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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File No. S-15-001  
) (DPD Project No. 3020324)  
FOSS MARITIME COMPANY )  
)  
from an Interpretation by the Director, Department )  
of Planning and Development. )

\_\_\_\_\_ )  
In the Matter of the Appeal of the: ) Hearing Examiner File No. S-15-002  
) (DPD Project No. 3020324)  
PORT OF SEATTLE, )  
) ENVIRONMENTAL  
from Interpretation No. 15-001 of the Director of ) INTERVENORS' POST-HEARING  
the Department of Planning and Development. ) BRIEF  
)  
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1 INTRODUCTION

2 The Port of Seattle and Foss Maritime Company appeal an interpretation issued by the  
3 City of Seattle Department of Planning and Development (“City” or “DPD”). The Seattle  
4 Municipal Code (“SMC”) authorizes DPD’s Director to issue interpretations as to “the meaning,  
5 application or intent of any development regulation . . . as it relates to a specific property.” SMC  
6 23.88.020.A. DPD Interpretation No. 15-001 applies shoreline development regulations to a  
7 particular use of Terminal 5 for over-winter moorage of a drill rig and associated vessels. Foss  
8 Exh. 1.

9 The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.88.020.F.  
10 Under the Code, “appeals shall be considered de novo, and the decision of the Hearing Examiner  
11 shall be made on the same basis as was required of the Director.” SMC 23.88.020.G.5. The  
12 Director’s interpretation “shall be given substantial weight, and the burden of establishing the  
13 contrary shall be upon the appellant.” SMC 23.88.020.G.5. Appellants must show that the  
14 interpretation is “clearly erroneous.” *Brown v. Tacoma*, 30 Wn. App. 762, 764 (1981). This is a  
15 deferential standard of review, under which the Director’s decision may be reversed only if the  
16 Hearing Examiner, on review of the entire record and in light of the public policy expressed in  
17 the underlying law, is left with the definite and firm conviction that a mistake has been made.  
18 *Moss v. Bellingham*, 109 Wn. App. 6, 13 (2001).

19 This brief: (1) reviews the statutory direction to construe the City’s Shoreline Master  
20 Program liberally to promote the purposes of the Shoreline Management Act; (2) shows that  
21 Terminal 5 is established only as a cargo terminal; (3) demonstrates that the defining feature of a  
22 cargo terminal is the transshipment of goods and cargo from one location to another and that  
23 moorage is an accessory use at a cargo terminal for vessels engaged in the business of  
24 transshipping cargo; and (4) confirms that over-winter moorage of a drill rig and associated

1 vessels is not a cargo terminal use, but a different principal use requiring an additional shoreline  
2 permit. For all those reasons, the Hearing Examiner should affirm the decision of the Director.

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

7 The City’s Shoreline Master Program (“SMP”) requires liberal construction of its  
8 provisions. Specifically, it is exempt from the rule of strict construction, and “it shall be liberally  
9 construed to give full effect to the objectives and purposes of RCW 90.58, the State Shoreline  
10 Management Act.” SMC 23.60A.014.A; *see also* SMC 23.60A.002 (SMP regulates  
11 development, uses and shoreline modification to protect ecological functions of shorelines,  
12 encourage water-dependent uses, maximize public enjoyment of shorelines, and preserve views  
13 of the water). At their core, the Shoreline Management Act (“SMA”) and the SMP establish a  
14 zoning and permitting scheme to coordinate uses of shorelines and protect public shoreline  
15 resources. Not only does the SMP specifically mandate construction of the SMP to promote  
16 these objectives, but it is the duty of the Hearing Examiner, like courts, to give effect to  
17 legislative intent in the context of the entire statute. *See State v. Elgin*, 118 Wn.2d 551, 556  
18 (1992).

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

21 In 1971, the legislature passed the SMA, and the voters adopted it the next year. The  
22 legislature found that the state’s shorelines “are among the most valuable and fragile of its  
23 natural resources,” “ever increasing pressures of additional uses are being placed on the  
24 shorelines necessitating increased coordination in the management and development of the  
25 shorelines of the state,” and “[t]here is, therefor, a clear and urgent demand for a planned,

1 rational, and concerted effort, jointly performed by federal, state, and local governments, to  
2 prevent the inherent harm in an uncoordinated and piecemeal development of the state's  
3 shorelines.” RCW 90.58.020. The Act declares that “[i]t is the policy of the state to provide for  
4 the management of the shorelines of the state by planning for and fostering all reasonable and  
5 appropriate uses and that “[p]ermitted uses in the shorelines of the state shall be designed and  
6 conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and  
7 environment of the shoreline area and any interference with the public’s use of the water.” *Id.*  
8 The SMP promotes the Act’s goal of avoiding piecemeal and uncoordinated shoreline  
9 development by adopting a zoning scheme designating which uses can take place in which  
10 shoreline environments and a permitting scheme through which conditions can be imposed to  
11 minimize damage to public resources, public health, navigation, and public use of the water.  
12 SMC 23.60A.012 to .090; *see also* SMC 23.60A.002.B & SMC 23.60A.004 (purposes, goals,  
13 and policies).

