BEFORE THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of:

FOSS MARITIME COMPANY

from an Interpretation by the Director, Department of Planning and Development.

Hearing Examiner File No. S-15-001
(DPD Project No. 3020324)

In the Matter of the Appeal of the:

PORT OF SEATTLE,

from Interpretation No. 15-001 of the Director of the Department of Planning and Development.

Hearing Examiner File No. S-15-002
(DPD Project No. 3020324)

ENVIRONMENTAL INTERVENORS’ POST-HEARING BRIEF
TABLE OF CONTENTS

INTRODUCTION ........................................................................................................................................... 1

I. THE CITY’S SHORELINE MASTER PROGRAM MUST BE CONSTRUED TO PROMOTE THE OBJECTIVES AND PURPOSES OF THE SHORELINE MANAGEMENT ACT, WHICH ESTABLISHES ZONING AND PERMITTING SCHEMES TO PROTECT SHORELINE RESOURCES. ........................................... 2

A. The Shoreline Management Act and Shoreline Master Program Protect Shoreline Resources Through Zoning and Permitting. ........................................... 2

B. Shoreline Permitting Extends to Changes of Use. ................................................................. 3

II. OVER-WINTER MOORAGE OF A DRILL RIG AND ACCOMPANYING VESSELS IS INCONSISTENT WITH THE ESTABLISHED USE OF TERMINAL 5 AS A CARGO TERMINAL AND REQUIRES A NEW PERMIT AUTHORIZING THE USE. ........................................... 4

A. Terminal 5 Is Established as a Cargo Terminal and for No Other Shoreline Use. ......................................................... 4

B. A Cargo Terminal Is a Transportation Facility Where Quantities of Goods and Container Cargo Are Transshipped by Carriers from One Location to Another. ......................................................... 7

1. The Applicable Rules of Statutory Construction ........................................... 7

2. The Pertinent Definitions ........................................................................ 8

3. Transshipment of Paying Cargo Is the Essential Feature of a Cargo Terminal Under the SMP Definition of Cargo Terminal. ........................................... 10

   a. “Stored Outdoors” is Directly Modified by the Concept of Transshipment. ........................................... 10

   b. Transferred to Other Carriers Refers to Transshipment by Businesses Engaged in Shipping Cargo From One Location to Another. ........................................... 11

   c. Stored, in the First Clause, Must Be Read to Be Storage for the Purpose of Transshipment. ........................................... 12

4. The LUC Definition of Cargo Terminal Removes Any Doubt That Transshipment of Paying Cargo Is the Essential Feature of a Cargo Terminal. ........................................... 15
5. Evidence of Non-Cargo Moorage Activities at Multiple Use Terminals Lacks Probative Value. ........................................16

C. Moorage Is an Accessory Use at a Cargo Terminal. ........................................18

1. Definitions of “Incidental” and “Intrinsic” ........................................19

2. Mooring Cargo Vessels in Connection with Transshipping Cargo Is an Appropriate Accessory Use at a Cargo Terminal. ........................................................................19

3. Lay Berthing Vessels Having No Relation to Transshipping Cargo Is Not an Appropriate Accessory Use at a Cargo Terminal. ........................................................................20

4. It Is Easy to Discern That Over-Winter Moorage of a Drill Rig Is Not Incidental and Intrinsic to Cargo Transshipping........23

D. Over-Winter Moorage of a Drill Rig and Associated Vessels Is Not a Cargo Terminal Use, But Rather Is a Different Principal Use Needing an Additional Permit. ........................................24

1. The Polar Pioneer is a Drill Rig, not a Carrier Engaged in Transshipping Cargo for Hire. ........................................24

2. Off-Season Moorage of Polar Pioneer Is Not a Cargo Terminal Principal or Accessory Use. ........................................27

3. Outfitting Polar Pioneer with Provisions, Stores, and Gear for the Arctic Offshore Drilling Operations Is Not a Cargo Terminal Principal or Accessory Use. ........................................30

4. An Additional Permit Is Needed and Is Available to Authorize Over-Winter Moorage and Provisioning of the Polar Pioneer. ........................................35

CONCLUSION ........................................................................................................39
INTRODUCTION

The Port of Seattle and Foss Maritime Company appeal an interpretation issued by the City of Seattle Department of Planning and Development ("City" or "DPD"). The Seattle Municipal Code ("SMC") authorizes DPD’s Director to issue interpretations as to "the meaning, application or intent of any development regulation . . . as it relates to a specific property." SMC 23.88.020.A. DPD Interpretation No. 15-001 applies shoreline development regulations to a particular use of Terminal 5 for over-winter moorage of a drill rig and associated vessels. Foss Exh. 1.

The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.88.020.F. Under the Code, "appeals shall be considered de novo, and the decision of the Hearing Examiner shall be made on the same basis as was required of the Director." SMC 23.88.020.G.5. The Director’s interpretation "shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." SMC 23.88.020.G.5. Appellants must show that the interpretation is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 764 (1981). This is a deferential standard of review, under which the Director’s decision may be reversed only if the Hearing Examiner, on review of the entire record and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made.


This brief: (1) reviews the statutory direction to construe the City’s Shoreline Master Program liberally to promote the purposes of the Shoreline Management Act; (2) shows that Terminal 5 is established only as a cargo terminal; (3) demonstrates that the defining feature of a cargo terminal is the transshipment of goods and cargo from one location to another and that moorage is an accessory use at a cargo terminal for vessels engaged in the business of transshipping cargo; and (4) confirms that over-winter moorage of a drill rig and associated...
vessels is not a cargo terminal use, but a different principal use requiring an additional shoreline
permit. For all those reasons, the Hearing Examiner should affirm the decision of the Director.

I. THE CITY’S SHORELINE MASTER PROGRAM MUST BE CONSTRUED TO
PROMOTE THE OBJECTIVES AND PURPOSES OF THE SHORELINE
MANAGEMENT ACT, WHICH ESTABLISHES ZONING AND PERMITTING
SCHEMES TO PROTECT SHORELINE RESOURCES.

The City’s Shoreline Master Program ("SMP") requires liberal construction of its
provisions. Specifically, it is exempt from the rule of strict construction, and "it shall be liberally
construed to give full effect to the objectives and purposes of RCW 90.58, the State Shoreline
Management Act." SMC 23.60A.014.A; see also SMC 23.60A.002 (SMP regulates
development, uses and shoreline modification to protect ecological functions of shorelines,
courage water-dependent uses, maximize public enjoyment of shorelines, and preserve views
of the water). At their core, the Shoreline Management Act ("SMA") and the SMP establish a
zoning and permitting scheme to coordinate uses of shorelines and protect public shoreline
resources. Not only does the SMP specifically mandate construction of the SMP to promote
these objectives, but it is the duty of the Hearing Examiner, like courts, to give effect to
legislative intent in the context of the entire statute. See State v. Elgin, 118 Wn.2d 551, 556

A. The Shoreline Management Act and Shoreline Master Program Protect Shoreline
Resources Through Zoning and Permitting.

In 1971, the legislature passed the SMA, and the voters adopted it the next year. The
legislature found that the state's shorelines "are among the most valuable and fragile of its
natural resources," "ever increasing pressures of additional uses are being placed on the
shorelines necessitating increased coordination in the management and development of the
shorelines of the state," and "[t]here is, therefore, a clear and urgent demand for a planned,
rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.” RCW 90.58.020. The Act declares that “[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses and that “[p]ermitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” Id. The SMP promotes the Act’s goal of avoiding piecemeal and uncoordinated shoreline development by adopting a zoning scheme designating which uses can take place in which shoreline environments and a permitting scheme through which conditions can be imposed to minimize damage to public resources, public health, navigation, and public use of the water. SMC 23.60A.012 to .090; see also SMC 23.60A.002.B & SMC 23.60A.004 (purposes, goals, and policies).

B. Shoreline Permitting Extends to Changes of Use.

Shoreline permits are required both for substantial developments and uses of shorelines. See RCW 90.58.020 (referring to “[p]ermitted uses in the shorelines of the state”); WAC 173-27-100 (permit revision is required for changes that relate to conformance to permit conditions, master program, or SMA policies, but only if use authorized in original permit is not changed). In Clam Shacks of America, Inc. v. Skagit County, 109 Wn.2d 91 (1987), the Washington Supreme Court held that a shoreline permit is required, even where there is no substantial development. In Clam Shacks, Skagit County had issued a conditional use permit for an aquaculture operation on tidal flats. When Clam Shacks failed to conduct a required study of the habitat, wildlife and water quality effects of the operation, the City issued a cease and desist
order. Clam Shacks challenged that order, arguing that its use was not a substantial development
and, therefore, was not subject to shoreline permit requirements. Highlighting the SMA’s intent
and provisions calling for comprehensive use plans and use regulations and noting that
development is a subset of uses, the Washington Supreme Court held that use of shorelines is
subject to shoreline permitting, even when there is no substantial development needing a separate
shoreline substantial development permit.

The City has incorporated this rule into its SMP. In a section entitled, “Inconsistent
development prohibited,” SMC 23.60A.012, it states:

No development shall be undertaken, no shoreline modification shall be made,
and no use, including a use that is located on a vessel, shall be established in the
Shoreline District unless the Director has determined that it is consistent with the
policy of the Shoreline Management Act and the regulations of this Chapter
23.60A. This restriction applies even if no shoreline substantial development
permit is required.

The SMP establishes procedures for determining consistency, which provide that the Director of
DPD “shall” make determinations that “a use . . . that is not substantial development is consistent
with the regulations of this Chapter 23.60A, as required by Section 23.60A.012” and that “[i]f
the . . . use does not require other authorizations, information of sufficient detail for a
determination of consistency shall be submitted to the Director, and the determination of
consistency shall be made prior to any construction or use.” SMC 23.60A.06.A & A.3 (emphasis
added).

II. OVER-WINTER MOORAGE OF A DRILL RIG AND ACCOMPANYING VESSELS IS INCONSISTENT WITH THE ESTABLISHED USE OF TERMINAL 5 AS A CARGO TERMINAL AND REQUIRES A NEW PERMIT AUTHORIZING THE USE.

A. Terminal 5 Is Established as a Cargo Terminal and for No Other Shoreline Use.

In the 1990s, the Port embarked on a major redevelopment and expansion of Terminal 5
to be a state-of-the-art container terminal. See Pre-Hearing Brief at 2-4; Blomberg Tr. (Day 4) at

ENVIRONMENTAL INTERVENORS’
POST-HEARING BRIEF

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340
3-4. The Port applied for and the City issued a Shoreline Substantial Development Permit (“SSDP”), which confirmed and established Terminal 5 as a “cargo terminal.” Foss Exh. 33 at W-1. Eagle Marine Services operated Terminal 5 as a container transshipment business under a long-term lease after the redevelopment until the Port cancelled the lease in 2014 to make way for modernizing Terminal 5 to handle even larger container ships coming to dominate international container shipping. DPD Exh. 24 at 1-2.

All parties agree that this shoreline permit established a cargo terminal use at Terminal 5, and that this permit remains operative. Mr. Blomberg, who was involved in the environmental review and permitting of the 1990s redevelopment, disagreed with the assertion that “Homeporting vessels is one of the types of maritime uses that have undergone environmental review and been approved at T-5.” PSA Exh. 12 (emphasis in original); Blomberg Tr. (Day 4) at 35-37.

