cargo.” McKim 52:4-54:25. The City *admitted* that these goods and

28 MCCULLOUGH HILL LEARY, P.S.

1 container cargo were “stored without undergoing any manufacturing processes,” and were then  
2 “transfer[red] [] to other locations.” McKim 65:14-23; McKim 77:15-23; 156:18-157:2. The  
3 City did not dispute at hearing that the goods were also “transferred to other carriers” and “stored  
4 outdoors.” These are the quintessential activities that occur at cargo terminals, as contemplated  
5 by the Code’s definition of a cargo terminal use and confirmed by maritime industry experts.  
6  
7 *See, e.g.* O’Halloran 17:22-19:19 (“everything that was done there on the Shell Oil rig was a  
8 traditional use of a terminal”).

9         The primary principle of statutory interpretation is that “[w]here statutory language is  
10 plain and unambiguous, a statute's meaning must be derived from the wording of the statute  
11 itself.” *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641  
12 P.2d 163 (1982); *HomeStreet, Inc. v. Dep’t. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297  
13 (2009); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). As discussed  
14 below, based upon the undisputed evidence presented at the hearing and the admissions by the  
15 City that these activities fall under the statutory definition, there can be no doubt that the  
16 activities fall under the plain language definition of a “cargo terminal.”  
17  
18

19         **1. The materials being unloaded and loaded onto vessels at Terminal 5 are goods  
20 and container cargo**

21         Because the City Code does not separately define “goods,” the dictionary definition  
22 applies. *Sleasman*, 159 Wn.2d. at 643. Goods, as defined by Webster’s New Collegiate  
23 Dictionary are (a) “something that has economic utility or satisfies an economic want”; (b)  
24 “personal property having intrinsic value but usu. excluding money, securities, and negotiable  
25 instruments”; (c) “cloth”; or (d) “wares, commodities, merchandise.” *See* Foss Exh. F025.  
26

27         At the hearing, Mr. Gallagher testified that materials such as pipe, wire, food, fuel,  
28 container cargo, bayrite, cement, equipment, provisions, and other supplies, were delivered to

**MCCULLOUGH HILL LEARY, P.S.**

1 Terminal 5, stored there either indoors and outdoors, and then loaded onto all of the vessels,  
2 including the Polar Pioneer. Gallagher 25:9-30:13; Exh. F061. Mr. Gallagher and Mr. McKim  
3 agreed that the pipe, equipment, provisions and other materials presented in the photographs of  
4 the materials stored on the dock and loaded on the vessels all have “economic utility,” all are  
5 “personal property having intrinsic value,” and all are “wares, commodities, [and] merchandise.”  
6 Gallagher 72:8-23; McKim 52:4-54:25.  
7

8 Four maritime industry witnesses testified that there is no doubt that these materials  
9 loaded onto the vessels (including those in the containers) are in fact “cargo,” as that term is  
10 generally understood in the maritime industry in Seattle. This was the testimony of Mr.  
11 Gallagher (Vice President of Foss with over 30 years maritime experience); of Jim Johnson  
12 (President of Glacier Fish Company, with over 15 years industry experience); of Mark Knudsen  
13 (the President of SSA Conventional, with over 40 years industry experience); and of Vince  
14 O’Halloran (the Seattle Branch Agent of the Sailors Union of the Pacific, with over 20 years  
15 industry experience). All of these witnesses testified, without any opposing testimony, that cargo  
16 generally includes provisions, stores, gear, and cargo for carriage in the marine industry. *See*  
17 O’Halloran 29:6-10 (“Loading provisions, stores and gear are loading and discharging of cargo if  
18 you’re taking them off or you’re loading them on, and you can carry -- and you also carry cargo.  
19 So, I mean, it’s a multipurpose definition”). Mr. Knudsen explained that “[c]argo is everything  
20 that comes on and off the ship, including the subsets of stores and provisions and various, you  
21 know, paying cargo, if it’s, you know, a piece of steel or a box or whatever. So we generally  
22 look at cargo as everything that moves on and off the ship, and it just has different subsets  
23 underneath.” Knudsen 52:8-15; *see also* O’Halloran 16:8-12 (cargo is “anything that isn’t nailed  
24 down”). Tellingly, neither the City nor Intervenor PSA presented any evidence to contradict or  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 even question these maritime industry experts and their understanding of the terms “goods” and  
2 “cargo.” And Mr. McKim had to admit that many of the items loaded onto the vessels were in  
3 fact in “containers” of various types – a fact he had not tried to investigate while authoring the  
4 final version of the interpretation. McKim 54:13-25.

5  
6 **2. The definition of cargo terminal broadly allows three categories of activities**

7 In the Land Use Code, the City Council has designated three categories of cargo terminal  
8 activity:

- 9 1. Goods or container cargo are stored without undergoing any  
10 manufacturing processes  
11 2. Goods or container cargo are transferred to other carriers  
12 3. Goods or container cargo are stored outdoors in order to transfer them to  
13 other locations

14 SMC 23.60A.906.

15 Accordingly, in order to qualify as a “cargo terminal use,” the Foss Operations must meet  
16 only one of the activities described in the definition of “cargo terminal.” As discussed below, the  
17 evidence at hearing made clear that Foss Operations at Terminal 5 are consistent with all three of  
18 these categories of activities.

19 **a. The goods and container cargo at Terminal 5 were stored without  
20 undergoing manufacturing processes.**

21 Mr. Gallagher testified that the goods and container cargo were delivered to Terminal 5  
22 (primarily by truck) and subsequently organized and stored, both indoors and outdoors, at the  
23 Terminal in preparation for the arrival of the vessels in May. Gallagher 25:9-30:13; Exh. F061.  
24 From February to May, Foss stored the goods, prepared the facility, trained the crew, mobilized  
25 equipment, and brought in cranes, riggings, and shackles. *Id.* Mr. Gallagher testified that no  
26 manufacturing processes occurred. When the eight vessels arrived in May, they were loaded  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 with the goods described above. Gallagher 20:13-24:20, 41:15-69:16; Exhs. F063 to F085  
2 (photos of loaded cargo, stowage plans, cargo manifests).

3 No witness disputed Mr. Gallagher's testimony; Mr. McKim agreed that the goods were  
4 stored without undergoing any manufacturing process. McKim 65:14-23. Accordingly, the  
5 activities at Terminal 5 constitute cargo terminal activities. The Hearing Examiner should  
6 reverse the Interpretation on this ground alone.  
7

8 **b. In the alternative, the Foss Operations are a "cargo terminal" use**  
9 **because the goods and container cargo at Terminal 5 were transferred**  
10 **to other carriers.**

11 As the City Code does not define "transfer" or "carrier," the dictionary definitions apply.  
12 *Sleasman, supra*. These definitions support the conclusion that Foss's Operations at Terminal 5  
13 include transferring goods to other carriers.

