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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)

**DECLARATION OF PATRICK J.
SCHNEIDER**

I, Patrick J. Schneider, hereby declare and affirm:

1. I am over the age of 18 years, and competent to be a witness herein;
2. Attached hereto is a true and correct copy of an excerpted portion of the verbatim hearing transcript of Paul Gallagher, as transcribed by Bonnie Reed, CETD and Marjorie Jackson, CETD, Reed Jackson Watkins. Excerpts from this transcript are quoted pages 7 and 8 of the Port of Seattle's Post-Hearing Brief.
4. Attached hereto is a true and correct copy of an excerpted portion of the verbatim hearing transcript of Andy McKim, as transcribed by Brian Killgore of ACE Transcripts, Inc. Excerpts from this transcript are quoted or referenced on pages 14, 15, 19 and 26 of the Port of Seattle's Post-Hearing Brief.

DECLARATION OF PATRICK J. SCHNEIDER - 1

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1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 EXECUTED at Seattle, Washington this 10th day of September, 2015.

4 FOSTER PEPPER PLLC

5 

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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

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1 A. You have to have pilotage onboard. Certain local vessels
2 that transit normally, the operators would get their
3 pilotage, which is a test. But other vessels that are
4 visiting must get a pilot onboard. And almost all the Shell
5 vessels that travel in the system always have a Puget Sound
6 Pilot onboard.

7 Q. So tell me what you did as a result of this suggestion from
8 the pilots?

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

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

25 A. We had the Coast Guard captain of the Port who showed up, we

1 also had his staff. And we actually had the District 17
2 admiral of the Coast Guard who thought it was such an
3 interesting exercise that he came by on that day to
4 participate as well.

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

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

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

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

19 Q. So these are large vessels?

20 A. These are large vessels. The largest being some of the
21 container barges that are larger than the size of a football
22 field with containers stacked five high, and cement ships
23 that use the West Duwamish waterway which are approaching
24 700 feet long and very large commercial oceangoing ships.

25 Q. And then when the Polar Pioneer was present at the dock,

1 were there ever any occasions where there were safety
2 concerns about other vessels being able to navigate past the
3 Pioneer in the waterway?

4 A. Not to my knowledge, no.

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

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

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

14 A. Yes, I do.

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

21 A. Yes.

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

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

1 Q. So is that --

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

5 MR. WEST: Okay. That's all the questions I have.

6 MS. GOLDMAN: Can I ask (inaudible).

7

8 R E B U T T A L C R O S S - E X A M I N A T I O N

9 BY MS. GOLDMAN:

10 Q. So the simulation that you described, was that including the
11 exclusion zones?

12 A. Yes.

13 Q. Did the simulation also model the vessels coming in with a
14 500-yard exclusion zone?

15 A. Yes.

16 Q. And the determination was vessels could navigate around --
17 around in the west waterway with the 500-yard exclusion?

18 A. As it was stated, with permission from the Coast Guard, they
19 could navigate through the safety zone.

20 Q. Oh, with permission?

21 A. With permission from vessel traffic.

22 Q. Oh. Was that here -- your testimony is that with permission
23 they could navigate around it?

24 A. By checking into vessel traffic, vessel traffic allows them
25 to pass through the zone.

1 delivered somewhere else, correct?

2 A. That's right.

3 Q. And also because the primary function of the vessel isn't as
4 a cargo vessel, right?

5 A. That's right.

6 Q. Okay.

7 And there are oil spill response vessels at cargo
8 terminals. These are vessels that make sure if there is an
9 oil spill, there is a vessel that goes out and lays a bunch
10 of boom out to contain the spill?

11 Those can't moor at cargo terminals either, can they?

12 A. That's right.

13 Q. And in fact they can't load and unload their boom and
14 absorbants and all the other things that they use at a cargo
15 terminal either, right?

16 A. That's right.

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

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

21 Q. Do you have expertise in that field?

22 A. No.

23 Q. Do you have expertise on moorage?

24 A. No.

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

1 A. No.

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

4 A. No.

5 Q. Let's go back to the interpretation now, which is exhibit
6 number 1, and particularly to the definition of cargo
7 terminal, and that is set forth in section 7, correct, of
8 the findings of fact?

9 A. Yes.

10 Q. And you concluded in paragraph 6, which is on page 4, that
11 the unifying theme of this definition is that last phrase in
12 the first sentence: "In order to transfer them to other
13 locations," correct?

14 A. "In order to be transferred to other locations."

15 Q. To be transferred? Are we reading the same definition?

16 I am reading paragraph 7 of the interpretation. It
17 says, "in order to transfer them."

18 A. Yes, that's right. I paraphrased in conclusion number 6.

19 Q. Correct.

20 And if that last phrase, "in order to transfer them to
21 other locations," does not modify each of the three
22 paragraphs, or the three options ahead, there is no unifying
23 theme, correct?

24 A. Well other than being a transportation facility.

25 Q. Correct, and a transportation facility, as described here in

1 Q. So you are relying on use reports in determining what Foss
2 was going to do at terminal 5?

3 A. I was relying on use reports about the two main vessels that
4 we were talking about, yes.

5 Q. You're talking about the drill rigs?

6 A. Yes.

7 Q. The two drill rigs?

8 A. Yes.

9 Q. What about the ancillary support fleet?

10 A. I did not rely on news reports about those.

11 Q. All right, but you also didn't consider whether or not
12 loading or unloading of those vessels was appropriate,
13 correct?