During the interpretation process, the Port submitted information to the City, which included descriptions and photographs of past uses of Terminal 5. Foss Exh. 20. While the more recent photos show the Eagle Marine container terminal use, the Port’s memo emphasized the non-containerized uses. The SMP in effect at the time of the interpretation defined “cargo, containerized” as “cargo packed in a large (typically eight (8) feet by eight (8) feet by twenty (20) feet) trunklike box and loaded, stored and unloaded as a unit.” SMC 23.60.906. The SMP also defined “cargo, breakbulk” as “cargo packed in separate packages or individual pieces of cargo and loaded, stored and unloaded individually,” and “cargo, neo-bulk” as “cargo which has

---

1 Citations to transcript excerpts are as follows: “[Witness] Tr. Day [#] at [pages].”

2 A public affairs staff person had drafted answers to questions that might be asked of Port staff at the January 13, 2015, public Commission meeting about the lease and suggested the language from PSA Exh. 12 quoted above. Mr. Blomberg was asked to review the accuracy of this statement, and he offered a different response because he did not believe this one was accurate. Blomberg Tr. (Day 4) at 35-37; Meyer Tr. (Day 3) at 61.
historically been classified as generalized cargo, such as grain, oil, and automobiles, but now is moved in bulk movements usually in specialized vessels.” SMC 23.60.906.

The Port’s submission described bulk steel, bulk lumber, and bulk construction material transshipping operations. Mr. Meyer, a Port employee familiar with Terminal 5, testified that all of these shipping operations involved transshipping cargo from one location to another. Meyer Tr. (Day 3) at 47-52. The Port lists two cargo shipping uses taking place at Terminal 5 after the redevelopment. First, as a customer of Eagle Marine, Westwood Shipping handled break-bulk shipping, which involved transshipping cargo from one location to another. Foss Exh. 20 at W-200; Meyer Tr. (Day 3) at 55; Gallagher Tr. (Day 4) at 102-03. That use ended when the Eagle Marine lease was terminated in 2014. Second, Crowley Maritime conducted tug and barge freight shipping operations at Pier 2, but those operations have been relocated. Foss Exh. 20 at W-199 to W-200.3

The Port’s submission identified only two prior uses of Terminal 5 that did not entail the transshipment of cargo by carriers from one location to another. First, a radio transmission tower was located in the uplands of Terminal 5, but that tower was demolished over a decade ago. DPD Exh. 1 at RFP 2000045 (2000 permit to demolish the radio tower); compare Foss Exh. 20 at W-198 describing radio tower and equipment in 1953, with id. at W-215 (showing no radio tower in 2005). Second, a shipyard dry dock was located at the north end of Terminal 5 from the 1950s through the 1980s, but that shipyard likewise has been demolished and that use abandoned. Meyer Tr. (Day 3) at 56; compare Foss Exh. 20 at W-198 describing shipyard drydock in 1953, with id. at W-215 (showing no shipyard in 2005). See SMC 23.60A.122 (a use discontinued more than 24 months ago cannot be continued as a nonconforming use).

---

1 Pier 2 is not part of the Foss lease, see Foss Exh. 36 at Exh. A-1, B, p. 1, B 1-1; Foss Exh. 39 at W-188 & W-190, and it is a separate Port facility from Terminal 5. PSA Exh. 2 at Port Management Agreement Exh. A-1 at 1.
The only use established by permit for Terminal 5 is as a cargo terminal based on the 1995 SSDP. While the Port has suggested that it might be able to continue other nonconforming uses, whether such nonconforming uses exist is beyond the scope of this appeal and is not borne out by the Port’s description of prior uses of Terminal 5 in its submission to the City. Order on Motion to Dismiss Claims at 3, ¶ 11.

B. A Cargo Terminal Is a Transportation Facility Where Quantities of Goods and Container Cargo Are Transshipped by Carriers from One Location to Another.

1. The Applicable Rules of Statutory Construction

At its heart, the interpretation and this appeal turn on the meaning of “cargo terminal.” In addition to mandating that it be liberally construed to promote the purposes and objectives of the SMA, the SMP prescribes specific rules for defining terms used in the SMP. Acknowledging that both the SMP and the Land Use Code (“LUC”) define relevant words and phrases, the SMP specifies that a definition in the SMP applies in the shoreline district where the SMP definition “differs from a definition of the same term” in the LUC. SMC 23.60A.900.A. Where words or phrases used in the SMP are not defined, they “shall be interpreted so as to give them the meaning they have in common usage.” SMC 23.60A.900.B. To discern the common meaning of terms, “[r]esort to dictionary definitions is commonplace.” Seattle-First Nat. Bank v. Snell, 29 Wn. App. 500, 506 (1981) (citing Dep’t of Fisheries v. Chelan County PUD 1, 91 Wn.2d 378 (1979)).

Established rules of statutory construction likewise guide the Hearing Examiner’s parsing of the meaning of a city ordinance. Where the meaning of an ordinance is plain on its face, that plain meaning must be given effect. City of Olympia v. Drebick, 156 Wn.2d 289, 295 (2006) (citation omitted). In addition, Code provisions should be considered as a whole, rather than read in isolation, so that all language “is given effect, with no portion rendered meaningless or

Additionally, courts read statutes and ordinances to “give effect to legislative intent determined ‘within the context of the entire statute’” and “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963 (1999) (citations omitted). Laws “should not be interpreted so as to render one part inoperative,” and must heed “the rule of statutory construction that trumps every other rule – ‘the court should not construe statutory language so as to result in absurd or strained consequences.’” *Id.* at 969 (citation omitted).

2. **The Pertinent Definitions**

The LUC defines the term “transportation facility” as follows:

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

SMC 23.84A.038. The LUC then states that “transportation facilities” include certain types of facilities and lists parking, moorage, passenger terminals, and cargo terminals among others. *Id.*

As the DPD interpretation notes, the SMP lists types of transportation facilities in SMC 23.60A.938, but contains no definition of “transportation facility,” and therefore, under the rules of construction, the LUC definition controls.

Both the SMP and LUC define “cargo terminal.” The LUC defines “cargo terminal” as part of its listing of transportation facilities in SMC 23.84A.038:

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

As recently amended, the SMP provides:

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

SMC 23.60A.906. The sole change made to this definition in the new SMP consists of the addition of a comma after "carriers." This change was made as part of a substitute bill that made only non-substantive changes like correcting spelling, punctuation, and cross-references. DPD Exh. 33.

The parties all agree, and the Hearing Examiner has already held, that there is no material difference between the two definitions of cargo terminal. In opposing the City’s motion to dismiss Foss’s citation to the LUC definition of cargo terminal in its first issue presented on appeal, Foss accused the City of neglecting to advise the Examiner that the two definitions do not differ and that the definition remains the same in both the SMP and LUC. Foss Opp’n Motion to Dismiss at 4-5. In its order, the Hearing Examiner denied this part of the City’s motion to dismiss upon concluding that “the SMP definition in SMC 23.60A.906 does not differ materially from that in SMC 23.84A.” Order on Motion to Dismiss Claims at 1, ¶ 6.

The Port, likewise, views the two definitions to be interchangeable. Paul Meyer, who oversees permitting and environmental compliance for the Port, drafted a memo addressing consistency of the proposed Foss lease with both the SMA and the State Environmental Policy Act (“SEPA”). The memo recited the LUC definition of cargo terminal. PSA Exh. 21 at CW-167. In a subsequent version of that memo, Mr. Meyer added a “data dump” of potentially relevant Code provisions, which included both the SMP and LUC definitions of cargo terminal.
PSA Exh. 20 at CW-152 to -156. Subsequently, one of the Port’s official SEPA categorical
exemption memos quotes only the LUC definition. Foss Exh. 46 at W-315; Meyer Tr. (Day 3) at
63-70. When asked whether the Port viewed the two definitions to be interchangeable, Mr.
Meyer replied, “I think we recently established that they’re the same.” Id. at 70.

The task for the Hearing Examiner is to harmonize the SMP and LUC definitions. See
Preserve Our Islands v. Shorelines Hearings Bd, 133 Wn. App. 503, 523 (2006); see also
harmonization of statutory provisions). This is in keeping with the overarching statutory
construction principle that related statutory provisions must be read as complementary, rather
than conflicting. Waste Mgmt. of Seattle v. Util. Transp. Comm’n, 123 Wn.2d 621, 630-31
(1994).

3. Transshipment of Paying Cargo Is the Essential Feature of a Cargo
Terminal Under the SMP Definition of Cargo Terminal.

The interpretation reads the SMP definition of cargo terminal to encompass three
activities in which quantities of goods or container cargo are – stored, transferred to other
carriers, and stored outdoors, all of which support moving goods or cargo in the stream of
commerce. It properly concluded that the “unifying theme is that the goods are at the cargo
terminal in order to be transferred to other locations.” Interpretation ¶ 6, at 4 (emphasis in
original). This interpretation is compelled by the definitions, read as a whole and in the context
of inter-related definitions and SMP provisions.

a. “Stored Outdoors” is Directly Modified by the Concept of
Transshipment.

With respect to the third clause in the cargo terminal definition, it is beyond question that
goods or containerized cargo stored outdoors must be at the terminal in order to be transferred to
other locations. The phrase “in order to transfer them to other locations” follows immediately
after “stored outdoors” and the definition could have no other meaning. Therefore, the
transshipment of goods or cargo is a necessary component of this specified activity.

b. Transferred to Other Carriers Refers to Transshipment by Businesses Engaged in Shipping Cargo From One Location to Another.

The second activity – transferred to other carriers – hinges on the meaning of “other
carriers.” Neither the SMP nor the LUC defines carriers. In common usage, the term “carrier”
refers to an entity in the business of transshipping cargo for a fee from one location to another as shown by:

- J. Monroe & R. Stewart, *Dictionary of Maritime and Transportation Terms*, PSA Exh. 6, which defines carrier as “[a]n individual, partnership, or corporation engaged in the business of transporting goods or passengers by rail, road, sea, air, inland waterway, or by a combination of such modes.”

- Black’s Law Dictionary, PSA Exh. 7, which defines carrier as “[a]n individual or organization (such as a shipowner, a railroad, or an airline) that contracts to transport passengers or goods for a fee. Cf. shipper.”

- The most pertinent definition of carrier in the O.E.D., PSA Exh. 8, which is “[a] person who is hired to undertake the conveyance of goods and parcels (usually on certain routes, and at fixed times),” followed by that “in the legal sense,” carrier includes “any person or association of persons undertaking, for payment, the transport of goods by land or water, as stage-coach proprietors, railway companies, parcel-delivery companies, owners and masters of ships, etc.”

- The Uniform Commercial Code, which defines a “carrier” as a person that issues a bill of lading, and a “bill of lading” as a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods. UCC § 7-102(2) & 1-201(6).

The bottom line in each of these definitions is that a carrier is a person or entity hired by
a third party to move goods from one place to another for a fee, which is the business activity at
a container terminal. *See* Knudsen Tr. (Day 3) at 72-75. This is, of course, the typical image one
has when picturing ordinary cargo terminal operations, as seen from the 2005 aerial photo of
Terminal 5 when it was a container terminal:\footnote{4}

c. Stored, in the First Clause, Must Be Read to Be Storage for the Purpose of Transshipment.

Foss has attempted to eliminate the transshipment requirement by arguing that the word “stored” in the SMP definition of cargo terminal should be read to mean that goods and container cargo may be stored at a cargo terminal for any purpose and without being linked to their transshipment. It contends that the phrase “in order to transfer them to other locations” does not modify “stored.”