14 Webster's New Collegiate Dictionary defines "carrier" in relevant part as follows:

- 15 1 : one that carries: BEARER, MESSENGER  
16 2 a : an individual or organization engaged in transporting passengers or goods for  
17 hire  
18 b : a transportation line carrying mail between post offices  
19 c : a postal employee who delivers or collects mail  
20 d : one that delivers newspapers  
21 e : an entity (as a hole or an electron) capable of carrying an electric charge  
22 3 a : a container for carrying  
b : a device or machine that carries: CONVEYOR

23 Declaration of John C. McCullough, Exh. 4.

24 In the context of Foss's Operations, there are any number of "carriers" at Terminal 5,  
25 each of whom received the goods and container cargo that Foss handled. All of the trucks and  
26 trains that delivered materials to the dock are "carriers" as they are engaged in transporting  
27 goods for hire, and because they "carried" the goods. Similarly, each of the vessels that were  
28

MCCULLOUGH HILL LEARY, P.S.

1 loaded with goods at Terminal 5 are “carriers” of those goods. All of the vessels were hired by  
2 Shell as contractors to transport the goods or materials from Terminal 5 to other locations, for a  
3 fee. Gallagher 21:10-16; 59:1-4. This is true of the Polar Pioneer, and it is true of the offshore  
4 supply vessels, the barges, and the specialty vessels Aiviq and Tor Viking II. Each of them  
5 received goods; were hired to transport them from Terminal 5; and did so.  
6

7 Webster’s New Collegiate Dictionary defines “transfer” in relevant part as follows:

8 1 a : to convey from one person, place, or situation to another : TRANSPORT

9 b : to cause to pass from one to another : TRANSMIT

10 c : TRANSFORM, CHANGE

11 2: to make over the possession or control of : CONVEY

12 McCullough Decl., Exh. 4.

13 At Terminal 5, the goods were delivered on trucks and trains (carriers) and conveyed or  
14 taken to the dock, where Foss maintained possession of them on the dock. Gallagher 25:9-30:13.  
15 The goods then were transferred to the vessels, to which they were “conveyed.” The goods and  
16 containers had a new location and a new carrier possessing them, and thus had been “transferred  
17 to a carrier.”  
18

19 No witness for the City or Intervenor PSA disputed these activities or testified that the  
20 goods loaded onto the vessels were not conveyed or taken from one place to another to a thing  
21 that carries. *See* McCullough Decl., Exh. 4. Accordingly, the activities at Terminal 5 are  
22 consistent with the plain language of the cargo terminal definition. This provides a separate and  
23 independent basis for reversal of the Interpretation.  
24  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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



1                   **c.       In the alternative, the goods and container cargo at Terminal 5 were**  
2                   **stored outdoors in order to transfer them to other locations.**

3                   It is not disputed that Foss stored goods and container cargo outdoors at Terminal 5; Mr.  
4 Gallagher’s testimony and the photographs show that beyond any argument, and Mr. McKim  
5 agreed. McKim 65:14-23.

6                   It is further undisputed that the vessels were loaded with the goods and container cargo  
7 and then left Terminal 5, headed for Port Angeles, Everett, Dutch Harbor, and/or the Arctic.  
8 Gallagher 59:5-10; 56:2-24; 21:17-24:20. Lastly, it is not disputed that the reason the goods and  
9 container cargo were stored was to load them on the vessels, so that the vessels could take them  
10 away to other places. When moved onto the vessels, the goods were “transferred to” another  
11 location; when the vessels left Terminal 5, they continued to transfer the goods to other  
12 locations. In other words, the goods were convey or taken from one place to another. *See*  
13 “transfer” definition, McCullough Decl, Exh. 4.

14                   The City specifically admitted that the Polar Pioneer’s activities met this part of the  
15 definition at the hearing. Mr. McKim testified that loading pipe and other “tubulars” onto the oil  
16 rig at Terminal 5 involves a “transfer to other locations” if the pipe is being taken to and left at a  
17 leased site to which the oil rig intends to return:  
18  
19

20                   Q. Okay. Let’s assume that the place they are leaving those pipes  
21 or casings or tubulars, I think, in the ground, is a place that they are  
22 leasing and that they plan to return to, so if we can just assume that  
23 for my next question. Does that sound to you like a transfer under  
the definition of a cargo terminal?

24                   A. Well, I think that it is being -- yes, we got into the difference  
25 between transfer and transport, but yes, I believe that they would  
26 be -- that that would be transferring those things to that location.

27 McKim 156:17-157:2 (emphasis added; cross examination from Matthew Baca, counsel for the  
28 environmental intervenors). This is, of course, exactly what will occur – the “tubulars” are being

**MCCULLOUGH HILL LEARY, P.S.**

1 left in a drilled exploration well in a site leased to Shell by the federal government – a specific  
2 location in the ocean. Gallagher 36:22-37:14 (well is drilled at a “very specific location” and  
3 engineered with geology of that location in mind).

4 Mr. McKim also agreed that the goods or container cargo on the vessels would be  
5 “transferred to another location” if the goods and container cargo were transferred to the Polar  
6 Pioneer and other vessels at sea. McKim 115:19-25 (agreeing that transfer of goods from an  
7 offshore supply vessel to the Polar Pioneer at sea meets the primary function test). Such  
8 transfers are a regular, integral part of the plans for all of the vessels that loaded at Terminal 5.  
9 Gallagher 37:15-40:6 (describing transfer of goods at sea). The Polar Pioneer will similarly  
10 transfer some of the goods and containers it carried from Terminal 5 to the offshore supply  
11 vessels and barges. Gallagher 37:15-24 (describing transfer of materials at sea to supply  
12 vessels). There is no principled basis on which to distinguish transfers from the offshore supply  
13 vessels to the oil rig from transfers from the oil rig to the offshore supply vessels.

14 Accordingly, when the goods left Terminal 5 for their ultimate destination, the goods  
15 were transferred to another location. The activities at Terminal 5 are consistent with the plain  
16 language of the cargo terminal definition. This provides an additional separate and independent  
17 basis for reversal of the Interpretation.

