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BEFORE THE HEARING EXAMINER
THE 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:
S-15-001 and S-15-002

(Director's Interpretation: 15-001)

**PORT OF SEATTLE'S POST-
HEARING BRIEF**

I. INTRODUCTION

The evidence presented over four days of hearing demonstrates that Appellants have overcome the substantial weight that the Code gives to every interpretation: this particular Interpretation is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts. DPD brought no knowledge of the maritime industry to the Interpretation; DPD disregarded important aspects of the evidence presented to it by the Port and Foss; and DPD relied on erroneous assumptions instead of making additional inquiry into the facts.

In addition, and as a threshold matter, DPD failed to present any evidence that moorage of vessels constitutes "substantial development" under the City's Shoreline Master Program (SMP). As discussed in Argument A, the City's SMP is part of the "state master program," and DPD cannot require permits under the SMP that are not required by the regulations that Ecology has approved and made part of the state master program. Even though the Hearing Examiner

1 expressly stated in her Order on Motion to Dismiss Claims that she wanted to receive additional
2 evidence on this issue (Port Issue No. 4), DPD presented no additional evidence, and all the
3 evidence presented by the Port and Foss demonstrates that vessel moorage is not development
4 within the meaning of the Shoreline Management Act (SMA) or the City's SMP.

5 This failure alone is determinative of this appeal. DPD may not require a shoreline
6 permit for a vessel to moor. Additionally, the Interpretation is not supported by substantial
7 evidence and is clearly erroneous for all the reasons discussed in Arguments B – F. The Hearing
8 Examiner should invalidate the Interpretation for all these reasons.

9 **II. ARGUMENT**

10 **A. The City Failed To Present Facts To Demonstrate That Moorage Of Vessels At Port**
11 **Facilities Interferes With The Normal Public Use Of The Surface Of The Waters,**
12 **And The City Cannot Require A Shoreline Permit For Moorage At Established Port**
13 **Facilities.**

14 The voters of Seattle created the Port of Seattle in 1911, and the Port has been mooring
15 vessels at its facilities since that time. After the City adopted its first SMP in 1997, it has issued
16 shoreline substantial development permits as the Port has developed and redeveloped its
17 facilities, applying the use label of "cargo terminal" to many of these developments. Many of
18 the shoreline permits have been made part of the record in this appeal, and none of these permits
19 for development (construction) of a cargo terminal or other Port facility imposes a condition that
20 limits the kinds of vessels that can moor at the development.

21 Thus, before it issued the Interpretation, the City applied its SMP consistently with the
22 rest of the State: as the Port stated in its Pre-Hearing Brief, a search by the Port's attorneys of
23 more than 20 years of on-line decisions by the Shorelines Hearings Board (SHB) failed to
24 identify a single instance of a city or county requiring a permit for a vessel to moor, as opposed
25 to permits for the development of moorage.

26 A shoreline substantial development permit can be required only for shoreline activities
that constitute "development," as defined in SMC 23.60A.908:

1 “Development” means a use consisting of the construction or exterior alteration of
2 structures; dredging, drilling; dumping; filling; removal of any sand, gravel or
3 minerals; bulkheading; driving of piling; placing of obstructions; or any project of
4 a permanent or temporary nature that interferes with the normal public use of the
5 surface of the waters overlying lands subject to this Title 23 at any water level.

6 The only portion of this definition that can even arguably apply to moorage is:

7 . . . any project of a permanent or temporary nature that interferes with the normal
8 public use of the surface of the waters . . .

9 Moorage of vessels is not a “project.” But even if one assumes *arguendo* that moorage is
10 a “project,” the question of whether moorage interferes with the normal public use of the surface
11 of the waters is a factual question. All of the evidence presented at the hearing demonstrates that
12 moorage is an inherent part of the normal public use of the surface of the waters of Elliott Bay
13 because it is an inherent part of vessel navigation.

14 **1. Whether a project interferes with the normal public use of the surface of the
15 waters is a factual question.**

16 Controlling case law, an Attorney General Opinion, and a decision of the Shorelines
17 Hearings Board all conclude that if a local government requires a shoreline substantial
18 development permit for a “project” on the theory that the project interferes with the normal
19 public use of the surface of the waters, the decision must be based on findings of fact that are
20 supported by substantial evidence.

21 After additional research, the Port’s attorneys have found only one type of “project” for
22 which a shoreline substantial development permit has been required because it interferes with the
23 normal public use of the surface of the waters: shellfish harvesting. In each instance where a
24 permit has been required, it is because of the factual record created before the SHB or the court.
25 In other words, the permit requirement was supported by substantial evidence of interference
26 with normal public use.¹

¹ The seminal case of *Clam Shacks of America, Inc. v. Skagit County*, 109 Wn.2d 91 (1987), also involved shellfish harvesting, but the county required only a shoreline conditional use permit, not a shoreline

1 In *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239 (2006), the Court of
2 Appeals affirmed a superior court order that upheld a Hearing Examiner order that a shoreline
3 substantial development permit was required for geoduck harvesting on tidelands in Pierce
4 County. The appellate decision describes in detail the factual record created before the Hearing
5 Examiner, and even includes a picture from that record in its decision (of PVC pipes being
6 inserted into eelgrass beds). The court concluded:

7 The testimony and exhibits provided *substantial evidence* to support the hearing
8 examiner's finding that WSF's geoduck activities interfered with the normal
9 public use of the surface water.

10 *Id.* at 251-52 (emphasis added).

11 After the court of appeals decided the *Washington Shell Fish* decision in 2006, the
12 Attorney General issued a formal Opinion on January 4, 2007, in response to questions about
13 geoduck harvesting from State Representative Patricia Lantz.² Representative Lantz's second
14 question to the Attorney General was:

- 15 2. Should local governments require shoreline substantial development
16 permits under RCW 90.58.140 for planting, growing, and harvesting farm-
17 raised geoduck claims by private parties?

18 The Attorney General's answer, in a nutshell, was that it depends on the facts:

19 Regarding the second question, we conclude that farm-raised geoducks may
20 require a substantial development permit under circumstances where the
21 particular geoduck planting project causes substantial interference with normal
22 public use of the surface waters. Projects that do not meet this description would
23 not require a substantial development permit.

24 AGO 2007 No. 1 at 2.

25 During the course of its analysis, the Opinion discusses the facts described by the court of
26 appeals in *Washington Shell Fish* and concludes:

substantial development permit. Both the trial court and the Supreme Court declined to decide whether
Clam Shacks' operations constituted development within the meaning of the SMA. *Id.* at 93 & 95.

² A copy of the Attorney General's Opinion (AGO 2007 No. 1) is attached as Exhibit 1].

1 Therefore, although hypothetically a project may interfere with use of surface
2 waters, we conclude that the SMA addresses permitting of actual “projects” and
3 involves a concrete examination of whether the project interferes with normal
4 public use of surface waters. The *Washington Shell Fish* case illustrates this
5 approach by examining the facts of a particular project. Accordingly, we
6 conclude that whether a particular geoduck farm interferes with normal public use
7 of surface waters will depend on the facts, which should be determined by local
8 government when deciding if a permit is required. See RCW 90.58.140(1).

6 AGO 2007 No. 1 at 8.

7 This Attorney General Opinion was followed by the SHB case of *John Marnin et al. v.*
8 *Mason County et al.*, SHB No. 07-021, Modified Findings of Fact, Conclusions of Law and
9 Order, February 6, 2008. In that case, Mason County required a shoreline substantial
10 development permit for shellfish operations on Hood Canal. The Hearing Examiner imposed
11 onerous conditions on the permit, and on appeal, the applicant argued to the SHB that the
12 shellfish operation was not a development. In addressing this issue, the SHB discussed both the
13 *Washington Shell Fish* case and AGO 2007 No. 1, and identified the facts presented to it at the
14 *de novo* appeal hearing that demonstrated interference with the normal public use of the surface
15 of the waters:

16 In fact, the stacked growing cages, rebar stakes protruding from the tidelands,
17 polyvinyl fencing across the area, and stationary boundary markers do present a
18 hazard to surface water users. Their presence changes the otherwise natural
19 tideland surface and diminishes the usable water area.

19 The Court of Appeals, the Attorney General, and the Shorelines Hearings Board all
20 agree: a determination that a project interferes with the normal public use of the surface of the
21 waters must be supported by findings of fact that must in turn be supported by substantial
22 evidence. If there is no such substantial evidence, then a shoreline substantial development
23 permit cannot be required for a shoreline use that does not otherwise meet the definition of
24 development.

25 The City’s Hearing Examiner in this case acknowledged that this is a factual issue when
26 she declined to rule on DPD’s motion to dismiss Port Issue No. 4 before the hearing:

1 22. Issue 4. The Port asserts that no shoreline permit is needed, because no
2 development is proposed and the use at issue, moorage, is exempt from permitting
3 requirements. The Examiner declines to rule on the motion in advance of
4 receiving further relevant evidence and argument. The motion is therefore denied.

5 Order on Motion to Dismiss Claims (July 6, 2015).

6 **2. DPD presented no evidence that moorage interferes with the normal public**
7 **use of the surface of the waters of Elliott Bay, while the Port and Foss**
8 **presented substantial evidence that moorage is inherent in the normal public**
9 **use of the surface of such a navigable water.**

10 DPD's Interpretation makes *no* finding that moorage of vessels interferes with the normal
11 public use of the surface of the waters, and DPD presented *no* such evidence at the hearing, let
12 alone substantial evidence. The only evidence that even arguably addressed this issue was the
13 testimony of Intervener Soundkeeper's witness, Sue Joerger, but her testimony fell well short of
14 substantial evidence.

15 On direct examination by Mr. Baca, Ms. Joerger testified that when motoring through the
16 West Waterway in her small craft, the need to avoid the 100-yard safety zone that the U.S. Coast
17 Guard imposed around the Polar Pioneer put her "uncomfortably close" to the east shore of the
18 Waterway that she testified was 800-yards wide. She testified to no actual interference with her
19 activities as the "Soundkeeper," only to concerns, and Soundkeeper's Exhibit 1, which
20 Ms. Joerger prepared, was admitted only as an illustrative exhibit because Ms. Joerger laid no
21 foundation to establish its accuracy. On cross-examination, she admitted that she had never read
22 the federal rule creating the safety zone, 33 C.F.R. Part 165 (Docket No. USCG-2015-0295), nor
23 called the local Seattle number set forth in it:

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Persons and/or vessels that desire to enter these safety zones must request permission to do so from the Captain of the Port, Puget Sound by contacting the Joint Harbor Operations Center at 206-217-6001, or the on-scene Law Enforcement patrol craft, if any, via VHF-FM CH 16.