According to Foss, this construction is compelled by the last antecedent rule, which reads a qualifying phrase to apply only to the immediately preceding antecedent. Foss Pre-Hearing Brief at 9-11. However, ever since Sutherland stated this rule of statutory construction over a

\footnote{4 Cropped from Foss Exh. 20 at W-215.}
century ago, it has been recognized not to be inflexible and uniformly binding, but to apply only where no contrary intention appears and where it would not impair the meaning of the statutory provision. J.Sutherland, Sutherland on Statutory Construction § 267 (1st ed. 1891). The Washington Supreme Court has counseled against relying exclusively on the last antecedent rule, noting that courts must not disregard the principle that “[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing rather than rendering any superfluous.” State v. George, 160 Wn.2d 727, 738 (2007). The last antecedent is merely one of several “aid[s] to discovery of legislative intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.” State v. McGee, 112 Wn.2d 283, 788-89 (1993). The rule also must give way when it would lead to absurd results that conflict with legislative intent. State v. Bunker, 169 Wn.2d 571, 579 (2010). Even the cases cited by Foss recognize the last antecedent rule applies only where no contrary legislative intent is evident and it would not impair the meaning of the provision. See In re Estate of Kurtzman, 65 Wn.2d 260 (1964) (applying last antecedent rule only “where no contrary intention appears in a statute”); In re Sehome Park Care Ctr, 127 Wn.2d 774, 781 (1996) (same); Judson v. Associated Meats & Seafoods, 32 Wn. App. 794, 801 (1982) (same).

Foss’s proposed reading of cargo terminal to allow storage without being closely tied to transshipping cargo must be rejected for three reasons. First, it would convert a cargo terminal, which is a type of transportation facility, into a storage facility. McKim Tr. (Day 1) at 66-67, 145. The SMP creates distinct transportation and storage use classifications, and the defining feature of a storage facility is the storage of goods or products for more than 72 hours. SMC
23.84A.036. Storage facilities, as spelled out in the SMP and defined in the LUC, expressly include warehouses, mini-warehouses, and outdoor storage as types of storage uses. *Id.; SMC 23.60A.482.* Given the direction to harmonize statutory provisions and avoid rendering any surplusage, storage and transportation facilities must be given independent meaning. *See Cobra Roofing Services,* 157 Wn.2d at 99. To cohere with the definition of transportation facility, the storage of goods and cargo must “support[ ] or provide[ ] a means of transporting . . . goods from one location to another.” SMC 23.84A.038. It follows that goods and cargo must be stored at a cargo terminal “in order to transfer them to other locations.”

Second, this construction is compelled by the delineation of principal and accessory uses in the definition of cargo terminals. The SMP classifies uses according to the principal use of a facility. A principal use is “any use, whether a separate business establishment or not, that has a separate and distinct purpose and function from other uses on the lot.” SMC 23.60A.940. The SMP defines accessory use as “a use that is incidental and intrinsic to the function of a principal use and is not a separate business establishment unless a home occupation.” *Id.* The SMP definition of cargo terminal provides that cargo terminals “may include accessory warehouses, railroad yards, storage yards, and offices.” SMC 23.60A.906; *see also SMC 23.84A.038* (identical LUC definition language). These accessory uses, by definition, must be “incidental and intrinsic to the function of” the cargo terminal, meaning use of the warehouses and storage yards must be accessory to transferring cargo from one location to another. Foss urges the Hearing Examiner to erase the transshipment requirement, which would allow the warehouse and storage accessory uses at a cargo terminal to become the principal use. Such a reading would run
counter to the SMP’s principal and accessory use paradigm and would allow the accessory uses
to supplant the principal cargo terminal use.

Third, the construction urged by Foss also would treat the indoor and outdoor storage of
goods and cargo differently. The SMP cargo terminal definition uses the word “stored” twice:
once alone, and once modified by “outdoors.” Foss concedes, as it must, that goods and cargo
stored outdoors must be stored in order to transfer them to other locations, but it contends that
the first reference to stored goods or cargo is in no way tied to this transshipment purpose. This
construction would mean that the first reference to stored refers to storage generally and the
second refers specifically to outdoor storage, and it would treat the two categories of stored
materials differently. Only the first reference would include indoor storage. The vast majority
of Foss’s photographic exhibits depict the staging of materials outdoors, Foss Exh. 61, and no
one contends – and it would be untenable to contend – that the materials stored indoors and
outdoors were at Terminal 5 for different purposes. Foss has pointed to no Code provisions that
evince intent to treat materials stored indoors and outdoors differently. It would make no sense
to allow storage under a roof to be divorced from the cargo terminal transshipment function,
while mandating that outdoor storage be for the purposes of transferring the goods or cargo to
other locations. Such absurd results would follow if Foss’s definition of cargo terminal –
without a transshipment function for some stored goods and cargo – is adopted. See Davis, 137
Wn.2d at 969. For all of these reasons, “in order to transfer them to other locations” is the
essential feature of moving goods and cargo at a cargo terminal.

4. The LUC Definition of Cargo Terminal Removes Any Doubt That
Transshipment of Paying Cargo Is the Essential Feature of a Cargo
Terminal.

The LUC definition of “cargo terminal” differs from the SMP definition in two respects
that reinforce the conclusion that goods and cargo are stored at a cargo terminal in order to be
transferred to carriers and other locations, i.e., to be transshipped. First, the phrase “without undergoing any manufacturing processes” is set apart by commas immediately after “quantities of goods and container cargo” and before any storage activities are mentioned. The LUC definition thereby clarifies that no goods or cargo may undergo manufacturing at a cargo terminal. This reading makes eminent sense since the use designation refers to the transportation facility, and there is no reason to allow manufacturing of some goods and cargo that move through cargo terminals, but not others.

Second, the LUC definition refers to storage only once, eliminating the first mention of storage in the SMP definition. The LUC definition calls out only two activities at a cargo terminal transportation facility; quantities of goods or container cargo may be “transferred to carriers or stored outdoors” with the second activity followed by “in order to transfer them to other locations.” SMC 23.84A.038. No longer is there another, earlier reference to storage that is separated from the qualifier by other words and phrases. Arguments about the last antecedent rule or an Oxford comma dissipate with the elimination of the first reference to storage. See McKim Tr. (Day 1) at 44-46, 63. The essence of the definition is transshipment either to other carriers or to other locations. The argument that storage can take place at a cargo terminal without being tied to the transfer of the goods or cargo to other locations is untenable.5

5. Evidence of Non-Cargo Moorage Activities at Multiple Use Terminals Lacks Probative Value.

In an attempt to refute this common understanding – that a cargo terminal transships large volumes of cargo – the Port and Foss presented several witnesses who testified about non-cargo

---

5Drawing from the shoreline permit establishing Terminal 5 as a cargo terminal, the Port’s head of permitting compliance indicated that the proposed lease “must be consistent with the approved status of Terminal 5 as a marine cargo transportation facility, allowing for service by large vessels and movement/transshipment of cargo to and from vessels” PSA Exh. 20 at CW-163, and that “[m]aintaining marine industrial cargo transshipment uses and activities at Terminal 5” is consistent with the terminal’s shoreline and other permits. PSA Exh. 19.
transshipment activities being the mainstay of moorage at Terminal 91. In the order on the
motion to dismiss claims at ¶¶ 8 & 20, the Hearing Examiner expressed willingness to hear
evidence “concerning past activities deemed by the City to be a cargo terminal use” as relevant
to whether the activities at issue constitute a cargo terminal use. To be probative, such evidence
must pertain to a Port facility established by the City as a cargo terminal. As discussed above,
except for two long discontinued uses, all established uses of Terminal 5 involved the
transshipment of cargo by carriers from one place to another, thereby reinforcing that cargo
transshipment is the linchpin of a cargo terminal.

The Port and Foss witnesses testified at length about non-cargo activities at Terminal 91.
In contrast to Terminal 5, which had been a container terminal for decades, Terminal 91 is a
diversified facility with numerous uses, including such disparate uses as a cruise ship terminal, a
seafood processing plant, a homeport for the Alaska fishing fleet, and a homeport for Seattle Fire
Department boats. McKim Tr. (Day 1) at 110-11; Englin Tr. (Day 1) at 204-05. It has been
officially recognized as devoted to commercial moorage in addition to cargo transshipment. The
1998 Port Management Agreement in which the Department of Natural Resources authorized the
Port’s use of state aquatic lands for thirty years described the then-current and planned uses of
Port facilities. Foss Exh. 36 at W-438 to W-456 (PMA appended to the Foss-Port lease). While
Terminal 5 “is the site of an existing marine container terminal,” Terminal 91 “is used for
transshipment of fruit, automobiles, and other products. Fishing and other commercial vessels
also moor at the facility.” PSA Exh. 2 at 1 & 4. Commercial moorage has long been part of
Terminal 91’s acknowledged use, whereas no such use has been permitted or established by the
City as a principal use at Terminal 5.
Some permits for Terminal 91 were admitted as exhibits, but no one purported to produce all Terminal 91 permits. From the Terminal 91 permits that were produced, it emerged that, in addition to a permit authorizing use of Terminal 91 as a cargo terminal, Terminal 91 also has permits establishing a public facility at which Seattle’s fire boats are moored, a passenger terminal for the cruise ship facility, and manufacturing for the seafood processing plant. DPD Exh. 11. Mr. Englin testified that the Port uses Terminal 91 to provide moorage to a vast array of non-recreational vessels, from cruise ships and factory trawlers to super-yachts and fiber cable laying vessels. Englin Tr. (Day 1) at 178, 221-22; Englin Tr. (Day 2) at 16-17. Mr. Englin runs this moorage program without regard to the shoreline permits issued by the City for Terminal 91 or the many other Port facilities where he allows free-standing vessel moorage. Englin Tr. (Day 2) at 12, 18-21; see also Knudsen Tr. (Day 3) at 60-61 (Port ran moorage program when he was at the Port 10-30 years ago without regard to shoreline permits). Mr. Englin is only vaguely aware of what permits exist and what they might allow; indeed, the Port believes it can allow vessels to moor and undertake any activity at any Port facility without regard to the permits for the facility. Englin Tr. (Day 2) at 18-21; Meyer Tr. (Day 3) at 12-15. It is that activity, mooring vessels with no awareness of or respect for permitting requirements, which the Port seeks to defend in this appeal. Accordingly, evidence that vessels moor at Terminal 91 for purposes other than loading and unloading cargo has no bearing on what the City characterizes as a cargo terminal since it was not linked up to City shoreline permits or to areas of Terminal 91 permitted exclusively as a cargo terminal use.

C. Moorage Is an Accessory Use at a Cargo Terminal.

The DPD interpretation also asks whether moorage of a drill rig and associated vessels could be allowed at a cargo terminal as an accessory use. The Hearing Examiner has held that
the SMP definition of “accessory use” controls and that it requires that the use be both incidental and intrinsic to the function of the principal use. Order on Motion to Dismiss at 2, ¶ 9.

1. Definitions of “Incidental” and “Intrinsic”

Since neither the SMP nor the LUC defines “incidental,” prior Hearing Examiner decisions have used the dictionary definition. “Webster’s Ninth New Collegiate Dictionary defines ‘incidental’ as ‘being likely to ensue as a chance or minor consequence.’” In re Appeals of Morrison et al., from an Interpretation by the Director, DPD, S-09-001, -002 & -003 (May 20, 2009). Black’s Law Dictionary defines “incidental” as “[s]ubordinate to something of greater importance; having a minor role.”