18  
19  
20  
21 **d. The last antecedent rule applies to the definition of cargo terminal**

22 To discern the plain meaning of the Code, courts employ traditional rules of grammar.  
23 *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). In Washington, it is well settled that,  
24 where the statute being interpreted includes a qualifying phase, the last antecedent rule applies.  
25 *Judson v. Associated Meats and Seafoods*, 32 Wn. App. 794, 801 (1982); *In re Renton*, 79 Wn.2d  
26 374, 485 P.2d 613 (1971); *In re Estate of Kurtzman*, 65 Wn.2d 260, 396 P.2d 786 (1964). The  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 last antecedent rule provides that, unless contrary intention appears in a statute, a qualifying  
2 phrase only applies to the immediately preceding antecedent (instead of all phrases) unless the  
3 qualifying phrase is separated from the antecedents with a comma. *See In re Sehome Park Care*  
4 *Ctr., Inc.*, 127 Wn.2d 774, 781, 903 P.2d 443 (1995); *Judson*, 32 Wn. App. at 801; *see also*  
5 Office of the Code Reviser, “State of Washington Bill Drafting Guide 2015” at Part II(12)(v),  
6 (2015), available at [http://leg.wa.gov/CodeReviser/Pages/bill\\_drafting\\_guide.aspx](http://leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx) (last visited  
7 August 9, 2015). In essence, this rule disfavors an interpretation that would have words “leaping  
8 across stretches of text, defying the laws of both gravity and grammar.” *Flowers v. Carville*, 310  
9 F.3d 1118, 1124 (9th Cir. 2002).

11 Here, the qualifying phrase “in order to transfer them to other locations” appears at the  
12 end of the definition, but is not separated from the three alternatives by a comma. As the  
13 definition is written, it is clear that the Department of Ecology and the City Council intended for  
14 “in order to transfer them to other locations” to qualify only the third phrase (“or stored  
15 outdoors”).<sup>2</sup> If the Department of Ecology and the City Council intended for the qualifying  
16 phrase “in order to transfer them to other locations” to apply to all of the three preceding phrases,  
17 it would have placed a comma before the qualifying phrase. *See Judson*, 32 Wn. App. at 801.

18 This conclusion is particularly compelling when one considers the most recent SMP  
19 revisions, where the Department of Ecology and the City Council added a comma before “or  
20 stored outdoors,” but did not add a comma before the qualifying phrase, “in order to transfer  
21 them to other locations.” *Compare SMC 23.60A.906 with SMC 23.60.906; see also, e.g., State v.*  
22 *Baldwin*, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001) (holding that “when a former statute is  
23 amended, or an uncertainty is clarified by subsequent legislation, the amendment is strong  
24

25  
26  
27 <sup>2</sup> As discussed *infra*, the draft interpretation applied the last antecedent rule and came to the same conclusion as  
28 Foss. Exh. F002.

1 evidence of what the Legislature intended in the first statute”) (citation omitted). The added  
2 comma sets off the last phrase from the other two, confirming and reinforcing the last antecedent  
3 interpretation of the ordinance. Indeed, no other conclusion makes any sense from a  
4 grammatical perspective.

5  
6 As discussed above, the Foss Operations fall within each of the three designated activities  
7 under the definition of cargo terminal. To the extent the Hearing Examiner believes that this  
8 qualifying phrase applies to each type of cargo terminal activity, the evidence at hearing makes  
9 clear that the activities at Terminal 5 remain consistent with the plain meaning of the definition  
10 of cargo terminal uses.

11  
12 **3. The Hearing Examiner’s inquiry ends at the plain, unambiguous language of  
13 the Code.**

14  
15 DPD has admitted that the Code definition is unambiguous and that the Foss Operations  
16 at Terminal 5 meet each element of the cargo terminal as defined in the SMP. The evidence at  
17 hearing supports these admissions. The inquiry into the meaning of the cargo terminal definition  
18 must end there, as “there is no need for the agency's expertise in construing the statute.” *Waste*  
19 *Mgmt. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Accordingly,  
20 the Hearing Examiner must determine, in reviewing the definition of cargo terminal de novo, that  
21 the Foss Operations fall within the plain language of cargo terminal uses.

22 **C. The Hearing Examiner must determine that DPD’s Interpretation is clearly  
23 erroneous because DPD failed to apply facts relevant to this Interpretation and  
24 misconstrued well-established canons of statutory interpretation**

25  
26 The Interpretation states that drilling equipment affixed to the Polar Pioneer is not  
27 considered “goods” and the only activity that would occur at Terminal 5 is “seasonal storage” of  
28 the drilling rig. Exh. F001. But, faced with testimony that significant materials, goods,  
provisions, and cargo were loaded onto the Polar Pioneer and other support vessels, the City

**MCCULLOUGH HILL LEARY, P.S.**

1 changed course and admitted that they are goods that were loaded onto several vessels that were  
2 then transferred to other locations. McKim 53:14-54:12 (admitting materials are goods); McKim  
3 77:15-23, 156:18-157:12 (admitting goods were transferred to another location). In essence, the  
4 City admitted at the hearing that it made a mistake.

5  
6 The Interpretation is accordingly clearly erroneous because (1) it relies on false factual  
7 assumptions; (2) is inconsistent with the plain language of the Code; (3) is inconsistent with the  
8 intent of the SMP and (4) is inconsistent with the City's prior implementation of the definition of  
9 "cargo terminal." Its Interpretation does not deserve to be afforded substantial weight. *Whatcom*  
10 *County Fire District No. 21*, 171 Wn.2d at 427.

11  
12 **1. DPD failed to investigate the proposed activities at Terminal 5 and instead**  
13 **based its Interpretation on a set of inaccurate, uninformed, and incomplete**  
14 **factual assumptions**

15 Despite receiving ample information regarding the operations of Terminal 5 and the  
16 activities that occur at cargo terminals generally, the City rejected this information and resorted  
17 to a number of inaccurate assumptions in the Interpretation, even though Mr. McKim admitted  
18 he was not an expert with regard to cargo terminals and maritime operations (McKim 60:17-  
19 61:4) and agreed that interpretations should not be based upon assumptions (McKim 77: 5-60).

20 Specifically, the following errors were discovered at the hearing.

- 21  
22 • Foss told the City on April 8, 2015 that Foss expected "two vessels as well as ancillary  
23 support fleet" to moor at Terminal 5 that month. Exh. F021, at RFP4000972. In the  
24 Interpretation, the City ignored Foss's input and instead incorrectly concluded that only a  
25 drilling rig and two tugs would utilize Terminal 5 in support of the Foss Operations. Exh.  
26 F001. The undisputed evidence showed that the oil rig and over seven other ancillary  
27 support vessels have moored or will moor at Terminal 5 in support of Foss Operations.  
28 • Foss told the City on April 8, 2015 that Foss expected to receive and load "goods, cargo,  
equipment, supplies, stores, provisions and other materials" at Terminal 5. Exh. F021, at  
RFP4000971. In the Interpretation, the City ignored Foss's input and incorrectly  
assumed, but did not seek to verify, that exploratory drilling equipment was the only  
material that would be loaded onto the drilling rig. Exh. F001. The evidence showed

**MCCULLOUGH HILL LEARY, P.S.**

1 that myriad types of goods were and will be loaded and unloaded onto the various vessels  
2 that support the Foss Operations, including the drilling rig. The City admitted that all of  
3 these materials are considered “goods.” McKim 53:14-54:12.