1 In rebuttal to Ms. Joerger's testimony, Paul Gallagher testified about the steps that Foss
2 took to affirmatively demonstrate that moorage of the Polar Pioneer at Terminal 5 would not
3 interfere with the use of the West Waterway by other vessels, even ocean-going vessels:

4 A. So there is a training institute down on the waterfront called Pacific
5 Maritime Institute, PMI, and they have a very technologically advanced
6 simulator, much like a flight simulator. And they have a model of Puget
7 Sound, including all of the terminals in Seattle and Elliott Bay. So we
8 created a simulation exercise for one day and we had the Coast Guard, the
9 Puget Sound Pilots, members from Western Towboat, captains from Foss
10 Tugs, captains from Transocean and the people from Shell participate in
11 this all-day exercise where we modeled the location of the Polar Pioneer
12 and we had vessels, ships and barges pass by in daylight, in nighttime and
13 different weather conditions, and the vessels would pass each other to
14 make sure that all the vessels could navigate safely in the West Duwamish
15 Waterway when the Polar Pioneer was there.

16 Q. And you said the Coast Guard was involved in this exercise?

17 A. We had the Coast Guard captain of the Port who showed up, we also had
18 his staff. And we actually had the District 17 admiral of the Coast Guard
19 who thought it was such an interesting exercise that he came by on that
20 day to participate as well.

21 Q. And what was the result of the exercise?

22 A. The result of the exercise was that there was no impact to commercial
23 traffic. And in all the scenarios that we created -- and we actually created
24 worst-case scenarios, the pilots felt that they could use the waterway
25 safely and navigate past the Polar Pioneer, and so they gave sort of their
26 stamp of approval of the mooring location of the Polar Pioneer at
Terminal 5.

Q. And can you describe the types of vessels that are required to have
pilotage?

A. I don't know the exact rule, but I believe it's vessels of a certain tonnage,
over 300 tons possibly, that have to have pilotage when they enter waters.
It's a state and a federal regulation.

Q. So these are large vessels?

A. These are large vessels. The largest being some of the container barges
that are larger than the size of a football field with containers stacked five
high, and cement ships that use the West Duwamish waterway which are
approaching 700 feet long and very large commercial oceangoing ships.

1 Q. And then when the Polar Pioneer was present at the dock were there ever
2 any occasions where there were safety concerns about other vessels being
3 able to navigate past the Pioneer in the waterway?

4 A. Not to my knowledge, no.

5 Q. Did other vessels navigate past the Pioneer during that time period?

6 A. It's a very busy waterway, so there were lots of vessels that navigated
7 every day. I don't know the exact number, but a considerable amount of
8 vessels including all the deep draft and large cargo vessels that use the
9 terminals upriver.

10 Q. Could you take a look at Puget Sound Keeper Exhibit No. 1, please? Do
11 you have those?

12 A. Yes, I do.

13 Q. And I want to focus on the second one. So this is the one entitled: Worse-
14 case scenario with Polar Pioneer at Terminal 5 and Noble Discoverer at
15 south end of Vigor Shipyard. And looking at the -- so you see the blue
16 rectangle that's got the Noble Discoverer with an arrow pointed at it?

17 A. Yes.

18 Q. Can you envision any scenario in which the Noble Discoverer would be
19 moored in that configuration at Vigor Shipyard?

20 A. There's no place to tie it up in that configuration. It's not a safe place to
21 moor the vessel.

22 Q. So is that --

23 A. So the answer would be, no, I can't think of any situation where the vessel
24 would tie up like that or any vessel of similar size.

25 Day 4, 4 of 4, 14:28 to 18:22 of audio recording for August 25, 2015; Trial Excerpts Transcript of
26 Paul Gallagher, 167:9-170:4, August 25, 2015

In response to a cross-examination question from Ms. Goldman, Mr. Gallagher also
clarified that the simulation that he described included the exclusion zone imposed by the Coast
Guard around the Polar Pioneer.

Thus, the evidence at the hearing affirmatively demonstrated that the moorage at
Terminal 5 of the Polar Pioneer, the principal subject of the Interpretation (along with "two
accompanying tugboats"), did not interfere with the normal public use of the surface of the
waters. In addition, all of the Port's and Foss's witnesses affirmatively testified, in many

1 different ways, that moorage is an inherent part of navigation, and that vessels cannot navigate if
2 they can't moor.

3 The very genesis of the SMA was concern for the preservation of navigational
4 values, expressed through the public trust doctrine. *See Wilbur v. Gallaher*, 77
5 Wn.2d 306, 462 P.2d 232 (1969); *Orion v. State*, 109 Wn.2d 261, 747 P.2d 1062
(1987). . . . There is in the Act a built-in pro-navigational bias, serving as the
6 backdrop for all planning and use conflict decisions.

7 *Sperry Ocean Dock v. City of Tacoma*, SHB Nos. 89-4 & 89-7, Conclusion of Law IX, Final
8 Findings of Fact, Conclusions of Law, and Order, March 1, 1990.

9 The Interpretation requires the Port to obtain new shoreline substantial development
10 permits to permit the moorage of many kinds of vessels that have always moored at Port
11 facilities, but neither the Interpretation nor the evidence presented at the hearing demonstrates
12 that moorage at Port facilities interferes with the normal public use of the surface of the waters.
13 The Interpretation is not supported by the substantial evidence that is required by the SMA and
14 by the cases and Attorney General Opinion discussed above.

15 **3. DPD cannot use SMC 23.40.002, which is not part of the SMP, to require a
16 shoreline substantial development permit when the SMP itself does not
17 require such a shoreline permit.**

18 Instead of attempting to make the findings of fact that the SMA requires in order for the
19 City to require a shoreline substantial development permit for moorage, DPD apparently relies
20 on SMC 23.40.002.A:

21 The establishment or change of use of any structures, buildings or premises, or
22 any part thereof, requires approval according to the procedures set forth in
23 Chapter 23.76, Procedures for Master Use Permits and Council Land Use
24 Decisions

25 The Port, however, is mooring vessels in the manner it has always moored them, and the
26 Port is not establishing or changing the use of any structures, buildings, or premises. Even more
to the point for purposes of this appeal is the fact that this Code section is not part of the SMP
and is not referenced in the SMP. Even if this Code section were worded differently so that it

1 arguably applied to the facts at issue, it could not be used to require a shoreline substantial
2 development permit when the SMP itself does not require one. The Interpretation is based on the
3 definition of cargo terminal in the SMP, and the Notice of Violation that DPD subsequently
4 issued (Foss Exhibit 105) directs the Port and Foss to obtain a shoreline permit establishing the
5 use of T5 as a commercial marina under the City's SMP. The Interpretation does not purport to
6 require a non-shoreline permit for the moorage of vessels, and if it had done so, it would have
7 given rise to a host of issues in addition to those that are the subject of the pending appeals.

8 A shoreline master program is not like other land use regulations. It is a State regulation
9 more than it is a local regulation, as many court decisions have made clear in different contexts
10 since the Washington Supreme Court decided *Orion Corp. v. State*, 109 Wn.2d 621 (1987)
11 (holding that only the State, and not Skagit County, was responsible for any unconstitutional
12 taking that arose out of the County's SMP).

13 The most recent such case is *Citizens for Rational Shoreline Planning v. Whatcom*
14 *County*, 155 Wn. App. 937 (2010), where the court of appeals held that RCW 82.02.020, which
15 prohibits local governments from imposing exactions on development that are not "reasonably
16 necessary as a direct result of the proposed development," does not apply to SMPs because
17 RCW 82.02.020 applies only to local governments, not to the State, and SMPs are State rather
18 than local regulations. *Id.* at 950 ("SMPs are developed at the insistence of, and with direction
19 by, the State and are effective only upon State approval. Because of the State's involvement,
20 SMP provisions do not constitute local regulations constrained by RCW 82.02.020.")

21 The analysis the court used to reach this conclusion included the following:

22 Most significantly, a SMP becomes effective only upon approval by Ecology.
23 RCW 90.58.090(1). Moreover, Ecology is to approve a SMP only if it determines
24 the SMP to be consistent with both the SMA and certain guidelines developed by
25 Ecology. RCW 90.58.090(3)-(5). In the event that a local government declines,
26 refuses, or fails to develop an adequate SMP, Ecology is authorized to develop
and impose a SMP in the local government's stead. RCW 90.58.070(2), .090(5).
All SMPs approved or adopted by Ecology become elements of the official state
master program, RCW 90.58.030(3)(c), which "constitute[s] use regulations for

1 the various shorelines of the state.” RCW 90.58.100(1).

2 Ecology’s statutorily-mandated involvement in the process of SMP development
3 is considerable and, ultimately, determinative. Among other responsibilities,
4 Ecology (1) develops guidelines that provide criteria for developing master
5 programs, RCW 90.58.030(3)(a); (2) reviews, revises, and approves SMPs,
6 RCW 90.58.090; (3) administers certain types of development along the
7 shorelines, RCW 90.58.140(10); and (4) enforces the SMA and SMP use
8 regulations against the federal government, RCW 90.58.260.

9 *Id.* at 943-44.

10 A few years earlier, in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 (2007), the
11 Supreme Court had to decide whether a city had the authority to impose moratoria on
12 development under its SMP when the SMA did not delegate such authority to the city. In
13 deciding that the City did *not* have such authority, the plurality decision concluded that because
14 of article XVII, section 1 of the State Constitution, cities have *no* authority over shorelines
15 except as that authority is delegated by the State:

16 The Washington Constitution’s recognition of local government police powers
17 “not in conflict with general laws” must be understood in light of article XVII,
18 section 1. That provision provides:

19 The state of Washington asserts its ownership to the beds and shores of all
20 navigable waters in the state up to and including the line of ordinary high
21 tide, in waters where the tide ebbs and flows, and up to and including the
22 line of ordinary high water within the banks of all navigable rivers and
23 lakes.