14 B. Shoreline Permitting Extends to Changes of Use.

15 Shoreline permits are required both for substantial developments and uses of shorelines.  
16 *See* RCW 90.58.020 (referring to “[p]ermitted uses in the shorelines of the state”); WAC 173-27-  
17 100 (permit revision is required for changes that relate to conformance to permit conditions,  
18 master program, or SMA policies, but only if use authorized in original permit is not changed).  
19 In *Clam Shacks of America, Inc. v. Skagit County*, 109 Wn.2d 91 (1987), the Washington  
20 Supreme Court held that a shoreline permit is required, even where there is no substantial  
21 development. In *Clam Shacks*, Skagit County had issued a conditional use permit for an  
22 aquaculture operation on tidal flats. When Clam Shacks failed to conduct a required study of the  
23 habitat, wildlife and water quality effects of the operation, the City issued a cease and desist  
24

1 order. Clam Shacks challenged that order, arguing that its use was not a substantial development  
2 and, therefore, was not subject to shoreline permit requirements. Highlighting the SMA's intent  
3 and provisions calling for comprehensive use plans and use regulations and noting that  
4 development is a subset of uses, the Washington Supreme Court held that use of shorelines is  
5 subject to shoreline permitting, even when there is no substantial development needing a separate  
6 shoreline substantial development permit.

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

9 No development shall be undertaken, no shoreline modification shall be made,  
10 and no use, including a use that is located on a vessel, shall be established in the  
11 Shoreline District unless the Director has determined that it is consistent with the  
12 policy of the Shoreline Management Act and the regulations of this Chapter  
13 23.60A. This restriction applies even if no shoreline substantial development  
14 permit is required.

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

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

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

26 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

1 3-4.<sup>1</sup> The Port applied for and the City issued a Shoreline Substantial Development Permit  
2 (“SSDP”), which confirmed and established Terminal 5 as a “cargo terminal.” Foss Exh. 33 at  
3 W-1. Eagle Marine Services operated Terminal 5 as a container transshipment business under a  
4 long-term lease after the redevelopment until the Port cancelled the lease in 2014 to make way  
5 for modernizing Terminal 5 to handle even larger container ships coming to dominate  
6 international container shipping. DPD Exh. 24 at 1-2.

7 All parties agree that this shoreline permit established a cargo terminal use at Terminal 5,  
8 and that this permit remains operative. Mr. Blomberg, who was involved in the environmental  
9 review and permitting of the 1990s redevelopment, disagreed with the assertion that  
10 “**Homeporting** vessels is one of the types of maritime uses that have undergone environmental  
11 review and been approved at T-5.” PSA Exh. 12 (emphasis in original); Blomberg Tr. (Day 4) at  
12 35-37.<sup>2</sup>

13 During the interpretation process, the Port submitted information to the City, which  
14 included descriptions and photographs of past uses of Terminal 5. Foss Exh. 20. While the more  
15 recent photos show the Eagle Marine container terminal use, the Port’s memo emphasized the  
16 non-containerized uses. The SMP in effect at the time of the interpretation defined “cargo,  
17 containerized” as “cargo packed in a large (typically eight (8) feet by eight (8) feet by twenty  
18 (20) feet) trunklike box and loaded, stored and unloaded as a unit.” SMC 23.60.906. The SMP  
19 also defined “cargo, breakbulk” as “cargo packed in separate packages or individual pieces of  
20 cargo and loaded, stored and unloaded individually,” and “cargo, neo-bulk” as “cargo which has  
21

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

23 <sup>2</sup> A public affairs staff person had drafted answers to questions that might be asked of Port staff at the January 13,  
24 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.



1 historically been classified as generalized cargo, such as grain, oil, and automobiles, but now is  
2 moved in bulk movements usually in specialized vessels.” SMC 23.60.906.