- 4 • In the Interpretation, the City incorrectly assumed, but did not seek to verify, that no  
5 container cargo would be loaded onto the vessels. In fact, a substantial number of  
6 containers were loaded and will be unloaded. The City admitted that these containers  
7 constituted container cargo. McKim 52:21-53:9.
- 8 • The City incorrectly assumed, but did not seek to verify, that the “drilling rig would be at  
9 Terminal 5 only for purposes of seasonal storage.” The undisputed evidence  
10 demonstrated that, in addition to routine moorage in support of normal cargo terminal  
11 operations, the drilling rig and other vessels have been and will be loaded and unloaded  
12 with goods or container cargo that will be transferred to other locations, as well as to  
13 mobilize for and to demobilize from voyages of several months at sea. The evidence also  
14 showed that loading and unloading would occur most of the time that the oil rig was at  
15 Terminal 5. Gallagher 30:18-31:25.
- 16 • The City incorrectly assumed, but did not seek to verify, that the goods being loaded and  
17 unloaded onto the various vessels supporting the Foss Operations would not be  
18 transferred to other places. The evidence showed that the goods or container cargo will  
19 be transferred to specifically leased locations in the Arctic, to other vessels in the Arctic,  
20 or to other locations. The City now admits that the goods were transferred to other  
21 locations. McKim 77:15-23, 156:18-157:12.
- 22 • The City ignored the historical operations that have occurred at Terminal 5 and other  
23 cargo terminals and Port facilities in Seattle that are identical in all material respects to  
24 the Foss Operations, as described by the Port and Foss in their submissions. The  
25 evidence and testimony highlighted the City’s fundamental misunderstanding of how  
26 maritime businesses operate in Seattle and throughout the world.
- 27 • Foss told the City on April 8, 2015 that Foss was aware of “numerous vessels of various  
28 types which spend a portion of the year in Alaska and return to Seattle for the off-season  
and/or winter months, moored at facilities that are permitted as cargo terminals.” Exh.  
F021, at RFP4000976. In the Interpretation, the City simply ignored this fact and instead  
concluded that lay berthing is not normal, customary, and an essential practice at marine  
cargo terminals. Mr. McKim acknowledged he had no evidence to support that  
conclusion. The testimony at hearing lays to rest any doubt that moorage or lay berthing  
is part and parcel of cargo terminal operations.

The City had – or could have had – access to all of these facts regarding the cargo  
terminal use at Terminal 5 simply by asking Foss, but instead the City chose to ignore the facts it  
had and not to investigate to learn more. Tellingly, after Mr. McKim sat in the hearing room and

**MCCULLOUGH HILL LEARY, P.S.**

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

1 heard four days of evidence contradicting his many assumptions and conclusions, counsel for the  
2 City never asked Mr. McKim to reaffirm the Interpretation or whether his conclusions in the  
3 Interpretation would change based upon the undisputed facts that had been demonstrated.  
4 Presumably, this was because Mr. McKim already admitted that the activities at Terminal 5 met  
5 each and every element of a cargo terminal use. The City’s failure to investigate, as well as its  
6 failure to apply the facts before it at the time the Interpretation was issued, constitutes clear error  
7 and the Interpretation must be reversed. *Whatcom County Fire District No. 21, supra*, 171  
8 Wn.2d at 427 (the City’s decision may be reversed if the Examiner is left with the “definite and  
9 firm conviction that a mistake has been made”).  
10

11 **2. The Interpretation misconstrues the allowable scope of uses associated with**  
12 **the plain language of the definition of a cargo terminal**

13 An administrative interpretation will not be accorded deference if it conflicts with the  
14 relevant statute. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549  
15 (1992). As discussed *supra*, the Foss Operations fall squarely within the plain language of the  
16 “cargo terminal” definition. The City’s Interpretation to the contrary is clear legal error.  
17

18 **a. DPD failed to apply the entire definition of goods in its final**  
19 **Interpretation**

20 The City initially defined goods as “something that has economic utility or satisfies an  
21 economic want.” Foss Exh. F002, at RFP1000005; McKim 43:10-15. Inexplicably, the City  
22 then changed the definition of “goods” in the final Interpretation to exclude this definition, and  
23 only to include “personal property having intrinsic value” or “wares, commodities,  
24 merchandise.” Foss Exh. F001. When interpreting the SMP, the City cannot cherry pick  
25 favorable parts of a definition that support its preferred result; the dictionary definition must be  
26 examined as a whole. *See, e.g., State v. Elgin*, 118 Wn.2d 551,556, 825 P.2d 314 (1992). As  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 demonstrated *supra*, the materials loaded onto the Polar Pioneer and support vessels are goods.  
2 The City's choice to ignore the full definition of "goods" in its final Interpretation is a  
3 consequential mistake, and the Interpretation must be reversed.

4  
5 **b. DPD refused to apply the last antecedent rule in the final Interpretation**

6 At hearing, Mr. McKim testified that he was familiar with the last antecedent rule and  
7 applied it in his initial draft interpretation. Foss Exh. F002; McKim 46:6-47:23. As a result, the  
8 draft interpretation concluded that the last qualifying phrase in the cargo terminal definition  
9 applied only to the third alternative in the definition. *Id.* In its final Interpretation, the City never  
10 mentioned the last antecedent rule and instead elevated the qualifying phrase to be the "unifying  
11 theme" of the entire definition. Foss Exh. F002, p. 4. That perverse approach ignores rules of  
12 grammar and statutory interpretation, and then was used by the City to manufacture a host of  
13 undocumented and entirely new requirements.  
14

15  
16 Mr. McKim testified that after several arguments, he was persuaded by the City's Law  
17 Department to abandon the last antecedent rule because it would essentially make a warehouse a  
18 permitted use, one which would otherwise not be appropriate in the shoreline environment unless  
19 it were water-dependent:  
20

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

23 **Mr. McKim:** Well I think that would really be no different than warehoused --  
24 whatever kind of goods -- and I think what we intend to regulate by cargo  
25 terminal is actually something that is associated with being transferred to other  
26 locations. I think this is -- particularly -- that is ultimately what we concluded in  
27 the interpretation. This is particularly the case in the shoreline where in order to  
28 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



1 arriving or leaving by water, then it wouldn't be consistent with what is desired  
2 under the shoreline code.