24 Article XVII, section 1 of the Washington Constitution asserts that powers of the
25 state, in this context, are controlling over any powers of local government.
26 Therefore, the police power question presented in this case involves a simple,
bright-line matter of jurisdiction. Under article XVII, section 1, the state has the
power to regulate shorelines.

Under the Washington Constitution, local governments have no broad police
power over shorelines. Neither the history of article XVII, section 1 nor its
interpretation by the courts of this state suggest it allows local governments
permit authority over shoreline development in violation of state law or policies,
much less power to declare moratoria on shoreline development.

The limitation on local police power over shoreline use and development is
reinforced by the public trust doctrine. According to the public trust doctrine, the
shorelines and state waters are held by the state, in trust for all the people of the

1 state. "The state can no more convey or give away this jus publicum interest than
2 it can 'abdicate its police powers in the administration of government and the
3 preservation of the peace.'" *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d
4 989 (1987) (quoting *Ill. Cent. R.R. Co.*, 146 U.S. at 453, 13 S. Ct. 110).

5 Clearly, the interests of all Washington residents in these shorelines cannot be
6 impliedly abdicated to local governments. A state statute, such as the SMA, may
7 serve to delegate some state power. Thus, regulation of the use and development
8 of shorelines under the SMA is derived from the state, which holds all such
9 shorelines in trust for all people of this state under the constitution.

10 *Id.* at 694-96 (internal citations omitted).

11 The City's SMP does not constitute a local regulation; instead, it is part of the official
12 "state master program" defined in RCW 90.58.030(3)(d). *See Citizens for Rational Shoreline*
13 *Planning*, 155 Wn. App. at 950. Similarly, the SHB refuses to take jurisdiction over any land
14 use regulation that is not incorporated into the local SMP and approved by Ecology:

15 This Board has addressed the question of its jurisdiction to decide issues related to
16 compliance with local zoning codes on many occasions. The interesting history
17 of these cases is traced most thoroughly in *Laccinole v. City of Bellevue*, SHB No.
18 03-025 (Order Granting Summary Judgment and Order of Remand) (March 10,
19 2004). Since 1999, it has been well settled that the Board does not have
20 jurisdiction over local zoning codes unless: (1) the local government's SMP has
21 specifically incorporated the zoning provisions in questions; and (2) the zoning
22 provisions have been reviewed and approved by Ecology in its approval of the
23 SMP as required by RCW 90.58.090(1).

24 *Breakwater Condominium Association, A Washington Nonprofit Corporation, Petitioner v. City*
25 *Of Kirkland, Marina Suites LLC And Yarrow Bay Yacht Basin And Marina, LLC, Respondents*,
26 SHB No. 06-034, Order on Motions at 3, April 5, 2008 (internal citations omitted).

All of the authority cited in this subsection demonstrates that the City's SMP is a State-
reviewed and approved regulation, not purely a local one, and the SMP includes only the
regulations that have been approved by Ecology. DPD cannot do what it has done, which is to
mix and match its local regulations with a discrete body of State regulation that is subject to
entirely different rules and procedures. More specifically, DPD cannot use SMC 23.40.002, a
local regulation that has not been approved by Ecology and incorporated into the SMP, to require

1 a permit that Chapter 23.60A does not require because DPD has not met the State standards for
2 requiring such a State permit.

3 DPD failed to present the evidence that State law requires for a State permit under the
4 SMA: DPD failed to present any evidence, let alone substantial evidence, that moorage of
5 vessels interferes with the normal public use of the surface of the waters, and it may not require a
6 shoreline substantial development permit for moorage.

7 **4. Moorage also is not “substantial development.”**

8 In order to require a shoreline substantial development permit for a vessel, DPD would
9 need to demonstrate not only that vessel moorage is “development” as defined in
10 SMC 23.60A.908, but that it also is “substantial development” as defined in SMC 23.60A.936:

11 "Substantial development" means any development of which the total cost or fair
12 market value exceeds the amount established in WAC 173-27-040, except as
13 otherwise provided in subsection 23.60A.020.C, or any development which
14 materially interferes with the normal public use of the water or shorelines of the
15 City.

16 DPD failed, both in the Interpretation and at the hearing, to present substantial evidence
17 that the “total cost or fair market value” of moorage exceeds the amount set forth in the
18 Washington State Register pursuant to WAC 173-27-040, and also failed to present substantial
19 evidence that the moorage of vessels “*materially* interferes with the normal public use of the
20 water or shorelines.” There has been a complete failure of the proof needed to sustain the
21 Interpretation.

22 **B. The Interpretation Is Not Supported By Substantial Evidence, And Is A Clearly**
23 **Erroneous Application Of Law To Facts.**

24 The previous section discusses the many reasons that DPD may not require a shoreline
25 permit for moorage of a vessel at an existing, developed moorage facility. If one assumes
26 *arguendo*, that DPD can require such a permit, DPD prepared its Interpretation by disregarding
the facts presented to it, and the evidence presented at the hearing affirmatively demonstrates
that the Interpretation is not supported by substantial evidence.

1 The Hearing Examiner's decision in this matter, like any other land use decision that is
2 subject to review under LUPA, must be supported by substantial evidence, and the decision's
3 application of the law to the facts cannot be clearly erroneous:

4 (1) The superior court, acting without a jury, shall review the record and such
5 supplemental evidence as is permitted under RCW 36.70C.120. The court may
6 grant relief only if the party seeking relief has carried the burden of establishing
7 that one of the standards set forth in (a) through (f) of this subsection has been
8 met. The standards are: . . .

9 (c) The land use decision is not supported by evidence that is substantial
10 when viewed in light of the whole record before the court;

11 (d) The land use decision is a clearly erroneous application of the law to
12 the facts;

13 RCW 36.70C.130.

14 Here, there is no evidence, let alone substantial evidence, to support DPD's conclusory
15 assertions about what uses are intrinsic at a cargo terminal. When DPD issued its Interpretation
16 it disregarded the most relevant evidence submitted to it by the Port and Foss, and the factual
17 basis for the Interpretation is contradicted by all the relevant evidence presented at the four-day
18 hearing.

19 To begin with, DPD brought no prior understanding of the relevant facts to the
20 Interpretation process, as Mr. McKim acknowledged in response to questions from Mr. West:

21 Q. Who at DPD is the expert on the operation of cargo terminals?

22 A. I don't believe we have anybody with expertise in that field.

23 Q. Do you have expertise in that field?

24 A. No.

25 Q. Do you have expertise on moorage?

26 A. No.

Q. Do you have expertise on the operation of cargo vessels?

A. No.

Q. Do you have expertise on the operation of any types of commercial
vessels?

A. No.

1 Day 1, 2 of 4, 26:55 to 27:22 of audio recording for August 13, 2015; Trial Excerpts Transcript
2 of Andy McKim, 60:17-61:4, August 13, 2015

3 The evidence presented at the hearing demonstrates that the Interpretation is simply
4 wrong about some of its factual assertions. For example, the Interpretation concludes that two
5 "tugboats" that accompanied the Polar Pioneer also cannot moor at Terminal 5, and one of these
6 "tugboats," the Aiviq, was the subject of the NOV that DPD issued on May 18, 2015 (Foss 105).
7 The evidence at the hearing, however, demonstrated that the "tugboats," including the Aiviq, are
8 in fact off-shore supply vessels, and Mr. McKim acknowledged at the hearing that offshore
9 supply vessels can moor at cargo terminals, so long as they are loading or unloading cargo,
10 because their "primary function" is transporting cargo.

11 During his testimony, Mr. McKim acknowledged repeatedly that he had conducted no
12 independent investigation into the facts; yet the Interpretation, without explanation, disregards
13 the most important facts presented to DPD by the Port and Foss: the facts relevant to the SMP's
14 definition of "accessory use" in SMC 23.60A.940:

15 "Use, accessory" means a use that is incidental and intrinsic to the function of a
16 principal use and is not a separate business establishment unless a home
17 occupation.

18 For example, on page 57 of his testimony, Mr. McKim admitted that he did not accept
19 what Foss told him about lay berthing:

20 Q. Foss told you, as well, that lay berthing is normal, customary and an
21 essential practice at marine cargo terminals? Is that correct?

22 A. Yes.

23 Q. And you didn't accept that as true?

24 A. No.

25 Day 1, 2 of 4, 23:16 to 23:32 of audio recording for August 13, 2015; Trial Excerpts Transcript
26 of Andy McKim, 57:16-57:21, August 13, 2015

1 The Interpretation itself demonstrates that DPD similarly disregarded the evidence
2 presented to it by the Port, particularly the letter and memo from Linda Styrk to Diane Sugimura
3 (Foss Exhibits 19, 20, and 22). Most strikingly, Paragraph 11 is a conclusory assertion about
4 application of law to facts (about what activities are intrinsic to the operation of a cargo
5 terminal):

6 11. For purposes of the shoreline code, "accessory use" is defined as "a use
7 which is incidental and intrinsic to the function of a principal use, and
8 is not a separate business establishment unless a home occupation."
9 SMC 23.60.940. This differs, and is more stringent than, the definition
10 that generally applies under the Land Use Code: "a use that is
11 incidental to a principal use." SMC 23.84A.040. We accept that lay
12 berthing of vessels otherwise used for transporting goods in the stream
13 of commerce may be regarded as incidental and intrinsic to the
14 function of a cargo terminal. This recognizes that shipment of some
15 sorts of goods is seasonal, and that vessels involved in that sort of trade
16 are necessarily idle for periods during the year. We do not, however,
17 find that provision of moorage to other vessels and equipment, not used
18 for transfer of goods to other locations, is intrinsic to the function of a
19 cargo terminal. Such moorage would be regarded as a separate
20 principal use, defined as "any use, whether a separate business
21 establishment or not, which has a separate and distinct purpose and
22 function from other uses on the lot." SMC 23.60.940.

23 This Conclusion 11, however, is contradicted by the facts that DPD sets forth in the
24 immediately preceding paragraph 10:

25 10. Based on information received from the Port, "lay berthing," or moorage
26 of vessels that are not actively loading or unloading materials, is a
normal, customary and essential practice at marine cargo terminals. The
Port has specific dockage fees for lay berthing in the fee schedule for its
facilities. According to the Port, lay berthing occurs at marine cargo
terminals throughout the coastal and inland waterways of the country
and the world, specifically at marine cargo terminals in Seattle,
Bellingham, Everett, Port Angeles, Tacoma, Olympia, San Diego, Los
Angeles, Long Beach, Sacramento, San Francisco, Oakland and
Portland. According to the Port, temporary, seasonal and sometimes
indefinite berthing of vessels must be provided by ports until duty calls
those vessels back to the sea. The Port indicates that cargo, emergency
response, military, and research vessels, as well as barges and tugboats,
commonly lay berth at the Port of Seattle's cargo terminals.