3 The Port’s submission described bulk steel, bulk lumber, and bulk construction material  
4 transshipping operations. Mr. Meyer, a Port employee familiar with Terminal 5, testified that all  
5 of these shipping operations involved transshipping cargo from one location to another. Meyer  
6 Tr. (Day 3) at 47-52. The Port lists two cargo shipping uses taking place at Terminal 5 after the  
7 redevelopment. First, as a customer of Eagle Marine, Westwood Shipping handled break-bulk  
8 shipping, which involved transshipping cargo from one location to another. Foss Exh. 20 at W-  
9 200; Meyer Tr. (Day 3) at 55; Gallagher Tr. (Day 4) at 102-03. That use ended when the Eagle  
10 Marine lease was terminated in 2014. Second, Crowley Maritime conducted tug and barge  
11 freight shipping operations at Pier 2, but those operations have been relocated. Foss Exh. 20 at  
12 W-199 to W-200.<sup>3</sup>

13 The Port’s submission identified only two prior uses of Terminal 5 that did not entail the  
14 transshipment of cargo by carriers from one location to another. First, a radio transmission tower  
15 was located in the uplands of Terminal 5, but that tower was demolished over a decade ago.  
16 DPD Exh. 1 at RFP 2000045 (2000 permit to demolish the radio tower); *compare* Foss Exh. 20  
17 at W-198 describing radio tower and equipment in 1953, *with id.* at W-215 (showing no radio  
18 tower in 2005). Second, a shipyard dry dock was located at the north end of Terminal 5 from the  
19 1950s through the 1980s, but that shipyard likewise has been demolished and that use  
20 abandoned. Meyer Tr. (Day 3) at 56; *compare* Foss Exh. 20 at W-198 describing shipyard  
21 drydock in 1953, *with id.* at W-215 (showing no shipyard in 2005). *See* SMC 23.60A.122 (a use  
22 discontinued more than 24 months ago cannot be continued as a nonconforming use).

23 \_\_\_\_\_  
24 <sup>3</sup> 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.

1 The only use established by permit for Terminal 5 is as a cargo terminal based on the  
2 1995 SSDP. While the Port has suggested that it might be able to continue other nonconforming  
3 uses, whether such nonconforming uses exist is beyond the scope of this appeal and is not borne  
4 out by the Port's description of prior uses of Terminal 5 in its submission to the City. Order on  
5 Motion to Dismiss Claims at 3, ¶ 11.

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

8 1. *The Applicable Rules of Statutory Construction*

9 At its heart, the interpretation and this appeal turn on the meaning of "cargo terminal." In  
10 addition to mandating that it be liberally construed to promote the purposes and objectives of the  
11 SMA, the SMP prescribes specific rules for defining terms used in the SMP. Acknowledging  
12 that both the SMP and the Land Use Code ("LUC") define relevant words and phrases, the SMP  
13 specifies that a definition in the SMP applies in the shoreline district where the SMP definition  
14 "differs from a definition of the same term" in the LUC. SMC 23.60A.900.A. Where words or  
15 phrases used in the SMP are not defined, they "shall be interpreted so as to give them the  
16 meaning they have in common usage." SMC 23.60A.900.B. To discern the common meaning  
17 of terms, "[r]esort to dictionary definitions is commonplace." *Seattle-First Nat. Bank v. Snell*, 29  
18 Wn. App. 500, 506 (1981) (citing *Dep't of Fisheries v. Chelan County PUD 1*, 91 Wn.2d 378  
19 (1979)).

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

1 superfluous.” *Cobra Roofing Services, Inc. v. Dep’t of Labor & Industries*, 157 Wn.2d 90, 99  
2 (2006). The goal of a court in statutory interpretation “is to discern and implement the  
3 legislature’s intent.” *Whatcom Cnty. Fire Dist. No. 21 v. Whatcom Cnty.*, 171 Wn.2d 421, 433  
4 (2011).

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

## 12                           2.       *The Pertinent Definitions*

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

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

16 SMC 23.84A.038. The LUC then states that “transportation facilities” include certain types of  
17 facilities and lists parking, moorage, passenger terminals, and cargo terminals among others. *Id.*  
18 As the DPD interpretation notes, the SMP lists types of transportation facilities in SMC  
19 23.60A.938, but contains no definition of “transportation facility,” and therefore, under the rules  
20 of construction, the LUC definition controls.

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

23           “Cargo terminal” means a transportation facility in which quantities of goods or  
24 container cargo are, without undergoing any manufacturing processes, transferred  
to carriers or stored outdoors in order to transfer them to other locations. Cargo

1 terminals may include accessory warehouses, railroad yards, storage yards, and  
2 offices.