3 McKim 144:23-145:17.

4 Mr. McKim's concerns have no foundation in the Code. Mr. McKim failed to explain  
5 that the definition of "warehouse" in the Land Use Code itself requires transfer of goods to  
6 another location. 23.84A.036 "S" (Warehouse means "a storage use in which space is provided  
7 in an enclosed structure for the storage of goods produced off-site, for distribution or transfer to  
8 another location.") Moreover, the City Council can—and in fact did—limit warehouse uses in  
9 the UI shoreline environment to water-dependent or water-related warehouse uses. SMC  
10 23.60A.482.D.  
11

12 Mr. McKim's other concern seems to be that a cargo terminal in the shoreline should not  
13 be properly be able to store materials unless the terminal is also transferring the goods to another  
14 location. McKim 146:5-13. Whether or not that is a proper policy concern, the language of the  
15 Land Use Code simply does not support his argument. Cargo terminals are a subset of the more  
16 general category of "transportation facilities," which includes facilities that "support[] the means  
17 of transporting . . . goods from one location to another." SMC 23.84A.038. A facility that is  
18 close to the shoreline, but does not have the ability to load vessels because of lack of sufficient  
19 water depth or lack of proper dock facilities, can "support" marine transportation by acting as a  
20 storage facility – this is, for example, done at cargo terminals that store empty containers and  
21 chassis, or which pack and unpack containers. Further, Mr. McKim's view illogically would  
22 allow transfer from one land-based type of transport (trucks, for example) to another land-based  
23 transport (rail, for example) at a cargo terminal even though neither involves any use of the  
24  
25  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 shoreline, but not storage on a shoreline when the goods are ultimately destined to be used on a  
2 vessel.

3 The City has no justification for its flagrant disregard of the last antecedent rule; the use it  
4 seeks to prohibit by ignoring the rule is both permitted in the shoreline environment and requires  
5 a “transfer” to another location. Because the City’s Interpretation improperly violates  
6 established canons of statutory interpretation, the Interpretation must be reversed.  
7

8 **c. The Interpretation fails to follow the clear language of the City Code**  
9 **and instead requires that the “primary function” of a vessel must be**  
10 **to transport goods in the stream of commerce**

11 In interpreting a statute, the Director (and thus the Examiner) must take the applicable  
12 words as the City Council has enacted them, and not insert words in an attempt to give the statute  
13 some different “meaning” or “intent.” *Shelton Hotel Co. v. Bates*, 4 Wash.2d 498, 508, 104 P.2d  
14 478 (1940); *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys.*, 92 Wash. 2d  
15 415, 421, 598 P.2d 379, 382-83 (1979) (citations omitted). Mr. McKim acknowledged that the  
16 role of DPD in performing an interpretation was to “interpret the words in the shoreline master  
17 program as the words are written,” to “use[] the language that is actually there in the program,”  
18 not to “insert words into the definition,” not “to take things out of the definition,” not “to ignore  
19 things that are in the definition,” and to “follow the rules of statutory interpretation.” McKim  
20 11:4-12:4. Here, the City has ignored its limited role and proposes to act instead as a legislative  
21 body, creating a new “primary function” test out of whole cloth, with no basis in the language of  
22 the SMP and contrary to its historical application of the Code.  
23

24 As articulated at the hearing, the new so-called “primary function” test, used for the first  
25 time in the Interpretation, has three elements: (a) in order for a vessel to moor, load, or unload  
26 goods at a cargo terminal, the primary function of the vessel must be to move cargo in  
27

28 **MCCULLOUGH HILL LEARY, P.S.**

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

1 commerce; (b) the vessel can only moor if it is in fact loading or unloading “cargo,” which is  
2 narrowly defined by the City to mean material being delivered to another location; and (c) the  
3 vessel must in fact deliver the material to that other location after it departs. The City appears to  
4 argue that this complex, multipart test originates entirely in the qualifying phrase “in order to  
5 transfer them to other locations” in the definition of a cargo terminal. This insertion of several  
6 new requirements into the Code is contrary to the clear and unambiguous language of the SMP,  
7 and creates an unworkable construct that produces absurd results.  
8

9 First, the City has no basis in the Code on which to distinguish materials that are carried  
10 from one location to another by a carrier for hire (so-called “paying cargo”) from the other types  
11 of cargo loaded onto vessels. The Code does not use the words “paying cargo” or “cargo for  
12 hire” or any other similar language in describing what needs to be transferred. The Code instead  
13 refers to “goods” (which has a broad dictionary definition) and “container cargo” (which was  
14 loaded onto all the vessels). The only testimony at the hearing – testimony not rebutted by the  
15 City or the PSA Intervenors – is that provisions, gear, equipment, paying cargo, and all other  
16 items “not nailed down” and loaded on a vessel are cargo. The testimony at the hearing is that  
17 the tubulars and other materials being transported to the Arctic are “paying cargo” because the  
18 owners of the Polar Pioneer and all of the other vessels are in fact being paid, by charter  
19 agreements with Shell, for carrying the goods and container cargo from Terminal 5 to other  
20 locations. Gallagher 21:10-16; 59:1-4. There is no narrow “cargo” requirement in the definition,  
21 and certainly no “paying cargo” requirement that would limit the activities considered here.  
22  
23  
24

25 A pernicious aspect of the City's Interpretation is that a vessel can comply with every one  
26 of the written requirements of the statutory definition, but still not use a cargo terminal because  
27 the City deems its “primary” purpose to be something other than transporting cargo, even though  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 there is no “purpose” or “primary purpose” test in the definition. A multipurpose vessel like the  
2 Aiviq or the Tor Viking II is an example. Those vessels load and carry cargo from place to  
3 place, and deliver the cargo to other locations, but also perform a number of other functions  
4 depending on how the vessel is deployed and who has hired it. The City’s Interpretation says the  
5 cargo-carrying function is irrelevant unless that is its “primary function.” That leads to a number  
6 of unanswerable questions – what criteria determine the “primary” function of the vessel? When  
7 is that test applied? Does a vessel’s function change from voyage to voyage, or day to day, or  
8 customer to customer? Who created the “primary function” test in the first place? Why is it  
9 critical that a vessels loading cargo at cargo terminals be limited to those which are “primarily”  
10 cargo vessels?  
11

12  
13 Of course, the phrase “primary function” appears nowhere in the SMP; has never been  
14 considered or adopted by the City Council; has never been subject to the normal legislative  
15 process; has not been vetted by the Department of Ecology; and was invented by DPD for one  
16 reason – to prevent the Polar Pioneer from mooring at Terminal 5 in Seattle. The term “vessel”  
17 does not even appear in the definition of cargo terminal, so there is no way to limit the types of  
18 vessels regulated at such facilities. There simply no Code requirement that a vessel’s “primary  
19 purpose” outside of the jurisdictional waters be to transport cargo. Indeed, regulating its  
20 shoreline by making judgments on the vessel’s purpose or use at its ultimate destination  
21 essentially regulates vessels, in direct violation of its own Code. *See, e.g.,* SMC 23.60A.215  
22 (regulating only the use of the vessel while moored); 23.60A.018 (prohibiting regulations of  
23 vessels other than while the vessels are moored).  
24