1 In other words, DPD in Conclusion 10 acknowledges that moorage of all kinds of vessels,
2 not just cargo vessels, is “normal, customary, and essential” at cargo terminals, but in
3 Conclusion 11, DPD concludes that provision of moorage to non-cargo vessels is not intrinsic to
4 the function of a cargo terminal.

5 Neither the SMP nor the land use code defines “intrinsic,” but Webster’s Third
6 International Dictionary defines “intrinsic” as “belonging to the inmost constitution or *essential*
7 nature of a thing: *essential* or inherent and not merely apparent, relative, or accidental”
8 (emphasis added). DPD acknowledges in Conclusion 10 that moorage of non-cargo vessels is
9 “normal, customary, and *essential*,” but DPD’s Conclusion 11 disregards its own Conclusion 10.

10 Further, DPD’s application of the law to the facts is not supported by *any* other facts set
11 forth in the Interpretation, and is contradicted by the few relevant facts that are set forth, not only
12 those in Conclusion 10, but also those in Finding of Fact 5:

- 13 5. The Port has indicated that a variety of types of vessels use its facilities.
14 The Port documented that its fee schedules include specific fees for “lay
15 berthing” of vessels that are not being actively loaded or unloaded. The
16 Port has asserted that this is common and necessary, as much cargo
activity is seasonal, and some vessels used to transport cargo are idle
during the off-season.

17 In its Interpretation, DPD disregarded inconvenient facts that demonstrated that the
18 moorage of the Polar Pioneer was consistent with normal, customary and essential activities at
19 cargo terminals, as DPD itself acknowledged in its first draft of the Interpretation. DPD instead
20 simply concluded that certain kinds of moorage are not intrinsic to cargo terminal use, even
21 though its own Finding 5 and Conclusion 10 said otherwise, and even though both the Port and
22 Foss had submitted substantial evidence to the contrary.

23 At the hearing, every witness presented by the Appellants – Greg Englin, Mike
24 McLaughlin, Paul Meyer, Paul Gallagher, Mark Knudsen, Jim Johnson, and Vince O’Halloran –
25 testified about how moorage of all kinds of vessels, whether or not they are loading and
26 unloading cargo, is essential not only to the operation of cargo terminals, but to the operation of

1 the maritime industry as a whole (George Blomberg, called by DPD, also so testified). Much of
2 this testimony, together with the accompanying exhibits, e.g. Port Exhibits 1-11 and 22, was
3 specific and detailed.

4 No evidence to the contrary was presented. The only other witnesses were Larry Ahern
5 and Sue Joerger, and neither of them addressed this issue.

6 DPD's Interpretation disregarded inconvenient facts about what activities are intrinsic to
7 the operation of a cargo terminal. The uncontroverted evidence presented over four days of
8 hearing affirmatively demonstrated that moorage of all kinds of vessels, for all kinds of purposes,
9 is in fact intrinsic to the operation of a cargo terminal. DPD's Interpretation is not supported by
10 substantial evidence, and because the facts are fundamentally different from those found in the
11 Interpretation, the Interpretation also constitutes a clearly erroneous application of law to facts.

12 **C. DPD's Interpretation Leads To An Absurd Result.**

13 Statutes and ordinances must be interpreted in a manner that does not lead to an absurd
14 result in the real world:

15 Courts also avoid interpreting a statute in a way that leads to an absurd result
16 because we presume the legislature did not intend an absurd result.

17 *Olympic Tug & Barge, Inc. v. Wash. State Dep't of Revenue*, 163 Wn. App. 298, 307, 259 P.3d
18 338, 343 (2011) (internal citations omitted). The evidence presented at the hearing by the Port,
19 Foss, and the Maritime Interveners demonstrates the Interpretation has the absurd effect of
20 making unlawful much of the ordinary and necessary business of the maritime industry.

21 Linda Styrk's April 6, 2015 memo to Diane Sugimura and Andy McKim (which is part of
22 both Foss Exhibits 19 and 20) specifically identified for DPD some of the types of vessels that
23 moor at Terminal 91: marine construction vessels, cruise vessels, state ferries and government
24 vessels, tug and barges, icebreakers, offshore supply vessels, ships of state, research vessels,
25 diving vessels, oil spill response vessels, pilot vessels, and seismic vessels. In response to
26 questions from Mr. Schneider, Mr. McKim testified that the only vessels among these that might

1 be allowed to moor at a cargo terminal, depending on the vessel's purpose at the time, were tugs
2 and pilot boats (if they are assisting cargo ships that are loading or unloading cargo) and offshore
3 supply vessels (if they are carrying products from here to an offshore oil drilling facility). Day 1,
4 3 of 4, 52:08-55:30 of audio recording, August 13, 2015; Trail Excerpts Transcript of Andy
5 McKim, 126:20-128:25, August 13, 2015.

6 Elsewhere in his testimony, Mr. McKim also testified that fishing boats cannot moor at
7 cargo terminals and that factory trawlers cannot moor if they do what Greg Englin from the Port
8 and Jim Johnson from Glacier Fish Company testified factory trawlers do most of the time:
9 unload their fish elsewhere and come to Terminal 91 to overwinter. Even if the factory trawlers
10 were to unload fish at Terminal 91, Mr. McKim testified he would have to think about whether
11 they could moor, because their primary function may not be the transport of cargo.

12 The absurd effect of the Interpretation is most obvious with regard to the Alaskan fishing
13 fleet that lay berths at Terminal 91. The Interpretation makes the fishing fleet's use of
14 Terminal 91 unlawful, even though the City's shoreline policies, particularly LU 257, call out
15 this industry for special protection:

- 16 2. **Tug & Barge Facilities:** Retain Seattle's role as the Gateway to Alaska
17 and maintain space for Puget Sound and Pacific trade.
- 18 3. **Shipbuilding, Boat Building & Repairs:** Maintain a critical mass of
19 facilities in Seattle in order to meet the needs of the diverse fleets that visit
20 or have a home port in Seattle, including fishing, transport, recreation and
21 military vessels.
- 22 4. **Moorage:** Meet the long-term and transient needs of all of Seattle's ships
23 and boats including fishing, transport, recreation and military. Locate
24 long-term moorage in sheltered areas close to services, and short-term
25 moorage in more open areas
- 26 7. **Fishing Industry:** Maintain a critical mass of support services including
boat building and repair, moorage, fish processors, and supply houses to
permit Seattle fishermen to continue to service and have a home-port for
their vessels in Seattle waters. Recognize the importance of the local
fishing industry in supplying local markets and restaurants. Recognize the

* * *

1 economic contribution of distant water fisheries to Seattle's maritime and
2 general economy.

3 The Alaskan fishing fleet also has a profound economic effect on the local economy, as
4 Linda Styrk discussed on page 3 of her April 15, 2015 letter to Diane Sugimura, Andy McKim,
5 and Ben Perkowski, and as is demonstrated by the documents that Ms. Styrk attached to her
6 letter and to which she provided a link.

7 In seeking to find a rationale for making unlawful the moorage of the Polar Pioneer,
8 DPD's Interpretation also makes unlawful much of the ordinary and necessary business of the
9 maritime industry and the Port, including the business of an industry that is favored in the
10 Shoreline Master Program itself – the Alaskan fishing fleet.

11 **D. The "Primary Function" Test Also Is Absurd Because It Is Inworkable On The
12 Harborfront.**

13 Mr. McKim testified that the Port should use the primary function test going forward, to
14 decide which vessels can moor at cargo terminals. Day 1, 3 OF 4, 38:07 TO 38:22 of audio
15 recording, August 13, 2015; Trial Excerpts Transcript of Andy McKim, 118:13-118:16, August
16 13, 2015. In other words, when a vessel's captain or agent calls the Port asking for moorage, the
17 Port's representative, which will often be Mr. Englin, is supposed to ask whether the purpose of
18 the moorage is to load or unload goods, and also ask for a description of the vessel's primary
19 function, not just here in Seattle but anywhere on the planet. If the answer to the first question is
20 "no," then the vessel cannot moor regardless of its primary function; if the answer to first
21 question is "yes," then whether it can moor depends on the answer to the second question.

22 The Interpretation provides no guidance for how to apply the "primary function" test
23 because the Interpretation is not written to provide guidance to the maritime industry going
24 forward. It is written to make illegal the moorage of a specific vessel. The "primary function"
25 test does not appear in the Interpretation; it does not appear in the definition of "cargo terminal";
26 and it does not appear anywhere else in the City's SMP or land use code. At the hearing,
Mr. McKim applied the test to many different kinds of vessels that have always moored at the

1 Port's cargo terminals and testified that moorage of most of these kinds of vessels is unlawful
2 because the vessels fail the "primary function" test. But someone who was not present for
3 Mr. McKim's testimony could not possibly reach the same conclusions from the language of the
4 Interpretation itself or from the Code definition of cargo terminal. And even Mr. McKim
5 testified that he was not sure whether factory trawlers could moor, even if they were mooring to
6 unload fish, and that tugboats and pilot boats may moor only if the vessels they are assisting are
7 allowed to moor. And Mr. McKim did not know what effect the Interpretation had on moorage
8 at moorage dolphins, which are not connected to the shore and provide only moorage.

9 DPD has thus taken a straightforward definition of "cargo terminal" – a kind of shoreline
10 "development" – and transformed it into a regulation of vessel moorage, a use that is not
11 "development" subject to regulation under the SMA. The resulting vessel moorage regulation is
12 of breathtaking uncertainty for the Port and the maritime industry. Yet somehow the Port, a
13 priority use under the SMA (RCW 90.58.202), and the maritime industry that the Port serves, are
14 supposed to conduct day-to-day maritime business and trade and enter into contracts in the face
15 of such regulatory uncertainty. A code interpretation should allay uncertainty, not create it in
16 abundance. Regulations must be understandable to those they regulate, but this Interpretation is
17 not understandable to anyone who did not attend the hearing, and certainly not to the maritime
18 world that DPD knew so little about when it issued the Interpretation.