Intrinsic is also not defined in the SMP or LUC. The O.E.D. defines “intrinsic” as “[b]elonging to the thing in itself, or by its very nature; inherent, essential, proper; ‘of its own.’” And the Black’s Law Dictionary definition is: “Belonging to a thing by its very nature; not dependent on external circumstances; inherent; essential.”6

In applying these definitions, it is important to distinguish the two types of moorage at issue in this appeal: (1) moorage of cargo vessels in connection with transshipping cargo; and (2) moorage or lay berthing of drill rigs not engaged in the business of cargo transshipment for other purposes such as maintenance, repairs, provisioning, and homeporting.

2. Mooring Cargo Vessels in Connection with Transshipping Cargo Is an Appropriate Accessory Use at a Cargo Terminal.

Cargo ships moor at a cargo terminal to load and unload goods and cargo. This type of moorage is both incidental and intrinsic to the cargo terminal use. It is incidental because it is subordinate to the transshipment of cargo, it ensues as a consequence of the cargo transshipment, and it is not a separate business activity in its own right. Moorage of cargo ships to load and

[6] These definitions of incidental and intrinsic are appended to this brief.

ENVIRONMENTAL INTERVENORS’ POST-HEARING BRIEF

Earthjustice
703 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340
unload cargo is also intrinsic to the transshipment of cargo in that it is inherent in and essential to the marine cargo transshipment activity.

A cargo ship also may sit idle for a period of time after unloading cargo before it leaves for its next scheduled delivery. DPD Interpretation ¶ 11 at 5. The Port calls it lay berthing when a ship sits idle and is not engaged in its principal function. Mr. Knudsen indicated that lay berthing of container ships is short-lived since the ships are on a tight schedule, although other cargo ships may sit idle for a couple days while they wait for a new crew or parts. Knudsen Tr. (Day 3) at 64; id. at 75-76 (the goal "is to unload and move vessels as fast as we can").

Such lay berthing is closely tied to the transshipment of cargo and is not a separate business enterprise. Short lay-overs would ensue as a minor consequence of, and be inherent in, cargo transshipping. They would, therefore, be incidental and intrinsic to cargo shipping. The DPD interpretation appropriately determined that moorage of cargo ships at cargo terminals to load and unload cargo and in between shipping operations is an accessory use at a cargo terminal.⁷

3. Lay Berthing Vessels Having No Relation to Transshipping Cargo Is Not an Appropriate Accessory Use at a Cargo Terminal.

The Port argues that lay berthing of any type of vessel at any time should be an allowable accessory use at cargo terminals, even if the moorage has no connection to cargo shipping. In its submission to the City, the Port pointed to the homeport for the Alaska fishing fleet as an example of long-term, off-season moorage. Foss Exh. 22 at 1, 4. The Port’s director of cruise and maritime operations, Mr. McLaughlin, testified that the homeport provides a safe place to call home and harbor the vessels in the off-season when they must be serviced and undergo

⁷ Although not addressed in the interpretation, Mr. McKim testified that, in his view, moorage of tugs that have brought the cargo ships to the terminal might also be an accessory use. McKim Tr. (Day 1) at 124-25.
maintenance and repairs to be readied for the next excursion. McLaughlin Day 2 Audio (2 of 4) at 0:28:38 – 0:30:00. The Port’s manager of maritime operations, Mr. Englin, testified that the fishing fleet chose to make the Port of Seattle its homeport because of easy access to numerous contractors and suppliers to service, repair, and upgrade the vessels and their complex processing equipment. Englin Tr. (Day 1) at 196-97, 202-10, 219-24. He stressed that few, if any, if the fishing vessels offload fishing cargo at the homeport. Englin Tr. (Day 1) at 196-97; see also Johnson Tr. (Day 3) at 35 (less than 5% of the dockage).

In addition to the fishing fleet homeport, the Port runs a moorage program using all of its facilities, except the few under a lease that gives the lessee exclusive control over the facility. When vessels seek moorage, the Port provides it based on berth availability and the size of the vessel. Englin Tr. (Day 1) at 172-73, 181-84; Englin Tr. (Day 2) at 10-11. Mr. Englin, who runs the Port’s moorage program, moves vessels around to different berths to suit the needs of the Port and the vessels; in his words, “[they] can move around anywhere.” Englin Tr. (Day 1) at 189. The purpose of the moorage program is not to provide berthing while a cargo ship is loading or unloading cargo, but rather to provide a place for off-season maintenance and repairs, a waiting station in between missions, or a place for Coast Guard inspections or public tours and receptions. See, e.g., Englin Tr. (Day 1) at 195-222. In fact, Mr. Englin testified that all of the vessels shown to be mooring at Terminal 91 on January 14, 2015 in Port Exh. 1 were “non-cargo vessels.” Englin Tr. (Day 1) at 217-22.

In running this moorage program, Mr. Englin pays no attention to the shoreline permits at the various Port facilities. Englin Tr. (Day 2) at 10-13, 18-21. He is unaware of which permits govern the various Port facilities and never ascertains whether moorage is an established or

---

8 The Foss lease covers only part of Terminal 5, leaving the remaining portions available, in Mr. Englin’s view, for the Port’s moorage program. Id. at 181-84.
permitted use when he decides to allow moorage of a vessel at the facility. *Id.* He does not believe a shoreline permit establishing a cargo terminal use imposes any limit on what vessels may be moored at the facility and what activities they may undertake, with the possible exception of needing to be hauled out on a dry dock for major repairs. *Id.* at 10-13, 18-21, 24; Meyer Cross at 12-15. In his view, even cruise ships could moor at Terminal 5. Englin Tr. (Day 2) at 30-31. The only constraint Mr. Englin identified apart from an exclusive lease was based on the Port’s decision not to convert the uplands of Port properties into residential developments, and this constraint came from a Port planning decision, not City zoning or permits. *Id.* at 36-38.

The Port’s attorney described the moorage program as analogous to moving chess pieces around a chess board based on the available spaces. Schneider Day 1 Audio (1 of 4) at 0:28:25 – 0:28:30. In chess, however, the various pieces cannot move anywhere at whim. Bishops must move diagonally, knights in “L” formations, and castles in straight lines. To be analogous to chess, the Port would need to abide by the City’s rule book and moor cruise ships loading passengers at passenger terminals, those engaged in transshipping cargo at cargo terminals, and those lay berthing or homeporting at commercial marinas or moorage facilities. Mooring any ship anywhere replaces the SMP’s system of permitting, which establishes principal uses at various Port facilities, with a free-for-all, Wild West system that modern land use and shoreline management laws sought to rein in.

Lay berthing this wide array of vessels divorced entirely from cargo transshipping operations is neither incidental nor intrinsic to a cargo terminal use. Such lay berthing is neither a consequence, nor an inherent part, of cargo transshipment. Instead, providing such moorage has a separate and distinct purpose and would constitute a separate business enterprise. It is
therefore a different principal use, and not accessory to a cargo terminal use.  

4. It Is Easy to Discern That Over-Winter Moorage of a Drill Rig Is Not Incidental and Intrinsic to Cargo Transshipping.

The Port and Foss accuse the City of regulating the use of vessels or making use of Port facilities dependent on what a vessel may do when at sea. These arguments have no merit.

First, the City is regulating the use of shoreline facilities, including the Port’s, and by extension, the activities of vessels when they use those facilities. No one disputes that the City can regulate the use of its shorelines, and the SMP expressly provides that such a use might be located on a vessel calling at a terminal. SMC 23.60A.012.

Second, throughout their examination of witnesses, the Port and Foss attorneys concocted what they called a “primary function test,” even though no such test is spelled out in the interpretation, nor is one required to apply the interpretation. Undercutting the Port’s argument, Mr. Englin, testified with ease as to whether various ships were loading and unloading cargo or lay berthing for maintenance and repairs or when in between jobs at Terminal 91, and the Port has an elaborate tariff scheme that differentiates among vessels based on their activities in Port. Englin Tr. (Day 1) at 185-222 & Port Exh. 22; Johnson Tr. (Day 3) at 38-39 (same). It does not take a rocket scientist to discern that the principal use of a drill rig is to drill, not to move cargo from port to port for a fee. One can tell by simply looking at the ship. See McKim Tr. (Day 1) at 151; Englin Tr. (Day 2) at 26; see also Knudsen Tr. (Day 3) at 73 (vessels transshipping cargo for hire need a trading license to do so).

Because the Port takes the position that it can moor any vessel at a cargo terminal for any reason and for any length of time without regard to any shoreline permit, that virtually all Port facilities are cargo terminals where such moorage can occur, and that provisioning a ship constitutes transshipping cargo, Meyer Tr. (Day 3) at 12-14, 50-52; Englin Tr. (Day 1) at 179, the testimony of the Port witnesses is untethered to the definition of “cargo terminal,” the pertinent shoreline permits, and the SMP’s allowance of accessory uses at a facility only when they are incidental and intrinsic to a principal use. It is, therefore, of marginal utility.

ENVIROMENTAL INTERVENORS*
POST-HEARING BRIEF - 23 -
D. Over-Winter Moorage of a Drill Rig and Associated Vessels Is Not a Cargo Terminal Use, But Rather Is a Different Principal Use Needing an Additional Permit.

The DPD interpretation properly concludes that off-season moorage and provisioning of a drill rig does not fall within the SMP’s definition of cargo terminal use, nor is it an accessory use to cargo transshipment. This conclusion is borne out by: (1) the nature of the offshore drilling vessels; (2) the disconnect between the off-season moorage and cargo transshipment; (3) the difference between cargo transshipment and the provisioning and outfitting of the drill rig; and (4) the availability of another SMP use category that fits the homeporting activities.

1. The Polar Pioneer is a Drill Rig, not a Carrier Engaged in Transshipping Cargo for Hire.

The Polar Pioneer is an offshore exploratory drill rig chartered by Shell for its Arctic offshore drilling operation. Its technical classification is mobile offshore drilling unit (“MODU”), just like the Noble Discoverer – the other drill rig that may call at Terminal 5 during the off-season. MODUs are highly specialized vessels, designed and built to engage in offshore drilling operations. Gallagher Tr. (Day 4) (Day 4) at 20-21 (“her job is to travel around the world and drill exploratory holes”).

The Polar Pioneer is a twin-hull drilling platform that is semi-submersible and positioned for drilling through the use of thrusters and a complex mooring system. PSA Exh. 46 at 1-16 to 17. It has features unique to the drilling enterprise onboard, including pumps, a rotary drill rig, and a 170-foot oil derrick that supports the drilling apparatus. It stores supplies for drilling activities, such as drill bits and pipe, muds, cement, and chemicals. It also stores sophisticated equipment like blowout preventers to be deployed in the event of an oil spill, remote automatic release systems that can release anchors so the rig can be moved quickly out of the path of approaching sea ice, and a sophisticated weather station PSA Exh. 47 at 1-14; Gallagher Tr.
(Day 4) at 48-49; 60. It has rooms, like a sack room for mixing cement and chemicals together to get the chemistry for drilling muds right, which Mr. Gallagher analogized to making a cake, id. at 53, and various racks and bays for stowing drilling supplies so that they will be accessible when are needed for the drilling operations. Id. at 35, 46, 50-53; Foss Exh. 62 at 1; Exh. 63 & 64.