25  
26 Moreover, the City has failed to articulate what, if any, standards should be used to  
27 determine the “primary function” of a vessel given a vessel’s myriad functions outside of Seattle  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 and the fact that the activities at the shoreline may be exactly the same. The City struggled to  
2 explain how an offshore supply vessel that loads pipe, wire, provisions, stores, and equipment  
3 and transfers those materials to a drilling rig in the Arctic could legally moor and operate at a  
4 cargo terminal, but a drilling rig, which loads the exact same pipe, wire, containers, provisions,  
5 stores and equipment at Terminal 5, cannot moor or load and unload those goods, even if it  
6 transfers some of those goods to a specific location and even if it transfers some of them to other  
7 vessels. The City will prohibit moorage of the drilling rig because its “primary purpose”  
8 approximately 2,000 miles away is deemed to be different than that of the other vessels, and even  
9 though it will load and unload goods in addition to its exploratory drilling activities. There is no  
10 such distinction in the cargo terminal definition.  
11

12  
13 Cargo terminal operators have the right to know what activities are permitted, and  
14 prohibited, under a zoning ordinance. *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d  
15 208 (2003). It is well settled that, “[t]he regulation of land use must proceed upon an express  
16 written code and not be based on ad hoc unwritten rules so vague that a person of common  
17 intelligence must guess at the law’s meaning and application.” *Id.* Here, there is not only no  
18 guidance in the Code to help understand the primary function test, but the City’s own witnesses  
19 contradicted one another on how the primary function test will be applied. *Contrast McKim*  
20 *74:13-75:25* (admitting that offshore supply vessels such as the Aiviq meet the primary function  
21 test) *with Lumsden Day 2, Tape 3 of 4, 1:52:53 – 1:55:32 and Exh. F015* (issuing a Notice of  
22 Violation for the Aiviq). This renders Foss and other cargo terminal operators vulnerable to  
23  
24  
25  
26  
27  
28

1 future arbitrary discretionary enforcement actions by the City if a particular vessel moors at  
2 Terminal 5.<sup>3</sup>

3 While an administrative agency can interpret ambiguous statutory language, it cannot  
4 create new statutory requirements in an interpretation, which is exactly what the primary  
5 function test does. *Washington Federation of State Employees v. State Personnel Bd.*, 54 Wn.  
6 App. 305, 308, 773 P.2d 421 (1989) (“Agencies do not have the authority to make rules which  
7 amend or change legislative enactments.”). Here, the City artificially manufactured a new  
8 standard for the sole purpose of finding a way to disallow this particular use. This factually  
9 devoid result is clearly erroneous.  
10

11 **d. The new “primary function” test produces absurd results**

12 The City must also avoid absurd results when interpreting its Code. *Post v City of*  
13 *Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009) (“A reading that produces absurd results  
14 should be avoided, if possible, because we presume the legislature does not intend them.”).  
15 Statutes and ordinances must be interpreted in a manner that does not lead to absurd results in the  
16 real world. *Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue*, 163 Wn. App.  
17 298, 307, 259 P.3d 338, 343 (2011) (internal citations omitted). However, in developing a new  
18 “primary function” test, the City created an unworkable test that will fundamentally change the  
19 operation of the City’s cargo terminals.  
20  
21

22 Many vessels moor, load and unload goods, and conduct routine maintenance at cargo  
23 terminals. The Interpretation will prevent many kinds of vessels from mooring at the Port’s  
24 cargo terminals, including NOAA and University of Washington research vessels, fishing  
25

26  
27 <sup>3</sup> The City has already issued a notice of violation not only for the drilling rig as part of the Interpretation, but also  
28 for the Aiviq, which as the evidence shows, is not a drilling rig and was not even described in the Interpretation.  
Exh. F105.

1 vessels, Navy and Coast Guard vessels, oil spill response vessels, ships of state, tug boats, and  
2 construction vessels. The Alaskan fishing fleet will no longer be able to homeport at Terminal  
3 91 or any other cargo terminal. Indeed, such vessels cannot even load or unload goods or  
4 equipment of any type at cargo terminals; they are essentially banned from those facilities. It is  
5 hard to imagine that the City Council intended such a result given the importance of these vessels  
6 to the City's marine economy. *See, e.g., Knappett v. Locke*, 92 Wash.2d 643, 645, 600 P.2d  
7 1257 (1979) (an ordinance is not construed so as to reach an absurd result).<sup>4</sup>

9 The City further suggests, without full examination, that the Port can simply get a  
10 commercial marina permit and then all of these vessels will be free to moor and load the goods  
11 and heavy equipment. Whether a commercial marina use is appropriate or not is beside the  
12 point; getting additional use permits to permit a decades-long practice and call into question all  
13 existing cargo terminal activities creates an absurd result contrary to the clear language of the  
14 SMP. *See, e.g., SMC 23.60A.220.D.9.a.1* (providing for efficient use of industrial shorelines by  
15 major cargo facilities).

17  
18 **3. The Interpretation is inconsistent with and frustrates the SMP's intended  
treatment of the Urban Industrial Environment**

19 "The fundamental objective of statutory construction is to ascertain and carry out the  
20 intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).  
21 In order to determine legislative intent, each statutory provision should be read by reference to  
22 the whole act. *Davis v. Dep't of Licensing*, 137 Wash. 2d 957, 970-71, 977 P.2d 554, 559-60  
23 (1999); *Whatcom Cnty. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996).  
24  
25

26  
27 <sup>4</sup> The City's argument that it does not intend to enforce the Interpretation against such vessels illustrates that the  
28 Interpretation is entirely result-oriented. Of course, any citizen (or competitor) can request an interpretation that  
applies to such vessels, forcing the City's application of the "primary function" test. *McKim* 99:22-25.