19 **E. The Interpretation Is Clearly Erroneous Because It Purports To Exercise**
20 **Extraterritorial Jurisdiction.**

21 The evidence demonstrates that Polar Pioneer's activities in Seattle were no different
22 from the activities of any cargo vessel: the Polar Pioneer berthed at T5 to load goods and
23 container cargo, and when it returns it will unload goods and containers, layberth, and then load
24 goods and container cargo again. Its activities in Seattle are indistinguishable from the activities
25 of any cargo vessel, and many non-cargo vessels, but DPD determined that its moorage is
26

1 unlawful because the vessel's "primary function" when it's in the arctic will be to drill for oil,
2 not deliver cargo.

3 DPD's Interpretation purports to regulate what happens in Seattle based on what happens
4 thousands of miles away, but DPD's regulatory authority is not planetary. DPD may regulate
5 what happens in Seattle and, perhaps under SEPA, regulate impacts elsewhere caused by
6 activities in Seattle. However, DPD has no authority to regulate on the basis of activities outside
7 the City's territorial limits or on the basis of impacts elsewhere that are not caused by regulated
8 activities within the City. DPD's "primary function" test, which appears nowhere in the
9 shoreline code or the larger land use code, is inherently arbitrary and capricious, not merely
10 clearly erroneous, because the test bears no relationship to any activities within the City, nor to
11 any impacts caused by activities within the City.

12 Under the Washington Constitution:

13 Any county, city, town or township may make and enforce *within its limits* all
14 such *local* police, sanitary and other regulations as are *not in conflict with general*
15 *laws.*"

16 WASH. CONST. art. XI, § 11 (emphasis added).

17 DPD's authority is local, within the City's territorial limits, and nothing in the code – and
18 certainly nothing in the SMP's definition of "cargo terminal" – purports to give DPD the
19 authority to regulate what happens in Seattle based on what happens somewhere else. A city
20 lacks authority to exercise its land use authority outside its territorial boundaries, even within its
21 Urban Growth Area, as the Court of Appeals confirmed when it held that a city could not
22 condition its provision of sanitary sewer service outside city limits on compliance with the city's
23 comprehensive plan:

24 The city's sewer service ordinance does not merely implement the Growth
25 Management Act's planning requirements. It imposes immediate use, density, and
26 structure requirements upon property outside the city's boundaries as a condition
of receiving a necessary service available only from the city. The ordinance thus
regulates use of the property and has the effect of zoning. Because the city's
zoning authority ends at its borders, the requirement that applicants for sewer
service outside city limits must comply with the city's "land use dimensions" is

1 unlawful.⁴ The trial court erred in failing to grant a writ ordering the city to issue
2 a certificate of sewer availability. We remand for issuance of the writ.

3 *MT Development, LLC v. City of Renton*, 140 Wn.2d 422, 429 – 30 (2007)

4 The Polar Pioneer does not have to satisfy DPD’s newly-invented primary function test
5 when it is in Alaska in order to moor in Seattle, because the Polar Pioneer’s activities in Seattle
6 are the same as the activities of the vessels that DPD allows to moor under this same test. The
7 Interpretation is clearly erroneous because it purports to give DPD the authority to prohibit a
8 vessel from mooring in Seattle because of what the vessel may do somewhere else.

9 **F. DPD Cannot Make Law Under The Guise Of Interpreting It.**

10 For the reasons discussed in Argument A above, DPD may not require a shoreline permit
11 for a vessel to moor; for the reasons discussed in Argument B, the Interpretation is not supported
12 by substantial evidence; and for the reasons discussed in Arguments C, D, and E, the
13 Interpretation leads to absurd results. Finally, the Interpretation also offends the most
14 fundamental tenets of statutory construction:

15 The fundamental objective of statutory construction is to ascertain and carry out
16 the intent of the Legislature. Where statutory language is plain and unambiguous,
17 the statute’s meaning must be derived from the wording of the statute itself.

18 *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (citing *Bellevue Fire*
19 *Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 750-51, 675 P.2d 592 (1984)).

20 With regard to legislative intent, DPD did not identify *any* legislative intent to limit the
21 types of vessels that can moor at cargo terminals, even though DPD just completed a multi-year
22 process to update its SMP. The Port participated actively in that process and, as Mr. Meyer
23 testified, Port staff also discerned no legislative intent to limit moorage of any kind of vessel at
24 any kind of facility.

25 Mr. McKim testified that the definition of cargo terminal is not ambiguous, thereby
26 conceding that the definition’s meaning must be derived from the wording of the definition itself:

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

6 DPD's first draft of the Interpretation (Foss Exhibit 2) is consistent with the plain
7 language of this definition, which does not refer to moorage or to vessels, or to the primary
8 function of vessels. Even if the definition were ambiguous, however, the fundamental objective
9 of statutory construction is to ascertain and carry out the intent of the Legislature, and DPD has
10 not identified any source of legislative intent that supports the Interpretation. Moreover, if the
11 Interpretation were ambiguous, one legitimate source of legislative intent would be the shoreline
12 goals and policies in the Comprehensive Plan, because SMC 23.60A004 states that these goals
13 and policies "shall be used by the Director in the promulgation of rules and in interpretation
14 decisions." As discussed in Argument C above, the Interpretation is dramatically inconsistent
15 with LU 257.

16 And, even if the definition of cargo terminal were ambiguous, contrary to Mr. McKim's
17 testimony and the definition's plain terms, such ambiguity would not delegate to DPD the
18 authority to rewrite the SMP under the guise of interpreting it. *Cole v. Wash. State Util. &*
19 *Transp. Comm'n*, 79 Wn.2d 302, 307-08 (1971) ("An administrative agency cannot amend its
20 statutory framework under the guise of interpretation."). Even a court cannot read into a
21 regulation something that is not there:

22 If an administrative rule or regulation is ambiguous, this court resorts to principles
23 of statutory construction, legislative history, and relevant case law to assist in
24 interpreting it. The court must construe an ambiguous rule or regulation to
25 effectuate the intent of the Legislature, or in this case, the State Toxicologist. In
26 construing an ambiguous provision, courts may not read into it matters that are
not in it and may not create legislation or promulgate rules under the guise of
interpreting a provision.

State Dep't of Licensing v. Cannon, 147 Wn.2d 41, 57-58 (2002) (internal footnotes omitted).

DPD is therefore doing what the Supreme Court says even a court cannot do: creating legislation

1 and promulgating rules under the guise of interpretation. The definition of “cargo terminal” does
2 not refer to vessels or to moorage, and it cannot be transformed by an administrative agency into
3 a regulation of vessels and moorage.

4 The “primary function” test is nowhere to be found in the definition itself, and, not
5 surprisingly, went undiscerned in the definition for decades by DPD itself, as well as by the Port
6 and the maritime industry. Even if DPD’s Interpretation were supported by some canon of
7 statutory construction, which it is not, DPD’s Interpretation makes the definition of “cargo
8 terminal” void for vagueness:

9 [A] statute which either forbids or requires the doing of an act in terms so vague
10 that [persons] of common intelligence must necessarily guess at its meaning and
11 differ as to its application, violates the first essential of due process of law. In the
12 field of regulatory statutes governing business activities, statutes which employ
13 technical words which are commonly understood within an industry, or which
14 employ words with a well-settled common law meaning generally will be
15 sustained against a charge of vagueness. The vagueness test does not require a
16 statute to meet impossible standards of specificity.

17 In the area of land use, a court looks not only at the face of the ordinance but also
18 at its application to the person who has sought to comply with the ordinance
19 and/or who is alleged to have failed to comply. The purpose of the void for
20 vagueness doctrine is to limit arbitrary and discretionary enforcements of the law.

21 *Anderson v. City of Issaquah*, 70 Wn. App. 64, 80-81 (1993) (internal citations omitted).

22 In this case it is DPD, not the Port and the maritime industry, that is unfamiliar with the
23 industry that the Interpretation purports to regulate. All the members of that industry who
24 testified – Greg Englin, Mike McLaughlin, Paul Meyer, Paul Gallagher, Mark Knudsen, Jim
25 Johnson, and Vice O’Halloran – testified about how out-of-touch the Interpretation is with the
26 realities of the maritime industry, as well as DPD’s past permitting practices.

This brief does not ask the Hearing Examiner to rule that the Interpretation makes the
definition of cargo terminal void for vagueness, even though it does. For purposes of the issues
over which the Hearing Examiner has accepted jurisdiction, the relevant facts are: (1) no one in
the maritime industry understands the definition of cargo terminal to mean what the

1 Interpretation says it means; and (2) DPD itself, for many years, and right up until no more than
2 two weeks before it issued the Interpretation, did not understand the definition to mean what the
3 Interpretation now says it means. These facts alone are sufficient to demonstrate that the
4 Interpretation is “creat[ing] legislation or promulgat[ing] rules under the guise of interpreting a
5 provision” of the SMP, which DPD does not have the authority to do. *Cannon*, 147 Wn.2d at 58.
6 Even “courts may not create legislation in the guise of interpreting it.” *Associated Gen.*
7 *Contractors of Wash. v. King County*, 124 Wn.2d 855, 865 (1994).

8 By issuing an Interpretation targeted at a specific vessel, DPD forgot that we are a nation
9 of laws, not people. *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Esping v. Pesicka*, 92 Wn.2d
10 515, 520 (1979). The Interpretation is contrary to principles encompassed in the “rule of law”
11 that are fundamental to our representative system of government: laws must be adopted by
12 legislative bodies, not created out of whole cloth by people who temporarily enjoy the power to
13 interpret and administer the laws.

14 Q. So this primary function test that you have adopted is not in the definition;
15 is that right?

16 A. It reflects our understanding of what the definition calls for.

17 Q. Your understanding, that is DPD's understanding?

18 A. Yes.

19 Q. And that understanding, has that ever been the subject of a public hearing?

20 A. Not that I know of.

21 Q. Was it ever adopted by the city council?

22 A. Not in so many words.

23 Q. Not in any words, correct? The primary function test has never been
24 identified to the city council as a test, correct?

25 A. Not in so many words.

26 Q. Has it ever been presented to the Department of Ecology for their approval
as an ordinance or a use in the shoreline master program?