3 As recently amended, the SMP provides:

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

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

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

21 The Port, likewise, views the two definitions to be interchangeable. Paul Meyer, who  
22 oversees permitting and environmental compliance for the Port, drafted a memo addressing  
23 consistency of the proposed Foss lease with both the SMA and the State Environmental Policy  
24 Act (“SEPA”). The memo recited the LUC definition of cargo terminal. PSA Exh. 21 at CW-  
25 167. In a subsequent version of that memo, Mr. Meyer added a “data dump” of potentially  
26 relevant Code provisions, which included both the SMP and LUC definitions of cargo terminal.

1 PSA Exh. 20 at CW-152 to -156. Subsequently, one of the Port’s official SEPA categorical  
2 exemption memos quotes only the LUC definition. Foss Exh. 46 at W-315; Meyer Tr. (Day 3) at  
3 63-70. When asked whether the Port viewed the two definitions to be interchangeable, Mr.  
4 Meyer replied, “I think we recently established that they’re the same.” *Id.* at 70.

5 The task for the Hearing Examiner is to harmonize the SMP and LUC definitions. *See*  
6 *Preserve Our Islands v. Shorelines Hearings Bd*, 133 Wn. App. 503, 523 (2006); *see also*  
7 *Philippides v. Bernard*, 151 Wn.2d 376, 385 (2004) (rule of statutory construction requires  
8 harmonization of statutory provisions). This is in keeping with the overarching statutory  
9 construction principle that related statutory provisions must be read as complementary, rather  
10 than conflicting. *Waste Mgmt. of Seattle v. Util. Transp. Comm’n*, 123 Wn.2d 621, 630-31  
11 (1994).

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

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

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

23 With respect to the third clause in the cargo terminal definition, it is beyond question that  
24 goods or containerized cargo stored outdoors must be at the terminal in order to be transferred to  
25 other locations. The phrase “in order to transfer them to other locations” follows immediately

1 after “stored outdoors” and the definition could have no other meaning. Therefore, the  
2 transshipment of goods or cargo is a necessary component of this specified activity.

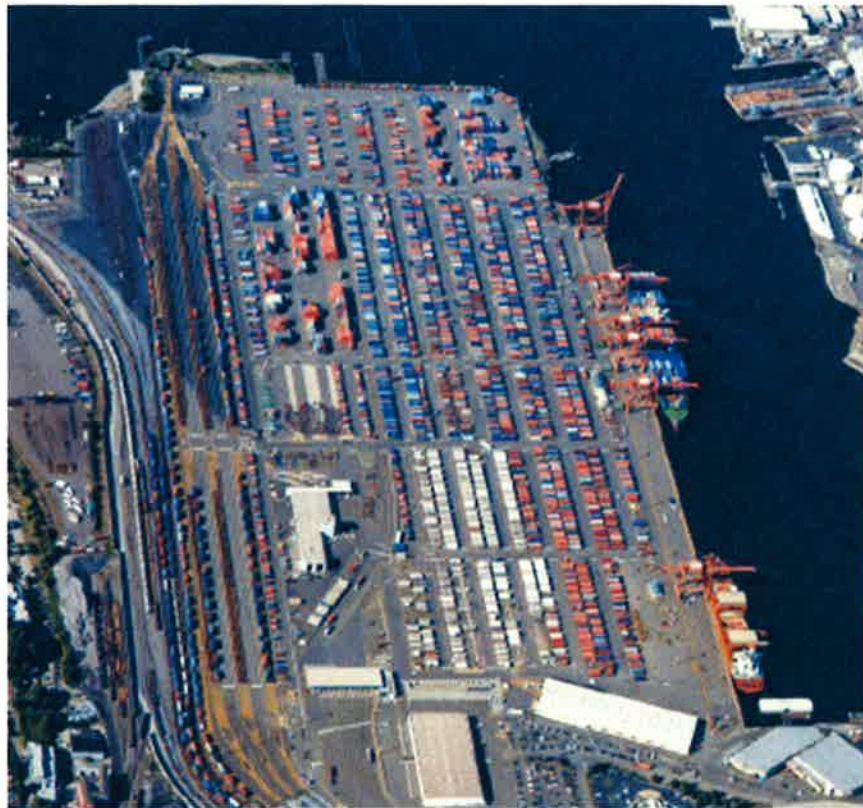
3                   b.       Transferred to Other Carriers Refers to Transshipment by  
4                               Businesses Engaged in Shipping Cargo From One Location to  
5                               Another.