**MCCULLOUGH HILL LEARY, P.S.**

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

1 The Shoreline Management Act (“SMA”) is required to be liberally construed to effect its  
2 purposes. RCW 90.58.900. This does not mean, as Mr. McKim suggested in his testimony, that  
3 the City must apply the SMP “strictly to achieve . . . particular things specific to the shoreline.”  
4 McKim 144:5-13. Indeed, Black’s Law Dictionary defines “liberal construction” as “[a]n  
5 interpretation that applies a writing in light of the situation presented and that tends to effectuate  
6 the spirit and purpose of the writing.” *Black’s Law Dictionary* (3<sup>rd</sup> Pocket Edition 2006),  
7 attached as Exhibit 5 to McCullough Declaration. This is contrasted with the meaning of “strict  
8 construction,” defined as “[a]n interpretation that only considers the literal words of a writing.”  
9 *Id.* In other words, the SMA must be read broadly to achieve its purposes, not narrowly to  
10 prohibit the mooring of a drilling rig.  
11

12  
13 A primary purpose of the SMA is to give priority to “industrial and commercial  
14 developments which are particularly dependent on their location on or use of the shorelines of  
15 the state.” RCW 90.58.020. Consistent with this priority, the City’s SMP encourages water-  
16 dependent uses. SMC 23.60A.002.B.2. More specifically, the UI environment, where Terminal  
17 5 is located, was established to facilitate all maritime operations. Indeed, this environment is  
18 intended to “provide for efficient use of industrial shorelines by major cargo facilities and other  
19 water-dependent and water-related industrial uses, and to allow for warehouse uses that are not  
20 water- dependent or water-related where they currently exist.” SMC 23.60A.220.D.9.a.1.  
21  
22 Contrary to the City’s Interpretation, the intent of the SMP to encourage and foster port and  
23 maritime operations in Seattle, not to allow the City to pick and choose the vessels at its  
24 shoreline based on the vessel’s primary purpose outside of the City’s jurisdiction. *Id.*  
25

26 Shockingly, the City argues that is not required to consider its own Shoreline Goals and  
27 Policies found in its Comprehensive Plan when issuing an interpretation. *See* DPD pre-hearing  
28

MCCULLOUGH HILL LEARY, P.S.

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



1 brief at p. 4. In fact, the very provision cited by the City in support of its argument *requires* such  
2 consideration. SMC 23.60A.004 (“[The Shoreline Goals and Policies] shall also be used by the  
3 Director in the promulgation of rules and in interpretation decisions”). The City cannot turn a  
4 blind eye to decades-long practices and stated shoreline goals in this Interpretation simply to  
5 justify the end result that effectively prohibits the Polar Pioneer from calling in Seattle. Its  
6 failure to consider its Comprehensive Plan is clear error and itself rebuts any deference the  
7 Hearing Examiner might otherwise provide the City’s decision.  
8

9         The Interpretation also ignores SMP’s application and discussion of cargo terminal uses  
10 in other contexts, each of which further demonstrates that the City’s narrow Interpretation is  
11 erroneous. For example, the definition of “tugboat services” states, in relevant part, that  
12 “facilities that include barge moorage and loading and unloading facilities for barges as well as  
13 tugboat moorage are not tugboat services and are classified as cargo terminals.” SMC  
14 23.60A.938. Implicit in this definition of tugboat services is a broad interpretation of “cargo  
15 terminal” that assumes the full range of permitted activities (consistent with the City’s historical  
16 application of that use). It does not require demonstration of a barge’s primary purpose or  
17 require that loading and unloading occur at the facility in order to moor at a cargo terminal.  
18 Instead, as suggested by DPD in its draft interpretation, this definition recognizes the City  
19 Council's intent to permit a broad range of activities at cargo terminals and lends support to the  
20 conclusion that the Foss Operations are consistent with the SMP’s intended cargo terminal use.  
21 Foss Exh. F002. It is further evidence that DPD’s narrow, myopic Interpretation is clearly  
22 erroneous.  
23  
24  
25

26         Similarly, in instances where the City Council wanted to limit the type of cargo terminal  
27 uses permitted in shoreline environments, it has done so. For example, cargo terminal uses that  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 are break bulk facilities are allowed only as a conditional use in the Urban Harborfront  
2 environment, but all other cargo terminal uses are prohibited. *See* SMC 23.60A.442.M. If the  
3 City Council intended to limit the type of cargo terminal or type of vessels that can use a cargo  
4 terminal at Terminal 5, it would have done so.

5 Because the SMP takes a broad view of cargo terminal uses, the definition of cargo  
6 terminal cannot be limited on an ad hoc basis in contravention of the purposes of the SMP.

#### 8 **4. The City’s Interpretation is Inconsistent with Its Past Implementation**

9 A number of witnesses testified to the various activities that occur at cargo terminals in  
10 Seattle, including idle moorage. Mr. Johnson testified that Glacier Fish Company’s fishing fleet  
11 homeports at T91, and rarely loads and unloads fish in Seattle. On average, the company’s  
12 larger fishing boats call at Terminal 91 for 125-150 days out of the year so that the crews can rest  
13 and be trained, routine vessel maintenance can be conducted, and additional supplies can be  
14 loaded onto the vessels. Similarly, Mr. Knudsen testified that while Terminal 18 primarily caters  
15 to container cargo, the terminal also provides moorage for various vessels, such as an empty  
16 container ship that is awaiting its next mission. Mr. Knudsen testified that moorage is part and  
17 parcel of what the maritime industry expects to do at a cargo terminal, and the allowance of the  
18 various activities described above is standard industry practice that has been occurring for  
19 decades.  
20  
21

22 The City understands these wide-ranging cargo uses, and until the issuance of this  
23 interpretation, encouraged moorage of vessels at cargo terminals for vessels whose primary  
24 function is not carrying cargo. For example, in a land use decision approving demolition of  
25 buildings and to change the use of a portion of an existing warehouse to an office use, DPD  
26 stated that “[t]he primary uses at T-91 which exist and are unchanged by this proposal are chill  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 cargo handling, vehicle importing, vessel moorage, fish processing, ship fueling, and tank farm  
2 operations.” DPD then concludes that “[t]he overall ‘use’ classification for T-91 is that of a  
3 cargo terminal.” DPD Exh. 11 at p. 30. Notably, even later permit decisions that established  
4 different uses at the site nevertheless recognize the broad range of activities allowed under the  
5 existing cargo terminal use. For example, a later permit for passenger terminal construction  
6 confirms that the cargo terminal use includes “diversified” activities such as “factory trawler  
7 homeport and support facility,” “short- and long-term moorage for tugs, barges and other large  
8 vessels,” and “berthing commercial vessels, including fish vessels, barges, transshipment vessels  
9 and other commercial moorage.” Exh. F111, p. 2. Tellingly, when asked if any permit or use  
10 approval at Terminal 91, besides the cargo terminal use, would allow long-term moorage of  
11 fishing vessels and other large vessel, Mr. McKim testified that he was not aware of any other  
12 approval. McKim 115:5-13.