A. Not in so many words.

Q. Has the public had any opportunity to weigh in on whether or not the
primary function test would work?

A. Not that I know of.

1 Day 1, 2 of 4, 41:20-42:23 of audio recording, August 13, 2015; Trial Excerpts Transcript
2 of Andy McKim, 71:1-71:22, August 13, 2015.

3 If DPD can disregard, without legal consequence, our constitutionally required,
4 foundational principles for how laws are created, then the people who are empowered today to
5 administer, interpret, and enforce the law will be free to make law under the guise of
6 interpretation without any constitutional authority to do so, and in an arbitrary and discriminatory
7 manner in order to accomplish a specific agenda that is unrelated to the general public health
8 safety and welfare.

9 III. CONCLUSION

10 The Hearing Examiner excluded all evidence regarding the political direction that was
11 given to DPD that led to the Interpretation, but DPD presented no evidence to fill the void
12 created by the exclusion of this evidence. In other words, there is no evidence that there is a
13 legitimate basis for the Interpretation.

14 Instead, the evidence demonstrates that the Polar Pioneer moored at Terminal 5 to load
15 goods and container cargo, and transported those goods and that cargo to another location, just as
16 countless other vessels have done since the creation of the Port of Seattle in 1911. But in a two-
17 week period in April and May of this year, without any public process, DPD hurriedly created
18 out of whole cloth a new test for moorage from the definition of cargo terminal, and determined
19 that because the “primary function” of the Polar Pioneer is something other than transporting
20 cargo, it cannot moor at a cargo terminal. DPD did so even though the vessel’s primary function
21 has nothing to do with its impacts on the City of Seattle, and even though any impacts the vessel
22 may have beyond the City’s limits are not caused by the vessel’s moorage at Terminal 5.
23 Moreover, DPD adopted its new “primary function” test even though vessels whose primary
24 function is something other than transporting cargo – research vessels, Navy and Coast Guard
25 vessels, ice breakers, tugboats – have been mooring at the Port’s cargo terminals since before the
26

1 City adopted its SMP and created the definition of cargo terminal to characterize what already
2 was happening at the Port's facilities.

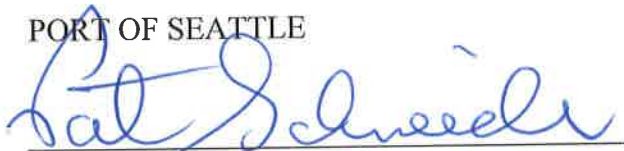
3 DPD provided no evidence or explanation why the Interpretation furthers the public
4 health, safety and welfare of the people of Seattle. The Port and Foss provided days of testimony
5 about how the Interpretation actively harms the public health, safety and welfare by harming the
6 entire maritime industry in the City, including the Alaskan fishing fleet that is called out for
7 special protection in the shoreline policies in the City's Comprehensive Plan.

8 The Interpretation is not supported by substantial evidence – it is undermined by the
9 evidence presented at the hearing. The Interpretation also is a clearly erroneous application of
10 law to facts, for all the reasons discussed above, and the substantial weight that the Code gives to
11 every interpretation, regardless of merit, has been overcome in this case.

12 The Port of Seattle asks that the Hearing Examiner reverse DPD's Interpretation.

13 RESPECTFULLY SUBMITTED this 10th day of September, 2015.

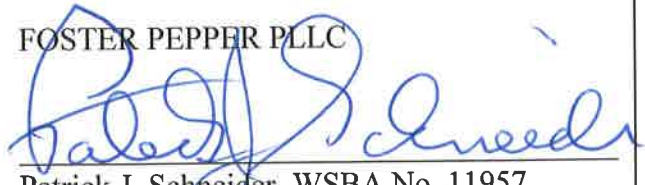
14 PORT OF SEATTLE

15 

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Attorneys for Appellant Port of Seattle

1 **DECLARATION OF SERVICE**

2 The undersigned declares under penalty of perjury under the laws of the State of
3 Washington that I am now and at all times herein mentioned a resident of the State of
4 Washington, over the age of eighteen years, not a party to the above-entitled action, and
5 competent to be a witness herein.

6 On September 10, 2015, I caused the foregoing document to be served as follows:

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DATED this 10th day of September, 2015.



Brenda Bole

EXHIBIT 1



Washington State (/)
Office of the Attorney General
Attorney General Bob Ferguson

(/)

Home (/) | AGO Opinion (/ago-opinions) | **Extent to which hydraulic project approval permits or shoreline substantial development permits are required for the planting, growing, and harvesting of farm-raised geoduck clams**

EXTENT TO WHICH HYDRAULIC PROJECT APPROVAL PERMITS OR SHORELINE SUBSTANTIAL DEVELOPMENT PERMITS ARE REQUIRED FOR THE PLANTING, GROWING, AND HARVESTING OF FARM-RAISED GEODUCK CLAMS



(<http://www.atg.wa.gov>)

AGO 2007 No. 1 - Jan 4 2007

Attorney General Rob McKenna

DEPARTMENT OF FISH AND WILDLIFE – SHORELINE MANAGEMENT ACT – DEPARTMENT OF ECOLOGY - Extent to which hydraulic project approval permits or shoreline substantial development permits are required for the planting, growing, and harvesting of farm-raised geoduck clams.

1. The Department of Fish and Wildlife may not require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, or harvesting of farm-raised geoduck clams by private parties.
2. The planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the Shoreline Management Act if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.
3. Where a geoduck clam culture project would require a substantial development permit, the local government and the Department of Ecology would have a variety of enforcement options available; in some cases, conditional use permits might also be used to regulate this practice.

January 4, 2007

Honorable Patricia Lantz
State Representative, 26th District
P. O. Box 40600
Olympia, WA 98504-0600

Cite As:
AGO 2007 No. 1

Dear Representative Lantz:

By letter previously acknowledged, you have requested an opinion on the following questions, which we have paraphrased slightly for clarity:

- 1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?**
- 2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?**
- 3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?**

[original page 2] BRIEF ANSWERS

We answer the first question in the negative. RCW 77.115.010(2) limits application of Washington Department of Fish and Wildlife (WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists.

Regarding the second question, we conclude that farm-raised geoducks may require a substantial development permit under circumstances where the particular geoduck planting project causes substantial interference with normal public use of the surface waters. Projects that do not meet this description would not require a substantial development permit.

In answer to the third question, local government and the Department of Ecology may take informal or formal civil enforcement actions against a substantial development that is undertaken without a permit. Alternatively, conditional use permits may be used to manage this type of aquaculture if the approved shoreline master program includes such a requirement.

BACKGROUND

Your questions concern a new type of shellfish farming that takes place on lower elevations of intertidal lands.

The process involves four-inch diameter PVC pipe cut into approximately one-foot lengths. The short PVC tube is inserted in the beach, leaving a few inches above the surface. A shellfish grower places tiny juvenile geoduck clams into the sandy substrate protected by the tube. The tube itself, or the general area, is covered with netting. Together, the tube and netting protect the juvenile geoduck from predators until it grows large enough to bury itself to a safer depth. After the geoduck has grown a sufficient amount to avoid predation (which requires several months), the shellfish grower removes the netting and tubes. The geoduck farming site may occupy many acres of tideland.

Approximately five years after planting, geoducks reach their marketable (and impressive) size as one of the world's largest burrowing clams. At that point, the shellfish grower harvests the clams which have "burrowed" two or three feet below the surface. A water jet loosens the substrate around the clam's shell and siphon (also called the "neck"), allowing the harvester to remove the geoduck from the muck.

The harvest incidentally releases silt and sediment which may temporarily be found in the surrounding water. Kent S. Short & Raymond Walton, Ebasco Environmental, *Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting* (April 1992) (copy on file). Removing a geoduck from the beach therefore results in a temporary depression where the substrate was loosened and the geoduck removed. See generally [original page 3] *Washington Shell Fish, Inc., v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (petition for review denied Jan. 3, 2007) (discussing geoduck aquaculture).

- 1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?**

Your first question concerns the requirement for a hydraulic project approval (HPA) issued by the WDFW under the authority of RCW 77.55.021. That statute provides, in part:

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a **hydraulic project**, the person or government agency shall, before commencing work thereon, secure **the approval of the department in the form of a permit** as to the adequacy of the means proposed for the protection of fish life.

RCW 77.55.021(1) (emphasis added). A “hydraulic project” is “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” RCW 77.55.011(7). The work of inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project because it is “work” that “uses” and “changes” the “bed of any of the salt or freshwaters of the state.” *Id.* An HPA permit would thus be required for geoduck aquaculture unless there is some exception. The exception is in the statutes that address WDFW disease inspection powers for private sector cultured aquatic products.

RCW 77.115.010(2) provides, in part:

The authorities granted the department by [the rules implementing a program of disease inspection and control for aquatic farmers] and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 77.115.020, 77.115.030, and 77.115.040 **constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020.**

(Emphasis added.)

[original page 4] Farm-raised geoducks are within the definition of private sector cultured aquatic products because they are “native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms”. RCW 15.85.020(3). An “aquatic farmer” is a private sector person who “commercially farms and manages the cultivating of private sector cultured aquatic products on the person’s own land or on land in which the person has a present right of possession.” RCW 15.85.020(2). The case of *State v. Hodgson*, 60 Wn. App. 12, 802 P.2d 129 (1990), illustrates that privately planted geoducks can be private sector cultured aquatic products.

RCW 77.115.010(2) allows WDFW to regulate private sector cultured aquatic products only by using the enumerated statutes, which do not include the HPA permit. We reach this conclusion after considering the two canons of statutory construction identified in your letter and by examining the language of the statute and the statutory scheme.

First, we examine whether the HPA statute is a later enacted statute that might apply to geoduck farming regardless of RCW 77.115.010(2). This concept does not apply, however, because the general HPA requirement dates back to the 1940s. *See* Laws of 1943, ch. 40, § 1. The HPA law, indeed, existed when the original version of RCW 77.115.010(2) was adopted in Laws of 1985, ch. 457, § 8. *See former* RCW 75.20.100 (1985 HPA statute). Thus, although a 2005 bill recodified the HPA law, we do not conclude that it is a new legal requirement. We therefore cannot conclude that HPA authority reflects a latter enactment outside the scope of RCW 77.115.010(2).