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

- 10       •       J. Monroe & R. Stewart, *Dictionary of Maritime and Transportation Terms*, PSA  
11       Exh. 6, which defines carrier as “[a]n individual, partnership, or corporation  
12       engaged in the business of transporting goods or passengers by rail, road, sea, air,  
13       inland waterway, or by a combination of such modes.”
- 14       •       Black’s Law Dictionary, PSA Exh. 7, which defines carrier as “[a]n individual or  
15       organization (such as a shipowner, a railroad, or an airline) that contracts to  
16       transport passengers or goods for a fee. Cf. shipper.”
- 17       •       The most pertinent definition of carrier in the O.E.D., PSA Exh. 8, which is “[a]  
18       person who is hired to undertake the conveyance of goods and parcels (usually on  
19       certain routes, and at fixed times),” followed by that “in the legal sense,” carrier  
20       includes “any person or association of persons undertaking, for payment, the  
21       transport of goods by land or water, as stage-coach proprietors, railway  
22       companies, parcel-delivery companies, owners and masters of ships, etc.”
- 23       •       The Uniform Commercial Code, which defines a “carrier” as a person that issues  
24       a bill of lading, and a “bill of lading” as a document evidencing the receipt of  
25       goods for shipment issued by a person engaged in the business of transporting or  
26       forwarding goods. UCC § 7-102(2) & 1-201(6).

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

1 Terminal 5 when it was a container terminal:<sup>4</sup>



13

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

15 Foss has attempted to eliminate the transshipment requirement by arguing that the word

16 “stored” in the SMP definition of cargo terminal should be read to mean that goods and container

17 cargo may be stored at a cargo terminal for any purpose and without being linked to their

18 transshipment. It contends that the phrase “in order to transfer them to other locations” does not

19 modify “stored.”

20 According to Foss, this construction is compelled by the last antecedent rule, which reads

21 a qualifying phrase to apply only to the immediately preceding antecedent. Foss Pre-Hearing

22 Brief at 9-11. However, ever since Sutherland stated this rule of statutory construction over a

23

24 <sup>4</sup> Cropped from Foss Exh. 20 at W-215.

1 century ago, it has been recognized not to be inflexible and uniformly binding, but to apply only  
2 where no contrary intention appears and where it would not impair the meaning of the statutory  
3 provision. J.Sutherland, *Sutherland on Statutory Construction* § 267 (1<sup>st</sup> ed. 1891). The  
4 Washington Supreme Court has counseled against relying exclusively on the last antecedent rule,  
5 noting that courts must not disregard the principle that “[a]n act must be construed as a whole,  
6 considering all provisions in relation to one another and harmonizing rather than rendering any  
7 superfluous.” *State v. George*, 160 Wn.2d 727, 738 (2007). The last antecedent is merely one of  
8 several “aid[s] to discovery of legislative intent or meaning and is not inflexible and uniformly  
9 binding. Where the sense of the entire act requires that a qualifying word or phrase apply to  
10 several preceding or even succeeding sections, the word or phrase will not be restricted to its  
11 immediate antecedent.” *State v. McGee*, 112 Wn.2d 283, 788-89 (1993). The rule also must  
12 give way when it would lead to absurd results that conflict with legislative intent. *State v.*  
13 *Bunker*, 169 Wn.2d 571, 579 (2010). Even the cases cited by Foss recognize the last antecedent  
14 rule applies only where no contrary legislative intent is evident and it would not impair the  
15 meaning of the provision. *See In re Estate of Kurtzman*, 65 Wn.2d 260 (1964) (applying last  
16 antecedent rule only “where no contrary intention appears in a statute”); *In re Sehome Park Care*  
17 *Ctr*, 127 Wn.2d 774, 781 (1996) (same); *Judson v. Associated Meats & Seafoods*, 32 Wn. App.  
18 794, 801 (1982) (same).