Shell’s Arctic drilling fleet contains other highly specialized vessels required as part of the federally approved plans for its drilling activities. PSA Exh. 46 & 47. Ice breakers are needed to clear sea ice, and anchor handlers are needed to position the drill rigs and move them out of harm’s way as sea ice or the severe storms common in the Arctic approach. Gallagher Tr. (Day 4) at 130-31. One of the vessels that called at Terminal 5 – Aiviq – is a multi-purpose offshore vessel that serves as an ice breaker, anchor handler, tug, a helicopter pad, a floating hotel, and an oil spill response vessel that can deploy a containment boom and skimmer to recover oil from the water. PSA Exh. 47 at A-9; Gallagher Tr. (Day 4) at 23; see also id. at 22-23 (Tor Viking 2, which called at Terminal 5, is an ice breaker, anchor handler, and tug that recently rescued a vessel in distress). Ice breakers and anchor handlers are among the vessels that must remain in the vicinity of the drilling operation to be available as conditions necessitate. Id. at 136; PSA Exh. 46 at 13-4 to 13-6, 13-10.

Shell’s federally approved and binding oil spill response plan obligates Shell to have more than 10 Shell-chartered oil-spill response vessels in the vicinity of the drilling operation or on call nearby to perform essential functions in the event of an oil spill. While blowout preventers, made infamous by the Deepwater Horizon catastrophe, are stowed on the drill rigs themselves, the oil spill response vessels carry other sophisticated emergency response equipment like capping stacks, containment domes, robots that assist in deploying blowout
preventers, and ocean skimmer boats. Some, like the Aiviq, also carry supplies to be deployed in
the event of a spill, such as containment booms and skimmer boats, and some are on call to burn
or skim oil on the ocean’s surface and store recovered oil. PSA Exh. 47 at A-2 to A-15;
Gallagher Tr. (Day 4) at 132-37.

The Polar Pioneer is not a carrier hired to ship cargo. See Gallagher Tr. (Day 4) at 126
(Polar Pioneer’s principal purpose is to “drill[] holes for exploration”; “she’s not a carrier, so she
doesn’t get paid by a third party to move cargo from port to port”). Even to the untrained eye, it
would be impossible to mistake the Polar Pioneer for a cargo ship, as the photograph below
shows.\textsuperscript{10}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{polar_pioneer.jpg}
\caption{Polar Pioneer, a drill rig used for oil exploration.}
\end{figure}

It is obvious from a glance at this enormous and highly specialized drill rig is in the business of
drilling for oil, not transshipping cargo.

\textsuperscript{10} This image is cropped from Foss Exh. 104 at DPD000063.
2. **Off-Season Moorage of Polar Pioneer Is Not a Cargo Terminal Principal or Accessory Use.**

At the January 13, 2015 public meeting, Port staff described the proposed lease as a “homeport” for an Arctic exploratory drilling fleet, “[o]ver-wintering moorage,” “commercial moorage,” and “vessel berth moorage and provisioning.” Staff Briefing Memo for Jan. 7, 2015 Commission Meeting at 6 (DPD Exh. 24); Transcript of Jan. 13, 2015 Port Commission Meeting at 5-9, 14 (DPD Exh. 23). Port staff explained that drill rigs and associated vessels would moor at Terminal 5 during the off-season for 6-7 months, and that Terminal 5 would serve the full array of drilling vessels from drill rigs to ice breakers to oil-spill response vessels. DPD Exh. 24 at 6; Meyer Tr. (Day 3) at 60. Shell provided greater detail in an August 2014 presentation to Port and Foss personnel, which provided the 6-7 month timeframe for over-wintering the drill fleet and described maintenance, tank cleaning, refueling, and material loading activities that would take place. PSA Exh. at 22 at CW-223, CW-225.

Foss has entered into a purchase contract with Shell that coincides with the two-year term of the Foss lease for Terminal 5. Gallagher Tr. (Day 4) at 106-10. The purchase contract obligates Foss to provide terminal dock facilities or slips, which Mr. Gallagher equated with providing the facility for moorage. PSA Exh. 40 at FOSS_00002; Gallagher Tr. (Day 4) at 111. This year Foss did, in fact, provide moorage for the Polar Pioneer and more than half a dozen other vessels in the drilling fleet. Gallagher Tr. (Day 4) at 20. While the drilling vessels did not begin to arrive until April this year, the plan for next season is for them to arrive after the drilling season ends in October-November and to stay until June of 2016. Foss Exh. 21 at RFP 4000975; PSA Exh. 22 at CW-223:

In its submission to the City, the Port compared the Shell homeport to the homeport on Terminal 91 for the Alaska fishing fleet:
The Alaska drilling vessels to be hosted at Terminal 5 under the Foss lease are analogous to Alaska fishing industry vessels already hosted by the Port. Like the fishing vessels, the drilling and exploration vessels work in Alaska is seasonal, and require a nearby homeport with temperate climate during the off-season when not actively working. These drilling and exploration vessels have similar maintenance and provisioning needs as described above for the fishing vessels.

Foss Exh. 22 at 3 (W-219). The memo explained that the Alaska fishing industry has made Seattle its homeport to escape the harsh winters at Alaska ports and to take advantage of the skilled workforce and extensive network of suppliers and service providers in Seattle. Id. While over-wintering, the vessels require maintenance and repair services on their propulsion, engine, and navigation systems, as well as on the complex factory, refrigeration, and wheelhouse systems on the ships. Id.

At the hearing, Mr. Englin explained that when fishing vessels come into their homeport, “[t]hey repair and maintain every aspect of the vessel from the bridge to the keel, so the propulsion systems, the hydraulic systems, the electrical systems, the factories, the deck systems, the cranes . . . the hull structure,” including painting. Englin Tr. (Day 1) at 202. Harsh Arctic weather conditions and storms take their toll on these vessels, necessitating extensive off-season repairs and maintenance. When Mr. Englin identified the reasons why specific vessels were moored at Terminal 91 during select months in 2015, he described extensive repairs of mechanical and propulsion systems, servicing of navigation equipment, replacement of boilers, tank cleaning, and unspecified off-season repair, maintenance and servicing of many vessels.

Englin Tr. (Day 1) at 201-204. Mr. Johnson, president of Glacier Fish Company, testified that, when his fishing vessels are at their homeport, his company conducts “maintenance, painting, sanding, grinding, lighter types of welding, factory repair, replacements of bearings, belting, things like that in the factory, cleaning the vessel, training our crews.” Johnson Tr. (Day 3) at 36. While some repairs must take place at a shipyard, vessels will conduct the full bridge to keel
maintenance and repairs—"[a]lmost anything and everything that doesn't require a haul out into
a [...] dry dock"—at Terminal 91. Englin Tr. (Day 2) at 24. Mr. McLaughlin described an
elaborate effort to repair the propulsion systems on the Polar Explorer using scaffolding and
ballast to avoid the extra cost of going to a shipyard. McLaughlin Day 2 Audio (2 of 4) at
0:34:45 – 0:36:39.

Foss similarly seeks to use Terminal 5 as a homeport where the drill rig and associated
vessels can moor, unload crew, a "do work after long voyages have been completed." Gallagher
Tr. (Day 4) at 84. This work includes maintenance and repairs of vessels. Id. Numerous
consultants and contractors already have come to Terminal 5 to service and maintain the moored
vessels and will be called upon to do so again in the next off-season. Foss Exh. 22 at 3;
Gallagher Tr. (Day 4) at 149. Virtually all of the Polar Pioneer's systems would need servicing
and maintenance in the off-season, including the drilling, electrical, navigation, and propulsion
systems. Id. at 84-85, 145-47. In the 2012 season, the Noble Discoverer had a malfunctioning
oil-water separator, leading to the discharge of oil-contaminated water into surface waters; this
year, the Coast Guard issued a detention hold to the Noble Discoverer for problems with the oil-
water separator. Id. at 151-54. The repairs required to prevent oil pollution from the drill rig
could take place at Terminal 5. Id.

While the Port has tried to equate mooring the Polar Pioneer with the moorage of cargo
ships that call at container terminals, the moorage is different in duration and the activities that
take place. Container ships come and go on a schedule with the goal of spending little time idle.
Lay berthing tends to be short-lived. Knudsen Tr. (Day 3) at 64, 75-76. When vessels return to
their homeport, they tend to conduct regular servicing and turn to the backlog of repairs needed
before the next season. Knudsen Tr. (Day 3) at 77-78.
Long-term moorage of the Polar Pioneer raises particular concerns because of its sheer size. When moored at Terminal 5, it juts further out into the West Waterway than the container ships that previously called at Terminal 5. Gallagher Tr. (Day 4) at 127-28. Vessels moored at Terminal 5 sit outside the outer harbor line and in waterways reserved by the state constitution for navigation. The Department of Natural Resources has questioned whether long-term moorage of the Polar Pioneer and associated vessels runs afoul of the constitution. Meyer Tr. (Day 3) at 84-85. Ms. Joerger, Puget Soundkeeper Alliance’s field director, testified that Soundkeeper has trained its staff to comply with a 100-yard Coast Guard exclusion zone around Polar Pioneer, which forces vessels heading south to move into the traffic lane normally reserved for vessels heading north. See Joerger Day 4 Audio (3 of 4) at 0:50:55 – 0:58:17 (describing potential safety risks in navigating around Polar Pioneer). 11 The potential interference with navigation and water safety provides further evidence that over-winter moorage of the Polar Pioneer is neither incidental nor intrinsic to cargo transshipment.

3. **Outfitting Polar Pioneer with Provisions, Stores, and Gear for the Arctic Offshore Drilling Operations Is Not a Cargo Terminal Principal or Accessory Use.**

Shell and Foss entered into a purchase contract for the duration of the lease between Foss and the Port in which Foss “is responsible for the receipt, storage, staging, loading and unloading of all material used by [Shell] in the performance of its business.” PSA Exh. 40 at Foss 0003. Shell’s business, of course, is offshore exploratory drilling. Gallagher Tr. (Day 4) at 114-19, 128-29. Polar Pioneer and other vessels that are part of Shell’s Arctic offshore drilling fleet

---

11 Mr. Gallagher attempted to rebut Ms. Joerger’s testimony that the public would be affected by the safety zones around Shell vessels by pointing to a simulation conducted by Foss, the Port, the Coast Guard, and others before the exclusion zone was in effect. On cross-examination, Mr. Gallagher clarified that the simulations were run on the assumption that vessels would seek and be granted vessel traffic controller permission to travel through the 100- and 500-yard exclusion zones. Gallagher Tr. (Day 4) at 170-71. The ability to seek permission to violate the exclusion zones was not communicated to Soundkeeper and other members of the public at the Coast Guard meeting announcing creation of the exclusion zone. Joerger Day 4 Audio (3 of 4) at 1:11:19 – 1:11:31.
moored at Terminal 5 to be loaded with materials to be used in Shell’s offshore exploratory
drilling business. Gallagher Tr. (Day 4) at 114-19. All of the materials loaded onto the drill rig
and associated vessels were loaded to be available to Shell during its drilling operations and for
no other use. Id. at 118-19.¹²

These are the activities that Foss and the Port previously called provisioning and
outfitting as part of over-winter moorage of the drilling fleet. DPD Exh. 23 at 6, 21 (Transcript
of Jan. 13, 2015 Commission Meeting); DPD Exh. 24 at 6 (CW-104) (Staff Briefing Mem. for
Jan. 13, 2015 Meeting). In its submission to the City, Foss characterized the materials handling
activities that would take place at Terminal 5 as the type of provisioning that prepares vessels for
their next journey: “The provisioning of Shell’s vessels at Terminal 5 for use in Alaska will be
no different from the provisioning of the fishing vessels that takes place every year at Terminal
91, to prepare those vessels for use in the same Alaskan waters.” Foss Exh. 19 at RFP
4000964.¹³

At the hearing, witnesses for both Foss and the Port tried to paint a picture of the
moorage and outfitting of the drill rig as a cargo terminal. In doing so, the witnesses used the

¹² Mr. Gallagher initially qualified his answers, by suggesting that some of the items might not actually be used this
season and would then be available for drilling at a later time, and that some might be used by a vessel supporting
the operation, like the Blue Marlin, which transported Polar Pioneer to Washington State but did not go up to the
Arctic. Id. at 113-18. Eventually, he conceded that all of the materials were being loaded onto the Polar Pioneer for
the purpose of being used in the offshore drilling operation and for no other business purpose. Id. at 118-19.