Second, we examine whether the HPA law is more specific than RCW 77.115.010(2), because a more specific statute is given effect if there is a conflict with a general statute. *See Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). However, the HPA law is substantially broader than RCW 77.115.010(2), applying to all work and construction in salt and fresh waters. In contrast, RCW 77.115.010(2) has a narrow scope. We therefore conclude that RCW 77.115.010(2) is a later enactment and more specific with regard to WDFW authority to regulate private sector cultured aquatic products.

Next, we consider that RCW 77.115.010(2) does not mention the HPA permit or terms that address HPA requirements. The HPA statute refers to “construction” or “work” that “uses” or “changes” the bed or flow of state waters. RCW 77.55.021(1). In contrast, RCW 77.115.010(2) does not use any of these terms. Moreover, other statutes in RCW 77.55 provide explicit exemptions to the HPA permit. *See* RCW 77.55.031–.071 (describing activities that might use or change the beds of state waters such as crossing an established ford, removing derelict fishing gear, abatement of certain noxious plants, hazardous waste cleanups, and construction of housing for sexually violent predators). It is arguable that these express **[original page 5]** exemptions in RCW 77.55 should be interpreted as providing the only exceptions to the HPA permit. *See In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (express exceptions in a statute exclude all other exceptions).

However, we do “not construe statutes so as to render language meaningless.” *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000). RCW 77.115.010(2) has no meaning if it does not reflect a legislative intent to limit WDFW authority to regulate private sector cultured aquatic products. We therefore construe RCW 77.115.010(2) as a limit on WDFW regulation of private sector cultured geoducks using the following guidance.

First, RCW 77.115.010(2) acts as an exception and must be read narrowly. See *State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990 (1980) (statutory provisos should be strictly construed with doubts resolved in favor of the general provisions to which the proviso does not strictly apply). We also avoid absurd or unintended consequences. *Frat. Order of Eagles, Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (The courts “will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.”). Thus, we do not read RCW 77.115.010(2) disjunctively as a limit on WDFW regulation of any registered aquatic farmer, because that leads to absurd results where, for example, WDFW could not regulate an aquatic farmer who is hunting because the laws regulating hunting are not on the statutory list. We read RCW 77.115.010(2) conjunctively. Thus, it limits regulations when applied to both the private sector cultured aquatic products *and* the aquatic farmer.

We also rely on RCW 77.12.047(3) to reach our conclusion. This statute provides that rules adopted by the Fish and Wildlife Commission shall not apply to private sector cultured aquatic products, except for rules adopted under RCW 77.12.047(1)(g) (allowing WDFW to adopt rules “specifying the statistical and biological reports required from fishers, dealers, boathouses, or processors of wildlife, fish or shellfish.”) Under this statute, WDFW rules governing the time, place, and manner for taking wild fish, shellfish, and wildlife are not applicable to private sector cultured aquatic products. We conclude that if an HPA permit were used to regulate geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules, confounding express legislative intent.

Finally, we consider that the HPA permit is enforced primarily using criminal sanctions under RCW 77.15.300. Interpretation of whether an HPA permit is required must therefore consider the rule of lenity. Under the rule of lenity, if two possible constructions of a statute imposing a criminal penalty are permissible, the criminal statute will be construed against the state and in favor of the accused. See, e.g., *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). A person planting geoducks without an HPA permit would properly invoke the rule of lenity to argue for the above interpretation of RCW 77.115.010(2) limiting the HPA permit requirement.

[original page 6] 2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?

Background – The Shoreline Management Act

The Legislature enacted the Shoreline Management Act (SMA) to protect and to manage the private and public shorelines of Washington State; to further public health, public rights of navigation, land, vegetation, and wildlife; and to plan for and foster reasonable and appropriate shoreline uses. RCW 90.58.020; *Samuel’s Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002). The SMA regulates both “uses” of shorelines as well as “developments” on them. *Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 95-96, 743 P.2d 265 (1987).

RCW 90.58.140(1) provides that development on the shorelines shall not be undertaken unless consistent with the SMA, with SMA guidelines, and with local government master programs. Subsection (2) prohibits substantial development on the shorelines “without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.”

RCW 90.58.030(3)(d) defines “development” to mean:

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]

RCW 90.58.030(3)(e) defines “substantial development” as “any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state.” We accept your suggestion that we engage in the reasonable assumption that the cost and value of such activity will

exceed the five thousand dollar threshold for “substantial” development in RCW 90.58.030(3)(e).

[6] “Under the [SMA] no ‘substantial development’ exists if there is no ‘development’ within the meaning of RCW 90.58.030(3)(d), because for there to be a ‘substantial [original page 7] development’, there must first be a ‘development’”. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812, 828 P.2d 549 (1992). Our analysis therefore focuses on whether geoduck farming is a development.

Substantial development permits are administered by local government according to shoreline master programs. RCW 90.58.140(3). The process for development of the shoreline master program governing these permits is described in *Weyerhaeuser Co. v. King Cy.*, 91 Wn.2d 721, 729, 592 P.2d 1108 (1979):

The SMA requires each local government to develop a master program for the use and development of shorelines within its boundaries. RCW 90.58.080. The programs, once approved by the Department of Ecology, operate as controlling use regulations for the various shorelines of the state. RCW 90.58.100.

[7] Analysis

We start by examining a recent case where the Court of Appeals held that a geoduck tube aquaculture operation required a substantial development permit. *Wash. Shell Fish*, 132 Wn. App. 239.

The Court analyzed the Pierce County shoreline master program definitions for substantial development, which are identical to SMA definitions. It held that geoduck aquaculture in that case involved “development” because it interfered with normal public use of the waters. *Id.* at 251-52, citing RCW 90.58.030(3)(d) (“any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level”).

We have found the Court of Appeals opinion answers your question only in the context of the facts of that case, and it fails to offer an analysis applicable to all geoduck tube aquaculture. To answer your questions, we conclude that geoduck tube aquaculture does not necessarily fall within the definition of development except where it interferes with normal public use of surface waters, as in *Washington Shell Fish*:

Several witnesses testified that WSF left rope in the water where WSF had planted geoducks, and this rope would become entangled with people or non-geoduck-harvest-related objects. WSF divers harvesting geoducks placed markers on the water’s surface that prevented public use of that area. The PVC planting pipes that WSF inserted into the shorelines were up to 12 inches long, [original page 8] with their top portions protruding vertically out of the sand. In addition, according to one witness, WSF used up to four boats at a time to store the geoducks that divers harvested, one of which was a barge large enough to drag a buoy; these WSF boats further constricted the water surface open to public use.

Wash. Shell Fish, 132 Wash. App. at 251. The opinion goes on to describe the particular site where wind surfers were affected by the project. The relevant factors appear to be the public use of the surface waters of the site and the manner in which the geoduck project interfered with public use—floating ropes on the surface, markers on the water’s surface creating barriers to public use, and barges and boats that occupy the site to the exclusion of the public.

Although *Washington Shell Fish* shows how geoduck tube aquaculture can interfere with use of surface waters, nothing in the description of geoduck aquaculture necessitates such interference. The PVC pipes protrude only inches and have no more interference with use of the surface waters than bags of oysters, clam nets, or a small rock on the shoreline. The markers, floats, barges, and entanglements affecting the surface in *Washington Shell Fish* may not exist at every geoduck farm. The neighboring public park appears to trigger the interference with public use of the surface waters.

Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual “projects” and involves a concrete examination of whether the project interferes with normal public use of surface waters. The *Washington Shell Fish* case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).

We next examine the other statutory definitions of development. The *Washington Shell Fish* opinion does not address the argument that geoduck tube aquaculture is development because the harvest disrupts the substrate around the geoduck. *Wash. Shell Fish*, 132 Wash. App. at 252 n.12. We conclude that disruption of the substrate around a geoduck, considered in isolation, cannot be legally distinguished from general clam digging or raking. Any clam harvest disrupts the substrate around the buried clam. We find no indication that the SMA has ever treated clam harvesting, alone, as development. Moreover, it would lead to a burdensome and apparently unintended consequence where substantial development permits would be required for all significant clam beds, both commercial and recreational.

Next, we consider whether geoduck tube aquaculture involves dredging. In 1977, the Washington Supreme Court affirmed the Shoreline Hearings Board and held that clam harvesting using a dredge was a type of substantial development. *English Bay Enters., Ltd. v. Island Cy.*, 89 Wn.2d 16, 568 P.2d 783 (1977). The court rejected the harvester's argument that the statutory definition of "development" did not explicitly include clam harvesting.

[T]he Board found, and we find here, that it is not the goal of the appellant's activity which governs **but rather it is the method employed**. The appellant's operation involves the removal of earth from the bottom of the bay. In the plain and ordinary sense of the term, this procedure is "dredging." The Board found **[original page 9]** that this activity constitutes dredging; the interpretation of the Board is to be given great weight. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash.2d 441, 536 P.2d 157 (1975).

Id. at 20 (emphasis added).

The dredging in *English Bay* is significantly different. A hydraulic dredge machine removed the top twelve inches of beach, leaving a trench while dislodging clams. *Id.* at 18. The *English Bay* case thus involved a dredging machine, which is necessary to dictionary definitions of dredging, but absent in geoduck farming. See Merriam-Webster OnLine Dictionary, Dredging, "1 a: to dig, gather, or pull out with or as if with a dredge -- often used with *upb*: to deepen (as a waterway) with a dredging machine". The water jet used to loosen the substrate around an individual geoduck is not a dredging machine, even if water jets might be used for dredging channels in other places. Here, the water jet simply loosens a geoduck.

Constructing Structures

Geoduck tubes do not fall within the ordinary meaning of the word "structures" referred to in the definition of development. WAC 173-27-030(15) defines structure as "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner." This does not suggest that a structure could comprise of PVC tubes on a beach. The tubes are not "edifices or buildings" taken separately, they do not form an "edifice or building" taken together, nor are the tubes "parts joined together in a definite manner." Our conclusion is reinforced by *Cowiche Canyon Conservancy*, above, where the Court rejected an argument that removal of railroad trestles was a development, because it modified a structure. The Court there held that removal resulted in no structures, applying the common meaning of the term.

Drilling, Filling, And Removal Of Materials

The term "drilling" is commonly defined in terms of creating a hole. See Merriam-Webster OnLine Dictionary, Drill, "2 a (1): to bore or drive a hole in (2): to make by piercing action <drill a hole>". While tubes could be creatively described as being "drilled into" the substrate, no hole is created. The tube is a temporary barrier protecting the juvenile clam.