19 Foss’s proposed reading of cargo terminal to allow storage without being closely tied to  
20 transshipping cargo must be rejected for three reasons. First, it would convert a cargo terminal,  
21 which is a type of transportation facility, into a storage facility. McKim Tr. (Day 1) at 66-67,  
22 145. The SMP creates distinct transportation and storage use classifications, and the defining  
23 feature of a storage facility is the storage of goods or products for more than 72 hours. SMC  
24



1 23.84A.036. Storage facilities, as spelled out in the SMP and defined in the LUC, expressly  
2 include warehouses, mini-warehouses, and outdoor storage as types of storage uses. *Id.*; SMC  
3 23.60A.482. Given the direction to harmonize statutory provisions and avoid rendering any  
4 surplusage, storage and transportation facilities must be given independent meaning. *See Cobra*  
5 *Roofing Services*, 157 Wn.2d at 99. To cohere with the definition of transportation facility, the  
6 storage of goods and cargo must “support[ ] or provide[ ] a means of transporting . . . goods from  
7 one location to another.” SMC 23.84A.038. It follows that goods and cargo must be stored at a  
8 cargo terminal “in order to transfer them to other locations.”

9         Second, this construction is compelled by the delineation of principal and accessory uses  
10 in the definition of cargo terminals. The SMP classifies uses according to the principal use of a  
11 facility. A principal use is “any use, whether a separate business establishment or not, that has a  
12 separate and distinct purpose and function from other uses on the lot.” SMC 23.60A.940. The  
13 SMP defines accessory use as “a use that is incidental and intrinsic to the function of a principal  
14 use and is not a separate business establishment unless a home occupation.” *Id.* The SMP  
15 definition of cargo terminal provides that cargo terminals “may include accessory warehouses,  
16 railroad yards, storage yards, and offices.” SMC 23.60A.906; *see also* SMC 23.84A.038  
17 (identical LUC definition language). These accessory uses, by definition, must be “incidental  
18 and intrinsic to the function of” the cargo terminal, meaning use of the warehouses and storage  
19 yards must be accessory to transferring cargo from one location to another. Foss urges the  
20 Hearing Examiner to erase the transshipment requirement, which would allow the warehouse and  
21 storage accessory uses at a cargo terminal to become the principal use. Such a reading would run  
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23  
24

1 counter to the SMP’s principal and accessory use paradigm and would allow the accessory uses  
2 to supplant the principal cargo terminal use.

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

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

23 The LUC definition of “cargo terminal” differs from the SMP definition in two respects  
24 that reinforce the conclusion that goods and cargo are stored at a cargo terminal in order to be

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

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

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

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

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22 <sup>5</sup>Drawing from the shoreline permit establishing Terminal 5 as a cargo terminal, the Port’s head of permitting  
23 compliance indicated that the proposed lease “must be consistent with the approved status of Terminal 5 as a marine  
24 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.

1 transshipment activities being the mainstay of moorage at Terminal 91. In the order on the  
2 motion to dismiss claims at ¶¶ 8 & 20, the Hearing Examiner expressed willingness to hear  
3 evidence “concerning past activities deemed by the City to be a cargo terminal use” as relevant  
4 to whether the activities at issue constitute a cargo terminal use. To be probative, such evidence  
5 must pertain to a Port facility established by the City as a cargo terminal. As discussed above,  
6 except for two long discontinued uses, all established uses of Terminal 5 involved the  
7 transshipment of cargo by carriers from one place to another, thereby reinforcing that cargo  
8 transshipment is the linchpin of a cargo terminal.

9       The Port and Foss witnesses testified at length about non-cargo activities at Terminal 91.  
10 In contrast to Terminal 5, which had been a container terminal for decades, Terminal 91 is a  
11 diversified facility with numerous uses, including such disparate uses as a cruise ship terminal, a  
12 seafood processing plant, a homeport for the Alaska fishing fleet, and a homeport for Seattle Fire  
13 Department boats. McKim Tr. (Day 1) at 110-11; Englin Tr. (Day 1) at 204-05. It has been  
14 officially recognized as devoted to commercial moorage in addition to cargo transshipment. The  
15 1998 Port Management Agreement in which the Department of Natural Resources authorized the  
16 Port’s use of state aquatic lands for thirty years described the then-current and planned uses of  
17 Port facilities. Foss Exh. 36 at W-438 to W-456 (PMA appended to the Foss-Port lease). While  
18 Terminal 5 “is the site of an existing marine container terminal,” Terminal 91 “is used for  
19 transshipment of fruit, automobiles, and other products. Fishing and other commercial vessels  
20 also moor at the facility.” PSA Exh. 2 at 1 & 4. Commercial moorage has long been part of  
21 Terminal 91’s acknowledged use, whereas no such use has been permitted or established by the  
22 City as a principal use at Terminal 5.