14 A. I don't think that I specifically looked at that, no.

15 Q. Okay.

16 Foss told you, as well, that lay berthing is normal,
17 customary and an essential practice at marine cargo
18 terminals? Is that correct?

19 A. Yes.

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

21 A. No.

22 I'm sorry, at cargo terminals specifically, no.

23 Q. Okay.

24 And you concluded in fact that lay berthing is not
25 intrinsic unless there is some cargo vessel involved,

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

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

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

6 A. Yes.

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

9 A. Not that I know of.

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

11 A. Not in so many words.

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

15 A. Not in so many words.

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

19 A. Not in so many words.

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

22 A. Not that I know of.

23 Q. Instead the primary function test was created by DPD by you;
24 is that right?

25 A. It reflects our understanding of what the definition calls

1 sorts of vessels, so it is one of those things in terms of
2 that particular wording. It was meant as explanatory --
3 when pressed in detail for six hours in my deposition.

4 Q. So does that mean the primary function test -- that
5 articulation of the test did not exist until after the
6 interpretation was issued?

7 A. I don't believe that we used that in so many words, but I
8 believe it is consistent with the interpretation.

9 Q. So that is your explanation provided after the
10 interpretation was issued in response to questions at the
11 deposition?

12 A. Yes.

13 Q. And but that is the test that the port should use going
14 forward in determining which vessels can and cannot moor at
15 cargo terminals?

16 A. I would say yes, which vessels would require -- could --
17 what activities would be permitted in association with
18 vessels moored at cargo terminals versus moored at -- or at
19 locations with additional or other permits established, yes.

20 Q. So if Greg Englin, who will testify after you, and is
21 responsible for moorage at T91 and a host of other places,
22 including portions of T5 not under lease to Foss, if he gets
23 a call from an agent saying a vessel is coming, and they
24 want to moor at a cargo terminal -- not to load and unload
25 cargo, but to lay berth or to do some minor repairs or

1 Crowley -- tug companies would need to divide their vessels
2 into those that assist cargo vessels and those that don't in
3 order to know which ones could moor at a cargo terminal?

4 A. No, I would say if they are in the business of providing
5 both moorage associated with cargo terminal use of
6 transportation of goods, as we have described it, and also
7 that they use the facility or provided the facility moorage
8 on a commercial basis or a -- you know, things that aren't
9 cargo vessels, then it would be reasonable, and if they get
10 permits establishing both of those things, then the tug
11 could do either of both of those things.

12 Q. Well again my question is about -- not what -- about future
13 permits someone might obtain, but right now at a cargo
14 terminal using the primary function test, wouldn't Foss and
15 Crowley have to divide the sheep from the goats -- the tugs
16 that assist cargo vessels from those that don't?

17 A. Well I think the bottom line would be that they just
18 couldn't have the goats unless they established -- got a
19 permit for the goats.

20 Q. So the answer then is yes, vessels -- tugs cannot moor at a
21 cargo terminal under the interpretation if those tugs are
22 assisting vessels that aren't -- that don't pass the primary
23 function test?

24 Is that fair?

25 A. Yeah.

1 What I am saying is that if you have a cargo terminal
2 and -- yeah, you can't have vessels that aren't carrying
3 cargo or else -- cargo or vessels -- or else vessels that
4 are assisting vessels that carry cargo.

5 Q. Okay.

6 How about icebreakers, pass or fail the primary
7 function test?

8 A. My again uneducated understanding would be that an
9 icebreaker, that the function is not to carry cargo, and
10 therefore that it wouldn't be a cargo terminal use. A
11 different moorage use should be established for it.

12 Q. Okay, the next category is offshore oil supply vessels.

13 I think you responded to a question from Mr. West about
14 those and indicated that they would pass the test?

15 A. Yes, if they are carrying -- carrying products from here to
16 an offshore oil drilling facility, that would be a
17 legitimate cargo terminal use.

18 Q. Okay, so if they were carrying supplies up to the Polar
19 Pioneer in the Arctic, that would be okay?

20 A. Yes.

21 Q. And now we get to ships of state, which I sort of lumped in
22 with the government vessels earlier, and your answer to that
23 is?

24 A. Again, you know, as I have said, I am not an expert in what
25 happens on any of these types of vessels, but based on my

1 understanding of what a ship of state is, it is not there to
2 pick up or deliver products, and so it would not be a cargo
3 terminal use.

4 Q. Okay.

5 So research vessels? For example, we will hear from
6 Mr. Englin that one of the vessels that is moored today at
7 T91 is the Tommy Thompson. It is a research vessel operated
8 by the University of Washington.

9 Does it pass or fail the primary function test?

10 A. I would say that that would not be a cargo terminal.

11 Q. How about diving vessels?

12 A. Again, I don't believe that that would be a cargo terminal
13 use.

14 Q. Oil spill response vessels?

15 A. No, I don't believe that would be, either.

16 Q. Pilot vessels?

17 A. I don't know what that is.

18 Q. A pilot vessel is a vessel that takes a harbor pilot out to
19 meet an ongoing ocean vessel. The pilot is on the vessel
20 and then brings it into its birth.

21 A. I suppose if the pilot vessel were being used in conjunction
22 with bringing a vessel carrying cargo to that particular
23 facility, it would be similar to a tugboat being used to
24 assist a cargo vessel, so it might be allowed as an
25 accessory use.