Similarly, while sand, silt, and gravel is disturbed, geoduck aquaculture does not involve filling of tidelands. In contrast, *Dep't of Fisheries v. Mason Cy.*, SHB No. 88-26, 1989 WL 106061 (Wash. Shore. Hrgs. Bd. Aug. 15, 1989), the Shoreline Hearings Board considered a proposal to apply several inches of gravel over large areas of tidelands to create an artificial bed for clam production. That filling required a substantial development permit.

Finally, if sediment is disrupted during harvest, only a minimal amount of sediment is actually removed with the clam. This minimal amount of materials removed does not comport with a reasonable interpretation of the statutory language concerning "removal of materials." See *Black's Law Dictionary* 464 (8th ed. 2004), "*de minimis non curat lex*" (the law does not concern itself with trifles).

[original page 10]Placing Obstructions

The statutory definition refers to “placing obstructions” as “development.” Assuming that this refers to blocking or clogging passage on the water, we conclude that it is conceivable that a project might involve tubes, nets, or other materials that obstruct passage. Arguably, the tubes could obstruct a walker, but that would be relevant only if placed on tidelands used by the public. This term should be applied based on the particular project, as in *Washington Shell Fish*. Local government, as the primary administrator of the substantial development permit system, would determine whether a particular project involves placing obstructions. See RCW 90.58.140(3); *Samuel’s Furniture*, 147 Wn.2d at 455.

The Farming Practices Exception

Several comment letters have raised the farming practices exception from the substantial development permit in RCW 90.58.030(3)(e)(iv). This subsection exempts:

Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels.

[9] Every term in the exception describes upland farming; no term reflects aquaculture. See also WAC 173-27-040(2)(e) (adopting statute into regulation without any clarification or interpretation of aquaculture practices). Moreover, the Department of Ecology guidelines on shoreline uses distinguish between aquaculture and agriculture. See WAC 173-26-241(3)(a), (b). We found no history to suggest that RCW 90.58.030(3)(e)(iv) was adopted to address aquaculture activities or that it has been applied to aquaculture.

Accordingly, we conclude that this exception does not apply to geoduck tube aquaculture.

To summarize, we conclude that geoduck aquaculture requires a substantial development permit if conducted as described by *Washington Shell Fish*. We do not conclude that geoduck [original page 11] aquaculture inherently involves interference with normal public use of the surface waters in all locations. We also conclude that it does not involve dredging, construction, or other types of development described by RCW 90.58.030(3)(d). Therefore, the substantial development permit requirement is not necessarily required for intertidal geoduck farming.

As described in the next section, our conclusion does not imply that the SMA lacks authority for local government to manage geoduck aquaculture use of the shoreline. The SMA authorizes conditional use permits to manage shoreline uses.

3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

[10] If there is a geoduck farm that meets the definition of substantial development, then both state and local government have a variety of options. First, government may simply pursue informal measures, like asking the geoduck farmer to obtain a permit. Second, RCW 90.58.210 authorizes Ecology and local government to issue penalties, orders requiring permits, and orders requiring corrective action.

We also note that government may consider using “conditional use permits” to regulate geoduck aquaculture. The *Clam Shacks* case, cited above, illustrates this SMA regulatory power. In that case, a shellfish harvester using a “hydraulic rake” claimed that if his harvests did not involve substantial development, then no SMA permit could be required to regulate it as a use of the shoreline. The Washington Supreme Court unanimously rejected the argument. The SMA includes express directions and powers to regulate and manage “uses” of the shoreline. Local government may, therefore, require a conditional use permit to manage that hydraulic rake clam harvest. The opinion contains the following discussion:

Clam Shacks argues that the language of the statute and its application of the permit process only to substantial developments limits the SMA to developments as defined. Thus, Clam Shacks concludes there can be no use control, regardless of the master program, unless the activity involved constitutes a development. We disagree. Such construction would frustrate the declared policy of the SMA.

Clam Shacks v. Skagit Cy., 109 Wn.2d at 95.

It is likely that shoreline master programs have not considered using conditional use permits to regulate geoduck aquaculture and, therefore, that option is not immediately applicable in all jurisdictions. However, all local master programs are being reviewed and updated during the upcoming decade. See RCW 90.58.080. Ecology's guidelines for updating master programs [original page 12] provide that aquaculture of this type is a favored use of the shoreline environment that should be accommodated by shoreline master programs. WAC 173-26-241(3)(b).

Therefore, this option is prospectively available as a means for managing existing and future operations.

We trust that the foregoing analysis will be helpful to you.

Sincerely,

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Attorney General

JAY DOUGLAS GECK
Deputy Solicitor General

:pmd

[1] Intertidal here simply refers to tidelands that are periodically covered and uncovered by the daily high and low tides. It is not necessary to distinguish types of tidelands and bedlands to address the questions.

[2] Embedded and immobile shellfish are part of the real property, under Washington law, belonging to the landowner. *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000). The proprietary aspect of shellfish is illustrated by statutes such as RCW 79.135.130, which requires payment of fair market value for existing shellfish on state aquatic lands before leasing to a shellfish farmer. Other state laws allow shellfish to be taken without regard to the state's proprietary interest. For example, shellfish on certain parks and public lands are available for recreational harvest under licenses and rules of the WDFW and other state agencies.

Shellfish may also be subject to a "right of taking fish at all usual and accustomed grounds and stations" created by federal treaties with various Indian Tribes in Washington. Because federal law creates the treaties and preempts contrary state laws, the right of taking shellfish under the treaty can be applied notwithstanding state property law. See *United States v. State of Washington*, 157 F.3d 630, 646-47 (9th Cir. 1998).

[3] In *Hodgson*, a criminal defendant contended that geoduck clams he harvested from DNR-managed bedlands were private sector cultured aquatic products. The court took judicial notice that geoduck clams take five years to mature and rejected the defendant's argument because the harvester's connection with the public geoduck beds was transitory, and wild geoduck clams were not under the active supervision and management of a private aquatic farmer at the time of planting. *State v. Hodgson*, 60 Wn. App. at 17-18. In contrast to *Hodgson*, your question deals with an aquatic farmer who actively supervises and manages the geoduck clam bed at the time of planting.

[4] Thus, a person who constructs a boat ramp, dock, or other construction work at an aquatic farm would require an HPA permit, because the permit regulates construction; it does not regulate aquaculture products.

[5] Whether lenity applies here depends on whether application of HPA laws to a geoduck planter would be criminal. An ordinance is penal or criminal in nature when "a violation of its provisions can be punished by imprisonment and/or a fine." *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987). An ordinance is remedial, rather than criminal, "when it provides for the remission of penalties and affords a remedy for the enforcement of rights and redress of injuries." *Von Thiele*, 47 Wn. App. at 562. Civil and criminal penalties may coexist without "converting the civil penalty scheme into a criminal or penal proceeding." *Von Thiele*, 47 Wn. App. at 561.

We interpret the HPA laws using lenity because of the primacy of the criminal sanctions; the HPA code includes minimal civil remedial powers. For example, the HPA laws include no provisions for civil orders to stop work or to take corrective actions. See RCW 90.58.210(3) (Shoreline Management Act authorizes civil penalty, stop work orders, and corrective action orders). While the HPA laws include a narrow civil penalty provision, RCW 77.55.291, the requirement of an HPA is enforced with a criminal sanction under case law. *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 602 P.2d 1172 (1979).

[6] In addition to substantial development permits, the SMA contemplates conditional use permits and variance permits. These latter types of permits are issued by local government but require the approval of the Department of Ecology to be valid. RCW 90.58.140(10); *Samuel's Furniture*, 147 Wn.2d at 455, n.13. We discuss the option of using conditional use permitting in response to the third question.

[7] The *Washington Shell Fish* case arose after the county leased 47 acres of county park tidelands for a nominal fee and the lessee proceeded to remove approximately 2.7 million dollars worth of geoducks. *Wash. Shell Fish*, 132 Wash. App. at 253. The county then raised the issue of a substantial development permit and also challenged the validity of its lease. See *Pierce Cy. v. Wash. Shell Fish, Inc.*, No. 31380-4-II, 2005 WL 536097 (Wash. Ct. App. Mar. 8, 2005) (unpublished).

[8] Washington common law also shows that the private property interest in a shellfish farm allows the farmer to restrain the general public from interfering with the farm. See *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 P. 922 (1908) (lessee of state aquatic lands devoted to shellfish operation can bring trespass action against others who enter the lands and take clams). Thus, even if the PVC tubes might hypothetically affect a person crossing a shellfish farm, it is not a cognizable obstruction of the public, because the person is there at the farmer's express or implied permission.

[9] We note that the findings section of the Aquaculture Marketing Act, RCW 15.85.010, describes a general goal that aquaculture "should be considered" a branch of the agricultural industry for purposes of laws that advance and promote the agricultural industry. "When the legislature employs the words 'the legislature finds,' as it did in RCW 80.36.510, it sets forth policy statements that do not give rise to enforceable rights and duties. See *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wash.2d 135, 139, 588 P.2d 185 (1978)." *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004). The Aquaculture Marketing Act, therefore, does not amend RCW 90.58.030(3)(e)(iv) to change the intent to address farming as described by the words in that subsection. We conclude that for marketing purposes, the Legislature intended to include aquaculture with agriculture but did not intend to erase all distinctions for purposes of environmental regulation or other laws not related to marketing.

[10] We interpret your third question as addressing unpermitted projects where no local decision expressly determined that no substantial development permit is required. If local government previously decided that a project is not a substantial development and did so with a final written local decision, then that decision may be final and unappealable because of appeal deadlines in the Land Use Petition Act. See *Samuel's Furniture*, 147 Wn.2d at 463 (local government decision that project was not in the shoreline became a final decision that no SMA permit is required because it was not appealed under the Land Use Petition Act, RCW 36.70C).

[11] Local government regulation of aquaculture in the shoreline must be consistent with the policies of the SMA, which promote appropriate aquaculture uses. See AGO 1988 No. 24 (opining that local government regulation of aquaculture in the shoreline must be done consistent with the SMA). As explained in this 1988 Attorney General's Opinion, the Planning Enabling Act, RCW 36.70, and local police powers cannot be used to impose greater restrictions on aquaculture than allowed under the shoreline master program.

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