1           Some permits for Terminal 91 were admitted as exhibits, but no one purported to produce  
2 all Terminal 91 permits. From the Terminal 91 permits that were produced, it emerged that, in  
3 addition to a permit authorizing use of Terminal 91 as a cargo terminal, Terminal 91 also has  
4 permits establishing a public facility at which Seattle's fire boats are moored, a passenger  
5 terminal for the cruise ship facility, and manufacturing for the seafood processing plant. DPD  
6 Exh. 11. Mr. Englin testified that the Port uses Terminal 91 to provide moorage to a vast array  
7 of non-recreational vessels, from cruise ships and factory trawlers to super-yachts and fiber cable  
8 laying vessels. Englin Tr. (Day 1) at 178, 221-22; Englin Tr. (Day 2) at 16-17. Mr. Englin runs  
9 this moorage program without regard to the shoreline permits issued by the City for Terminal 91  
10 or the many other Port facilities where he allows free-standing vessel moorage. Englin Tr. (Day  
11 2) at 12, 18-21; *see also* Knudsen Tr. (Day 3) at 60-61 (Port ran moorage program when he was  
12 at the Port 10-30 years ago without regard to shoreline permits). Mr. Englin is only vaguely  
13 aware of what permits exist and what they might allow; indeed, the Port believes it can allow  
14 vessels to moor and undertake any activity at any Port facility without regard to the permits for  
15 the facility. Englin Tr. (Day 2) at 18-21; Meyer Tr. (Day 3) at 12-15. It is that activity, mooring  
16 vessels with no awareness of or respect for permitting requirements, which the Port seeks to  
17 defend in this appeal. Accordingly, evidence that vessels moor at Terminal 91 for purposes other  
18 than loading and unloading cargo has no bearing on what the City characterizes as a cargo  
19 terminal since it was not linked up to City shoreline permits or to areas of Terminal 91 permitted  
20 exclusively as a cargo terminal use.

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

22           The DPD interpretation also asks whether moorage of a drill rig and associated vessels  
23 could be allowed at a cargo terminal as an accessory use. The Hearing Examiner has held that  
24

1 the SMP definition of “accessory use” controls and that it requires that the use be both incidental  
2 and intrinsic to the function of the principal use. Order on Motion to Dismiss at 2, ¶ 9.

3 *1. Definitions of “Incidental” and “Intrinsic”*

4 Since neither the SMP nor the LUC defines “incidental,” prior Hearing Examiner  
5 decisions have used the dictionary definition. “Webster’s Ninth New Collegiate Dictionary  
6 defines ‘incidental’ as ‘being likely to ensue as a chance or minor consequence.’” *In re Appeals*  
7 *of Morrison et al., from an Interpretation by the Director, DPD, S-09-001, -002 & -003* (May  
8 20, 2009). Black’s Law Dictionary defines “incidental” as “[s]ubordinate to something of  
9 greater importance; having a minor role.”

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

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

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

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

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24 <sup>6</sup>These definitions of incidental and intrinsic are appended to this brief.

1 unload cargo is also intrinsic to the transshipment of cargo in that it is inherent in and essential to  
2 the marine cargo transshipment activity.

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

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

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

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

23 \_\_\_\_\_  
24 <sup>7</sup> 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.

1 maintenance and repairs to be readied for the next excursion. McLaughlin Day 2 Audio (2 of 4)  
2 at 0:28:38 – 0:30:00. The Port’s manager of maritime operations, Mr. Englin, testified that the  
3 fishing fleet chose to make the Port of Seattle its homeport because of easy access to numerous  
4 contractors and suppliers to service, repair, and upgrade the vessels and their complex processing  
5 equipment. Englin Tr. (Day 1) at 196-97, 202-10, 219-24. He stressed that few, if any, if the  
6 fishing vessels offload fishing cargo at the homeport. Englin Tr. (Day 1) at 196-97; *see also*  
7 Johnson Tr. (Day 3) at 35 (less than 5% of the dockage).

8 In addition to the fishing fleet homeport, the Port runs a moorage program using all of its  
9 facilities, except the few under a lease that gives the lessee exclusive control over the facility.  
10 When vessels seek moorage, the Port provides it based on berth availability and the size of the  
11 vessel. Englin Tr. (Day 1) at 172-73, 181-84; Englin Tr. (Day 2) at 10-11.<sup>8</sup> Mr. Englin, who runs  
12 the Port’s moorage program, moves vessels around to different berths to suit the needs of the  
13 Port and the vessels; in his words, “[they] can move around anywhere.” Englin Tr. (Day 1) at  
14 189. The purpose of the moorage program is not to provide berthing while a cargo ship is  
15 loading or unloading cargo, but rather to provide a place for off-season maintenance and repairs,  
16 a waiting station in between missions, or a place for Coast Guard inspections or public tours and  
17 receptions. *See, e.g.*, Englin Tr. (Day 1) at 195-222. In fact, Mr. Englin testified that all of the  
18 vessels shown to be mooring at Terminal 91 on January 14, 2015 in Port Exh. 1 were “non-cargo  
19 vessels.” Englin Tr. (Day 1) at 217-22.