¹³ Neither the Port nor Foss called the new use a cargo terminal before the Port was trying to justify invoking SMA
permitting and SEPA exemptions. In fact, when the Port asked Mr. Gallagher how the use of the property should be
described in the letter of understanding for the lease, he said “Vessel supply base and storage depot,” rather than
cargo terminal. PSA Exh. 29. Both the letter of understanding and drafts of the lease just days before it was
finalized used this description. Foss Exh. 39 at 2; PSA Exh. 13-15. The term “cargo terminal” appeared after the
legal department became involved, as Mr. McLaughlin testified, to draft the lease language. See PSA Exh. 15, 17-
18; Foss Exh. 36; McLaughlin Day 2 Audio (3 of 4) at 1:01:45 – 1:02:08. On the morning of February 3, 2015, Mr.
Gallagher suggested: “Marine Cargo Terminal: vessel outfitting and supply base to receive, store, inventory, load,
unload and stow vessel gear, equipment, supplies and cargo.” PSA Exh. 16. By that evening, the lease described
the use as a cargo terminal, reciting the SMP definition of that term. PSA Exh. 17. From that point on, the Port
stopped mentioning the drill rig, homeport, or over-winter moorage and started characterizing provisioning of the
drill rig as loading cargo. Foss Exh. 55 at RFP 4000336 (Port response to correction notice for shoreline exemption
request); PSA Exh. 19 (identical language in SEPA exemption for the lease).
word “cargo” to encompass anything that can be loaded onto a vessel or as Mr. O’Halloran, the
Seattle branch agent of the Sailors’ Union of the Pacific, testified “anything that isn’t nailed
down.” O’Halloran Tr. (Day 3) at 16; Gallagher Tr. (Day 4) at 9 (“cargo is a term that refers to
lots of different things that get moved on vessels”).

During his testimony, Mr. O’Halloran broke the concept of cargo into four parts:

1. Provisions “would be items the crew would use... food, laundry, you know, blankets, milk.” O’Halloran Tr. (Day 3) at 15.

2. Stores “would be items the vessel would need to operate” and “could be lube oils, engine room parts, radar, you know, electronic parts, whatever operational necessities the vessel needs. Any time a ship docks it has to load stores.” Id.

3. Gear “could be mooring lines, again, lubrication greases, paint, and anything else the vessel needs to operate.” Id. at 16. Later in the hearing, the term “gear” was used to refer to items used by the vessel to engage in its business, e.g., fishing nets on a fishing vessel. Gallagher Tr. (Day 4) at 105.

4. Cargo would be what generates revenue for vessels engaged in the transshipment of cargo. A ship transporting diesel to a tank farm would be shipping diesel as pay cargo; a ship loading diesel to consume in its voyage would be loading stores. O’Halloran Tr. (Day 3) at 22-24. As another example, Mr. O’Halloran explained that APL, which ran the container terminal at Terminal 5, is a shipping company that ships cargo from one place to another for a fee; it does not use the cargo as its provisions, stores, or gear. Id. at 25-26.

Mr. Johnson explained that the fishing industry loads and unloads “supplies and
provisions in support of the vessels, and then we have the production itself that—of the vessel,
which is frozen fish that we produce from... harvest.” Johnson Tr. (Day 3) at 33, 39-40.

Almost all of the fish product is unloaded as frozen fish in Alaska for shipment by break bulk
freezer ships to Asia, Europe, and the East Coast of the U.S. Id.

Mr. Knudsen, president of conventional cargo for SSA Marine, which runs container and
cargo terminals at the Port, described cargo in general as “everything that comes on and off the
ship, including the subsets of stores and provisions and various, you know, paying cargo,” which
he also called “cargo for carriage.” Knudsen Tr. (Day 3) at 52, 54. He elaborated on the
meaning of “paying cargo” calling it “cargo that’s there for hire” and explained that it would be
cargo “someone has paid you to put on your vessel and move it to another location and take it
off.” Id. at 73. When asked whether vessels loaded up with container cargo would use the cargo
inside the containers in transit, he responded: “Not unless they are pirates.” Id. at 74. His
response clarified the clear industry differentiation between transshipment of paying cargo by
carriers for a fee and loading vessels of any type with provisions, stores, and gear to be used in
their voyages and business operations.\(^{14}\)

Mr. O’Halloran was the first witness to apply these subsets of cargo to the moorage of
Polar Pioneer at Terminal 5. He testified that provisions, stores, and gear were loaded onto the
Shell drilling vessels at Terminal 5, but did not mention cargo. O’Halloran Tr. (Day 3) at 17-18.

Mr. Gallagher initially characterized everything that was loaded onto Polar Pioneer as
cargo. Gallagher Tr. (Day 4) at 23-25, 35, 40-41, 83-84. However, when instructed to
differentiate between provisions, stores, gear, and paying cargo, id. at 104-06, Mr. Gallagher
conceded that all of the materials were provisions, stores, and gear; none was paying cargo. Id.
at 114-19, 128-30, 143-44. He provided examples of the provisions, stores, and gear loaded onto
Polar Pioneer and the associated vessels as follows:

1. Provisions – “if it’s things consumed by the crew, it would be groceries, paper
towels, laundry soap, things like that along those lines.” Id. at 143.

2. Stores “are generally referred to as things go on the shelf and will be used over
time, so we think of stores as paint, oil filters, different things that would be –
cleaning material, possibly. Extra brooms, extra paintbrush, things like that that
might be used and then consumed of and thrown away during the voyage. Some

\(^{14}\) Mr. Meyer agreed that the bulk lumber, steel, and construction materials shipping operations at Terminal 5
transshipped cargo from one location to another, but then went so far as to suggest that the ships might use the
lumber, steel, or construction materials for repairing the ship while in transit and therefore the cargo would
constitute provisions. Meyer Tr. (Day 3) at 50-52. That testimony was flatly contradicted by Mr. Knudsen.
Knudsen Tr. (Day 3) at 74.
people would argue that lubricating oils and WD-40, that those would be stores as well that would get loaded.” *Id.*

3. Gear - Mr. Gallagher testified that “the other things that were loaded were to be used in the drilling enterprise. They were cargo that we loaded to put on board so that it can be used to perform the mission of the vessel.” *Id.* at 144. Gear would include the drill bits, drill pipe, “[t]he specialized tools, the ROV that looks under water, the blowout preventer, all of those things,” *id.*, as well as the specialized weather station used to forecast the weather and incoming sea ice. *Id.* at 48-49 (specialized weather station “would be gear”). ROV stands for “remotely operated vehicle,” PSA Exh. 46 at ix.

Mr. Gallagher pointed to the intricate stowage plans that store the drilling gear on Polar Pioneer and other vessels for easy access during the drilling operations. *Id.* at 46-50, 54-58; Foss Exh. 62 & 63. All of these provisions, stores, and gear were loaded onto the Polar Pioneer and the associated vessels at Terminal 5 for use by Shell in drilling in the Chukchi Sea where it has an exclusive lease from the U.S. Department of Interior to drill. *Id.* at 114-19, 128-30, 143-44.

None will be transshipped and delivered to some other entity for a fee. *Id.*

Maritime operations at the Port regularly treat paying cargo differently from provisions, stores, and gear. At most Port facilities, vessels receive provisions when they prepare to head out to sea. Cruise ships load food, beverages, and even gift items for sale on the cruise. Ships moored at commercial marinas will load stores for the ship and provisions for the crew. Such provisioning is part and parcel of most uses of Port facilities, but it is an accessory, not the principal use.

The Port’s attempt to equate provisioning with loading paying cargo hinges on its overly expansive view of what constitutes a cargo terminal. It contends that mooring and provisioning

---

15 In questioning witnesses, the Foss attorneys focused on the fact that drill casings might be left in the ground and chemical-laden drill muds might be disposed and left in the ocean. But the drill casings would be left only with the Department of Interior’s permission and only at the specific location where Shell has exclusive rights to drill and return under its lease. Gallagher Tr. (Day 4) at 36, 121. Neither the discharges of drill muds nor depositing drill casings to keep drill holes open constitutes the transfer of cargo to another entity; it shows the linguistic lengths to which the Port and Foss must go to characterize the Shell use as transshipment.

---
any kind of vessel can be the principal use at a cargo terminal, and it contends that provisioning a
ship is the same activity as loading cargo to be transshipped for a fee. Because mooring and
provisioning happen at most, if not all, Port facilities, in the Port’s view, they can be the
principal use of any facility. By way of analogy, cruise ships moor at passenger terminals for
passengers to disembark and new passengers to come on board. Vessels of all types change
crews when they moor. If provisions can be cargo, crew changes might constitute loading
passengers, but surely passengers cannot disembark from cruise ships at any Port facility simply
because crew changes might happen there. Polar Pioneer engaged in provisioning at Terminal 5,
not transshipping paying cargo, which is the defining activity at a cargo terminal.

4. An Additional Permit Is Needed and Is Available to Authorize Over-
Winter Moorage and Provisioning of the Polar Pioneer.

Because a homeport for a drill rig is a different principal use than a cargo terminal, the
Port needs to obtain authorization from the City establishing an additional use at Terminal 5. As
demonstrated above, shoreline permits are required for a change of use of shorelines, even where
there is no substantial development. See Clam Shacks of America, Inc., 109 Wn.2d 91. Indeed,
the SMP prohibits establishment of a new use unless the Director has made a determination that
the new use is consistent with the SMP. SMC 23.60A.012 (no use shall be established in the
shoreline district unless the Director has made a consistency determination); SMC 23.60A.06.A
& A.3 (the Director shall determine that any use that is not a substantial development is
consistent with the SMP). When Mr. Meyer, prepared a background memo to ascertain
consistency of the homeport with the SMP, he stated:

Similar to compliance requirements at all port marine cargo terminals, continuing
Terminal 5 marine cargo operations must be consistent with prior approvals and
conditions for use of the site and any substantial expansion or change in use at the
site would require new approvals and authorizations, including local, state, and
federal review depending on the scope of the proposed activities and uses.
PSA Exh. 20 at CW-162. At the hearing, he testified that the Port might need to apply to the
City for approval of an additional use if the DPD interpretation is upheld and the term “cargo
terminal” does not encompass the use of Terminal 5 under the Foss lease. Meyer Tr. (Day 3) at
70-73.\(^\text{16}\)

Providing over-winter moorage to Polar Pioneer and associated vessels constitutes a
different principal use than the cargo terminal use authorized in the 1995 shoreline permit.
While the Hearing Examiner does not need to decide what use category applies, the City has
already notified Foss and the Port that their activity at Terminal 5 could be permitted as a
commercial marina use. Foss Exh. 105 at 2; see also McKim Tr. (Day 1) at 166-67. The terms
of the commercial marina use definition easily fit the drill rig use of Terminal 5 without the
strained effort necessary to try to characterize the use as a cargo terminal within the meaning of
that term in the SMP.