15 By analogy to the legislature’s presumed awareness of an interpretation of a statute by the  
16 courts, the City Council is presumed to know how DPD has interpreted the Code. Certainly, the  
17 City had some understanding of the wide variety of vessels and activity that occur at the  
18 shoreline, and, understanding much of this activity occurs at cargo terminals, did not seek to  
19 limit the definition of cargo terminal to exclude those vessels that are not specifically loading  
20 and unloading at the terminal itself or whose primary function is not to transfer cargo. If the City  
21 Council has declined to amend the Code in its most recent SMP, under a well-established canon  
22 of statutory interpretation, this indicates agreement with the historic interpretation. *See Broom v.*  
23 *Morgan Stanley D.W., Inc.*, 169 Wn.2d 231, 238, 236 P.3d 182 (2010) (“[t]he Legislature is  
24 presumed to be aware of judicial interpretation of its enactments,’ and where statutory language  
25 remains unchanged after a court decision the court will not overrule clear precedent interpreting  
26  
27  
28

**MCCULLOUGH HILL LEARY, P.S.**

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

1 the same statutory language.”); *City of Federal Way v Koenig*, 167 Wn.2d 341, 348, 217 P.3d  
2 1172 (2009) (“This court presumes that the legislature is aware of judicial interpretations of its  
3 enactments and takes its failure to amend a statute following a judicial decision interpreting that  
4 statute to indicate legislative acquiescence in that decision.”).

5  
6 In its SMP revisions, rather than tightening the restrictions, the City instead reiterated the  
7 three separate types of activities that occur at cargo terminals, and by adding a comma to the  
8 definition entirely separated the last antecedent from the prior phrases in the definition.  
9 Accordingly, DPD’s Interpretation that moorage is not permitted at a cargo terminal unless the  
10 primary function of the vessel is to transfer cargo in the stream of commerce is without basis in  
11 the language or intent of the SMP revisions.  
12

13 **D. The Interpretation misconstrues the allowable scope and nature of accessory uses  
14 and improperly determines the Foss Operations are not an accessory use**

15 The Code Interpretation erroneously concludes that moorage is not “accessory” to the  
16 established cargo terminal use of Terminal 5. This conclusion is inconsistent with the law and  
17 facts shown at hearing. The Hearing Examiner should reverse the City’s decision.

18 SMC 23.84A.040 defines “accessory use” as “a use that is incidental to a principal use.”  
19 In addition, SMC 23.60A.940 defines “accessory use” as “a use that is incidental and intrinsic to  
20 the function of a principal use and is not a separate business establishment unless a home  
21 occupation.” SMC 23.60A.900 states that the definitions of Chapter 23.60A apply when they  
22 differ from the definitions in the rest of the Land Use Code.  
23

24 The Interpretation relies solely on SMC 23.60A.940, asserting that the word “intrinsic”  
25 makes this definition more stringent than the one appearing in SMC 23.84A.040. However, the  
26 City provides no support for its bare assertion that the term “intrinsic” somehow yields a more  
27 narrow definition that would exclude the moorage of the drilling rig. The weight that the City  
28

**MCCULLOUGH HILL LEARY, P.S.**

1 places on the word “intrinsic” renders meaningless the preceding the word “incidental.” To the  
2 contrary, under the plain meaning of these terms, moorage is both incidental and intrinsic to the  
3 cargo terminal use. The City is bound by standards of statutory interpretation.

4           According to Webster’s New Collegiate Dictionary, “incident” means (among other  
5 things) something that is incidental, while “incident” means (among other things) “something  
6 dependent on or subordinate to something else of greater or principal important.” McCullough  
7 Declaration, Exhibit 4. “Intrinsic” means (among other things) “belonging to the essential nature  
8 or constitution of a thing.” *Id.* Here, vessel moorage is incidental to cargo terminal use because  
9 it is associated with such use, and is inherent in it. Under the plain language of the definition, a  
10 cargo terminal use involves either storage or transfer of goods or container cargo. Moorage is  
11 incidental to these uses in that vessels must moor in order to deliver goods or cargo for storage or  
12 transfer. In addition, moorage is intrinsic: while the definition focuses on what happens to the  
13 goods or cargo (storage or transfer), vessels must moor at the terminal in order to deliver or (as  
14 here) be loaded with the goods or cargo. The undisputed evidence presented at the hearing made  
15 this clear:  
16  
17  
18

19           Q. Mm-hmm. Would you say that this idle moorage activity you've  
20 described is intrinsic in operating a cargo terminal?

21           A. Yeah, it's just part and parcel of what people expect out of a cargo  
22 terminal to be able to do, or at least what our customers expect, is the  
23 ability to come in, lay their vessels up if they need to between vessels --  
24 there is a large difference between the different types of vessels that  
25 call in, but some of the ones that aren't on -- you know, the high profile,  
26 big containerhips are going to be pretty tight on their schedules. A lot of  
27 the other ships have, you know, the opportunity or maybe need the  
28 opportunity to stay for a day or two to make up their schedule or wait for  
29 crew or wait for parts or whatever. So –

30           Q. Has this been the case for the last 30 years, in your experience?

1 A. Yeah.

2 Knudsen 64:5-20; *see also* Gallagher 87:2-8.

3 For this reason, in the alternative, the Hearing Examiner should determine that the current  
4 and proposed use of Terminal 5 is accessory to the permitted cargo terminal use.

5  
6 **IV. CONCLUSION**

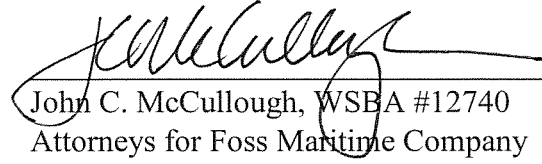
7 Under the plain language of the City Code and the uncontested evidence at hearing, the  
8 activities at Terminal 5 constitute a cargo terminal use. To reach a contrary conclusion in the  
9 Interpretation, the City ignored the evidence before it in the record, relied instead on assumptions  
10 and supposition, abandoned long-standing canons of statutory interpretation and, if all this were  
11 not enough, fabricated a new “primary function” test to apply in this case. The Hearing  
12 Examiner must reject the Interpretation because it is contrary to the record in this proceeding,  
13 contrary to the plain meaning of the City Code, contrary to standards of statutory interpretation  
14 and leads to absurd results. Accordingly, the Hearing Examiner should reverse the Interpretation  
15 because it is clearly erroneous. The Examiner should instead determine that the use of Terminal  
16 5 to load and unload vessels and to moor those vessels, is a cargo terminal use or, in the  
17 alternative, accessory to a cargo terminal use.  
18  
19

20 [signatures on the next page]  
21  
22  
23  
24  
25  
26  
27  
28

1 Respectfully submitted this 10<sup>th</sup> day of September, 2015.


2 MCCULLOUGH HILL LEARY, P.S.

3  
4 By:

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

7 GARVEY SCHUBERT BARER

8  
9 By:

  
David R. West, WSBA #13680  
Donald B. Scaramastra, WSBA #21416  
Daniel J. Vecchio, WSBA #44632  
Attorneys for Foss Maritime Company

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 **MCCULLOUGH HILL LEARY, P.S.**

701 Fifth Avenue, Suite 6600

Seattle, WA 98104

206.812.3388

206.812.3389 fax