The defining characteristic of a commercial marina is that it is a site in the shoreline
district “used to provide moorage.” SMC 23.60A.926. Commercial marinas provide moorage
for “rent usually on a monthly or yearly basis,” for the operation of businesses, or for minor
vessel repair. Id. This plainly describes Foss’s use of Terminal 5. Foss has rented moorage
space from the Port for a period of two years, Foss Exh. 36, has moored Polar Pioneer and other
drill fleet vessels at Terminal 5 as part of its offshore drilling business, and has already
conducted, and will again conduct, minor vessel repair when the Shell vessels return from a
bruising season in harsh Arctic conditions.

\(^{16}\) The Port obtained an exemption from shoreline permitting requirements for replacing the bollards at Terminal 5.
The Port did not ask the City to determine whether the Foss lease constituted a change of use, see Blomberg Tr.
(Day 4) at 21, 23, 26, 32-33, and the City conditioned the shoreline exemption by providing that “[n]o change in use
at Terminal 5 is approved as part of this exemption,” and that the “Project is subject to zoning review and approval
for consistency with applicable development standards.” Foss Exhs. 54 & 55.

ENVIRONMENTAL INTERVENORS’
POST-HEARING BRIEF - 36 -
At the hearing, Mr. Meyer accepted a Foss attorney’s characterization of various Code provisions to suggest that the homeport use of Terminal 5 would not qualify as a commercial marina and that the applicable standards could not be applied at a commercial marina. Meyer Tr. (Day 3) at 46-53. On cross-examination by the City’s attorney, however, Mr. Meyer conceded that the SMP’s commercial marina standards imposed conditions that would protect public health and environmental resources from pollution from commercial as well as recreational marinas. Meyer Tr. (Day 3) at 16-20. Mr. Meyer has never asked the City how it would construe its SMP definition of commercial marina, nor has he ever applied for a commercial moorage or commercial marina permit. Id. at 8-9.

Mr. Meyer also argued that loading pipes onto a drill rig is not a “commercial” use. Meyer Day 2 Audio (4 of 4) at 1:01:00 – 1:11:45. However, the word “commercial” distinguishes “commercial” from “recreational marinas” in the SMP. Under the SMP, commercial and recreational marinas are defined separately. See SMC 23.60A.926. Mr. Gallagher understood that calling vessels “commercial” means they are different from recreational vessels, Gallagher Tr. (Day 4) at 90, and Mr. Knudsen testified that commercial vessels are “used in some kind of business-related activity.” Knudsen Tr. (Day 3) at 70.

Moreover, only 75% of a commercial moorage must be taken up by commercial vessels. SMC 23.60A.926 (“Marina, commercial”)(1). Word-smithing aside, it would strain credulity to conclude that Foss’s activity pursuant to its purchase contract with Shell – mooring and loading materials onto the Polar Pioneer for use in Shell’s offshore drilling operation – could be characterized as anything other than a commercial activity. Moorage of these vessels and the associated maintenance, repair, and outfitting activities constitute a plain vanilla commercial marina use.
Properly classifying the use category for Terminal 5 matters because a shoreline permit must mitigate harm to shorelines, the environment, and public access from the use. After extensive review of environmental and community impacts, the prior shoreline permit imposed conditions to lessen community and shoreline harm from container terminal operations, focusing for example on lighting, noise, and train and truck traffic. Foss Exh. 33 at 2. The focus of that permit did not include the impacts from homeporting the drill fleet, which will entail longer-term moorage and more extensive vessel repairs and maintenance in the off-season than when container ships called at Terminal 5 to load and unload. Blomberg Tr. (Day 4) at 35-37. The commercial marina use identifies vessel repair as an accessory use, and presumably the permit writer would impose conditions to reduce environmental harm from such activities. In writing a new permit to cover the over-wintering moorage of the drill rig, the City would also address obstruction of navigation in the West Waterway from mooring Polar Pioneer there. The 1995 shoreline permit never addressed this issue since it found that “[n]o part of the proposal, once completed, would present hazards or obstructions to navigational channels.” Foss Exh. 33 at 65. These and other novel or intensified impacts from homeporting the drill rig at Terminal 5 should be considered and subject to conditions in the shoreline permitting process to protect shoreline and public resources.

17Terminal 91 has been used for commercial moorage, quite apart from cargo terminal activities, since at least 1998. PSA Exh. 2 at 4. Terminal 91 is located entirely within the outer harbor line, while Terminal 5 ends at the outer harbor line, meaning ships moored at Terminal 5 are in the West Waterway, which is a water highway designated as such for navigation purposes. Meyer Tr. (Day 3) at 57-59; Foss Exh. 39 at W-188; Foss Exh. 20 at W-201. Article XV, ¶ 1 of the Washington Constitution bars the state from leasing to any private entity “any rights whatever in the waters beyond” the outer harbor lines, which delineate navigable water thoroughfares. The Washington Department of Natural Resources has sought an Attorney General opinion as to whether long-term moorage of the drill rig and associated vessels violates this constitutional provision. Meyer Tr. (Day 3) at 84-85.
CONCLUSION

The essential feature of a cargo terminal, as defined and used in the SMP and LUC, is the transshipment of cargo by a carrier from one location to another. Mooring vessels and storing cargo are accessory uses, allowed when they are inherent in and intrinsic to transshipping cargo, but not in their own right. Polar Pioneer is a drill rig, not a carrier that transships cargo as its business. Over-winter moorage of Polar Pioneer and associated vessels to provide a resting place for maintenance, repairs, and servicing of the vessels and for provisioning and outfitting them for their next season of operations is not a cargo terminal use. Accordingly, the Hearing Examiner should affirm the interpretation.

DATED this 10th day of September, 2015.

PATTI A. GOLDMAN, WSBA No. 24426
MATTHEW R. BACA, WSBA No. 45676
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
pgoldman@earthjustice.org
mbaca@earthjustice.org
Attorneys for Intervenors Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club and Washington Environmental Council
BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of:

FOSS MARITIME COMPANY

from an Interpretation by the Director, Department of Planning and Development.

Hearing Examiner File No. S-15-001
(DPD Project No. 3020324)

In the Matter of the Appeal of the:

PORT OF SEATTLE,

from Interpretation No. 15-001 of the Director of the Department of Planning and Development.

Hearing Examiner File No. S-15-002
(DPD Project No. 3020324)

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of the state of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203; Seattle, Washington 98104-1711.

I declare that on September 10, 2015, I served a copy of ENVIRONMENTAL INTERVENORS' POST-HEARING BRIEF and this DECLARATION OF SERVICE via the Hearing Examiner’s electronic filing system and/or via e-mail on the following parties:

DECLARATION OF SERVICE
John C. McCullough
MCCULLOUGH HILL LEARY, PS
701 – 5th Avenue, Suite 6600
Seattle, WA 98104
(206) 812-3388 | Phone
(206) 812-3389 | Fax
jack@mhsseattle.com
Attorney for Appellant Foss Maritime Company

David R. West
Donald B. Scaramastra
Dan Vecchio
GARVEY SCHUBERT BARER
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
(206) 464-3939 | Phone
(206) 464-0125 | Fax
drwest@gsblaw.com
dscar@gsblaw.com
DVecchio@gsblaw.com
Attorneys for Appellant Foss Maritime Company

Eleanore S. Baxendale
Assistant City Attorney
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8232 | Phone
(206) 684-8284 | Fax
eleanore.baxendale@seattle.gov
Attorney for Respondent Department of Planning and Development

Traci Goodwin
Senior Port Counsel
PORT OF SEATTLE
PO Box 1209
Seattle, WA 98111
(206) 787-3702 | Phone
(206) 787-3205 | Fax
goodwin.t@portseattle.org
Attorney for Appellant Port of Seattle

DECLARATION OF SERVICE
Patrick J. Schneider  
Adrian U. Winder  
FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299  
(206) 447-4400 | Phone  
(206) 447-9700 | Fax  
schnp@foster.com  
winda@foster.com  
Attorneys for Appellant Port of Seattle  

Joshua C. Allen Brower  
Molly K. D. Barker  
VERIS LAW GROUP PLLC  
1809 Seventh Ave., Suite 1400  
Seattle, WA 98101  
(206) 829-9590 | Phone  
(206) 829-9245 | Fax  
josh@verislawgroup.com  
molly@verislawgroup.com  
Attorneys for Intervenors Alaska Marine Lines;  
American Seafoods Company; American Waterway  
Operators; Arctic Fjord, Inc.; Arctic Storm, Inc.;  
Ballard Oil Company; Crowley Maritime Corporation;  
Glacier Fish Company; Premier Pacific Seafoods;  
Sailors’ Union of the Pacific; SSA Terminals, LLC;  
Transportation Institute and Vigor Industrial LLC  

I, Eudora Powell, declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.  

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

Eudora Powell, Litigation Assistant
ATTACHMENT 1
incidental, adj. and n.

Pronunciation: /ɪnˈsɪdəntəl/


A. adj.
   1.
   a. Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual.

1644 Milton Of Educ. 1. Those incidentall discourses which we have wander'd into.
1697 W. Dampier New Voy. around World vii. 161 With an incidental Account of the first Inducements that made the Privatcers undertake the passage.
1790 W. Paley Horæ Paulinae Rom. ii. 19 A circumstance as incidental, and as unlike design, as any that can be imagined.
1871 B. Jowett in tr. Plato Dialogues I. 14 The simple and apparently incidental manner in which the last remark is introduced.
1876 E. Miller Priesthood viii. 371 There is scarcely any practice which is so corrupt as not to produce some incidental good.

b. Of a charge or expense: Such as is incurred (in the execution of some plan or purpose) apart from the primary disbursements.

1740 C. Cibber Apol. Life C. Cibber xvi. 328 In the first six days of acting it, we paid all our constant, and incidental expense, and shar'd each of us a hundred pounds.
1773 Ann. Reg. 1772 224 For defraying the expences of the civil establishment of his Majesty's colony of West Florida, and other incidental expences attending the same.
1804 W. Tennant Indian Recreat. (ed. 2) I. 63 The house rent, and the incidental charges of a family.
1868 W. Pead Prac. Water-farming x. 104 These calls sufficed..for the nursery, and incidental expenses.

c. incidental images, incidental colours: such as are perceived by the eye as a consequence of visual impressions no longer present.

1876 J. Bernstein Five Senses 117 These prolonged impressions of light are called incidental images.
2. **incidental to**: liable to happen to; to which a thing is liable or exposed. **incidental upon**: following upon as an incident.

1616 *Corn*, in J. Taylor *Wks.* (1630) II. 83 If I should happen to be destitute; a matter very incidental to a poore Footman Pilgrim.

1665 T. Mall *Offer of Farther Help* 96 Those temptations that are incidental to a suffering state.

1732 G. Berkeley *Alciphron* I. i. x. 31, I who am no great Genius have a Weakness incidental to little ones.

1828 *Scott* *Fair Maid of Perth* vi, in *Chron. Canongate* 2nd Ser. I. 141 The hesitation incidental to the use of a foreign language.

1851 H. Spencer *Social Statics* 70 Others...may contend that...with the rightly constituted or moral man, correct conduct to others is merely incidental upon the fulfilment of his own nature.

1888 J. Ingls *Tent Life Tigerland* 148 The dangers incidental to pigsticking.

3.

a. Casually met with or encountered. **rare**.

1856 J. Cummg *Script. Reading Deut.* viii. 143 The green moss and incidental flowerets break out from the rifts and rents.

1871 J. S. Blackie *Four Phases Morals* I. 122 The...braying of an incidental ass.

1876 'G. Elliot' *Daniel Deronda* III. v. xxxvii. 142 A store of magical articulation with which he...promised himself to frighten any incidental Christian of his own years.

b. Given to relating casual incidents. **nonce-use**.

1843 T. Carlyle *Past & Present* II. v. 85 Says the incidental Jocelin.

†4. = **INCIDENT adj.** 7. **Obs. rare**.

1813 T. Bussy tr. Lucretius *Nature of Things* IV. Comment. xv, The angle contained by the incidental ray.

**B. n.**

An incidental circumstance, event, charge, expense, etc.

1707 *Modest Enquiry in Sewall’s Diary* (1879) II. 73 The accidental occasions of hiring Transport Ships, together with the other Incidentals that must necessarily accrue.

1726 *Pope* *Corr.* 9 Aug. (1956) II. 386 Almost every body and every thing is a cause or object for
humanity, even prosperity itself, and health itself, so many weak pitiful incidentals attend on them.

1866 J. E. T. Rogers *Hist. Agric. & Prices* I. xxviii. 673 We should find in others a large bill for incidentals.

**COMPONDS**

Special collocations.

**incidental advertisement** *n.* see quot.

1931 *Times Lit. Suppl.* 20 Aug. 636/3 ‘Incidental’ advertisements, advertisements...which are printed in a separate gathering from the body of the book and sewn in at either the end or the beginning.

**incidental music** *n.* music played as an accompaniment or ‘background’ to a play or film, or to a radio or other performance or entertainment.

1864 in H. J. Byron *Orpheus & Eurydice* 2 (heading) The incidental music selected and arranged by Mr. Frank Musgrave.

1928 *Melody Maker* Feb. 214 (advt.) Liber’s incidental music.

1938 *Oxf. Compan. Music* 464/1 Incidental music to plays has always been an important side-line of the art and business of the composer.

**incidental number** *n.* a piece of incidental music; also in extended use.

1904 W. D. Adams *Dict. Drama* I. p. vi, Musical Composers, the latter ranging from the writers of operas and operettas to the providers of ‘incidental numbers’ for plays.

1912 E. Wylie (title) Incidental numbers.

This entry has not yet been fully updated (first published 1900).
intrinsic, adj. and n.

Pronunciation: /ɪnˈtrɪnstk/

Forms: ME–16 intrinsique, (ME intrynsique), 16 intrynsyke, 16 intrinsike, intrinsick, 16– intrinsick, 16– intrinsie.

Etymology: < French intrinsèque (13–14th cent. in Godefroy Compl.), < medieval Scholastic Latin intrinsecus adjective (Fr. Mayron a1325; Hervius Natalis a1322 has an adverb intrinsec : Prantl), < Latin intrinsecus (adverb) inwardly, inwards. The ending was from the beginning confounded with the adjectival suffix -ic suffix, but the etymological -eque, -ec(k) occurs in 17th cent. Compare extrinsic adj., to which this is in all senses opposed.

A. adj.
†1.

a. Situated within; interior, inner. Obs. (exc. as in A. 1b.)

1490 Caxton tr. Eneydos xxv. 91 Occupied for to make the palayces and other edyfices intrinsique of ye cyte.

?1541 R. Copland Guy de Chauliac's Questyonary Cyrrugyens ii. sig. Cij, How many maners of skynnes or lethre are there? Answere. Two, one is extrynsyke or outforth... The other is intrynsyke.

1665 T. Herbert Some Years Trav. (new ed.) 253 The Waters...mixing with it [the earth] in the most intrinsique places.

b. Anat. Applied to a muscle of a member or organ which has its origin and insertion within that organ; so in Pathol. to a morbid growth arising in the part or tissue in which it is found.

1839–47 Todd's Cyclo. Anat. & Physiol. III. 111/2 The intrinsic muscles of the larynx...determine its form.

1874 D. B. St. J. Roosa Dis. Ear 56 The auricle has also a set of muscles which are contained in its structure, intrinsic muscles, as they are called by several authors.

1890 Nature 11 Sept. Structures which, like the outer digits of the horse's leg, or the intrinsic muscles of the ear of a man, are present in the adult in an incompletely developed form, and in a condition in which they can be of no use.

1897 T. C. Allbut et al. Syst. Med. IV. 834 The intrinsic variety [of laryngeal cancer] including the growths originating from the vocal cords.

†2.

a. Inward, internal (in fig. sense); secret, private. Obs. (passing into
sense A. 3).

1490 Caxton tr. Enedos xii. 71 By great yre gadred by inmense sorow intrynsique within her hert.
1605 Bacon Of Advancem. Learning i. sig. F4v, There are...other...peccant humors...not so secret and intrinsike, but that they fall vnder a popular observation.
1658 Hist. Mem. K. James 66 Not only...the publick but most intrinsicke actions of the State.
1689 Bp. G. Burnet Tracts I. 16 When there are Intrinsic diseases in a state.


1613 A. Sherley Relation Trav. Persia 65 We must haue a more intrinsicke acquaintance to perfect that knowledge.

3.

a. Belonging to the thing in itself, or by its very nature; inherent, essential, proper; ‘of its own’.
intrinsinc mode: See INTRINSICAL adj. 3.

1642 J. Howell Instr. Forreine Travell ix. 116 If one would go to the intrinsique value of things.
1661-98 R. South 12 Serm. III. 57 As if every such single Act could by its own Intrinsicke Worth merit a glorious Eternity.
1691 J. Locke Money in Wks. (1727) II. 67 The intrinsicke Value of Silver consider’d as Money, is that Estimate which common Consent has placed on it.
1725 I. Watts Logick i. ii. §4 The third division of modes shews us, they are either intrinsical or extrinsical. Intrinsical modes are conceived to be in the subject or substance, as when we say, a globe is round, or swift, rolling, or at rest; or when we say a man is tall or learned, these are intrinsic modes.
1758 W. Blackstone Comm. Laws Eng. I. Introd. 14 The civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom.
1835 C. Thirlwall Hist. Greece I. iv. 84 Confirmed as well by high authority as by intrinsic probability.
1859 C. Kingsley Misc. (1860) II. 167 Then came out the intrinsic rottenness of the whole system.
1861 G. Ross W. Bell’s Dict. Law Scotl. (rev. ed.) Intrinsic is a term applied to circumstances...so intimately connected with the point at issue that they make part of the evidence afforded by the oath, and cannot be separated from it.

b. Const. to.

1850 W. E. Gladstone Homer II. ii. 153 Latona...remains all alone without any meaning or purpose.
intrinsic to herself.

1873 L. Ferguson Disc. 159 The flower has no beauty that is not its own,..that is not intrinsic and native to it.

c. Math. intrinsic equation of a curve: an equation expressing the relation between its length and curvature (and so involving no reference to external points, lines, etc., as in equations referred to co-ordinates).

1849 Whewell in Cambr. Philos. Trans. (Royal Soc.) 8 660 The intrinsic equation to the circle is \( s = a\phi, \) \( a \) being the radius.


d. intrinsic factor n. a substance (perhaps a mucoprotein) which is secreted in the gastric juice and makes possible the absorption by the body of vitamin B\(_{12}\) ('extrinsic factor').

1930 Amer. Jrn. Med. Sci. 180 306 The process freely permits an interaction between a factor present in the normal gastric juice, which may thus be termed intrinsic, and a factor contained in the beef muscle, which is thus an extrinsic element.

1961 Lancet 26 Aug. 483/2 Vitamin-B\(_{12}\) deficiency through lack of intrinsic factor (I.F.), as in pernicious anaemia, has stimulated efforts to purify and isolate I.F.

1965 A. DoscherHolmen Stud. Metabolism Vitamin B\(_{12}\) 4 The intrinsic factor has not yet been isolated in pure form., but it is believed to be a mucoprotein or mucopolyprteide... The purpose of the intrinsic factor is to bring about the absorption from the food, by some mechanism still unknown., of the small amount of cyanocobalamin needed.

e. Physics. Of a semiconductor: owing its electrical conductivity to thermally excited electrons from the principal substance present, rather than to electrons from impurity atoms. Hence applied to conduction that arises in this way.

1933 R. H. Fowler in Proc. Royal Soc. A. 140 507 Semi-conductors without impurities owe their conductivity and other electrical properties to thermal excitation of electrons from band 2 to band 1. These we shall refer to as intrinsic semi-conductors.

1945 Jrn. Appl. Physics 16 562/2 The atoms of the bulk material hold their valence electrons at low temperatures but become thermally ionized at elevated temperatures. An electronic conductivity of this type is called intrinsic.

1948 H. C. Torrey & C. A. Whitman Crystal Rectifiers iii. 47 Intrinsic semiconduction occurs in materials that have a band structure similar to that of insulators..but with the difference that the gap in energy between the highest filled band and the lowest empty band is relatively small.

collector is practically intrinsic and under proper operating conditions the transition region (depletion region) of the collector barrier occupies the whole of it.

1966 C. R. Tottle *Sci. Engin. Materials* ii. 46 Intrinsic semiconductors...are insulators below a given temperature and conductors with a negative temperature coefficient above it. Silicon and germanium are examples of this type of semiconductor.

**B. n.**

(ellipt. for 'inmost part', 'intrinsic value', 'intrinsic quality': see A. 3)

1665 T. Herbert *Some Years Trav.* (new ed.) 88 To visit and search the intrinsique of that precious piece of Earth which [etc.].

1716 J. Collier tr. Gregory of Nazianzus *Panegyrick upon Maccabees* 96 We should be better prepar'd to examine the Intrinsick.

1734 R. North *Examen* (1740) III. vi. §78 481 Then the Merchants tumbled them in for the Gain by the Intrinsic.

1744 R. North & M. North *Life Sir D. North & Rev. J. North* 179 It is no other than a Token, or Leather Money, of no Intrinsic.

1751 W. Warburton *Notes on Pope's Dunciad* ii. 187 Let our English at least escape, whose intrinsic is scarce of marble so solid, as not to be impaired or soiled by such rude and dirty hands.

This entry has not yet been fully updated (first published 1900).
incidental adj. (17c) Subordinate to something of greater importance; having a minor role <the FAA determined that the wind played only an incidental part in the plane crash>.

INTRINSIC, Black's Law Dictionary (10th ed. 2014)

Black's Law Dictionary (10th ed. 2014), intrinsic

INTRINSIC

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Abbreviations

**intrinsc (in-trin-zik or -sik) adj.** (17c) Belonging to a thing by its very nature; not dependent on external circumstances; inherent; essential.