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

23 \_\_\_\_\_  
24 <sup>8</sup> 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.



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

9         The Port's attorney described the moorage program as analogous to moving chess pieces  
10 around a chess board based on the available spaces. Schneider Day 1 Audio (1 of 4) at 0:28:25 –  
11 0:28:30. In chess, however, the various pieces cannot move anywhere at whim. Bishops must  
12 move diagonally, knights in “L” formations, and castles in straight lines. To be analogous to  
13 chess, the Port would need to abide by the City's rule book and moor cruise ships loading  
14 passengers at passenger terminals, those engaged in transshipping cargo at cargo terminals, and  
15 those lay berthing or homeporting at commercial marinas or moorage facilities. Mooring any  
16 ship anywhere replaces the SMP's system of permitting, which establishes principal uses at  
17 various Port facilities, with a free-for-all, Wild West system that modern land use and shoreline  
18 management laws sought to rein in.

19         Lay berthing this wide array of vessels divorced entirely from cargo transshipping  
20 operations is neither incidental nor intrinsic to a cargo terminal use. Such lay berthing is neither  
21 a consequence, nor an inherent part, of cargo transshipment. Instead, providing such moorage  
22 has a separate and distinct purpose and would constitute a separate business enterprise. It is  
23  
24

1 therefore a different principal use, and not accessory to a cargo terminal use.<sup>9</sup>

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

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

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

10 Second, throughout their examination of witnesses, the Port and Foss attorneys concocted  
11 what they called a "primary function test," even though no such test is spelled out in the  
12 interpretation, nor is one required to apply the interpretation. Undercutting the Port's argument,  
13 Mr. Englin, testified with ease as to whether various ships were loading and unloading cargo or  
14 lay berthing for maintenance and repairs or when in between jobs at Terminal 91, and the Port  
15 has an elaborate tariff scheme that differentiates among vessels based on their activities in Port.  
16 Englin Tr. (Day 1) at 185-222 & Port Exh. 22; Johnson Tr. (Day 3) at 38-39 (same). It does not  
17 take a rocket scientist to discern that the principal use of a drill rig is to drill, not to move cargo  
18 from port to port for a fee. One can tell by simply looking at the ship. *See* McKim Tr. (Day 1) at  
19 151; Englin Tr. (Day 2) at 26; *see also* Knudsen Tr. (Day 3) at 73 (vessels transshipping cargo  
20 for hire need a trading license to do so).

21  
22 <sup>9</sup> Because the Port takes the position that it can moor any vessel at a cargo terminal for any reason and for any length  
23 of time without regard to any shoreline permit, that virtually all Port facilities are cargo terminals where such  
24 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.

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

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

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

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

18 The Polar Pioneer is a twin-hull drilling platform that is semi-submersible and positioned  
19 for drilling through the use of thrusters and a complex mooring system. PSA Exh. 46 at 1-16 to -  
20 17. It has features unique to the drilling enterprise onboard, including pumps, a rotary drill rig,  
21 and a 170-foot oil derrick that supports the drilling apparatus. It stores supplies for drilling  
22 activities, such as drill bits and pipe, muds, cement, and chemicals. It also stores sophisticated  
23 equipment like blowout preventers to be deployed in the event of an oil spill, remote automatic  
24 release systems that can release anchors so the rig can be moved quickly out of the path of  
25 approaching sea ice, and a sophisticated weather station PSA Exh. 47 at 1-14; Gallagher Tr.

1 (Day 4) at 48-49; 60. It has rooms, like a sack room for mixing cement and chemicals together  
2 to get the chemistry for drilling muds right, which Mr. Gallagher analogized to making a cake,  
3 *id.* at 53, and various racks and bays for stowing drilling supplies so that they will be accessible  
4 when are needed for the drilling operations. *Id.* at 35, 46, 50-53; Foss Exh. 62 at 1; Exh. 63 &  
5 64.

6 Shell's Arctic drilling fleet contains other highly specialized vessels required as part of  
7 the federally approved plans for its drilling activities. PSA Exh. 46 & 47. Ice breakers are  
8 needed to clear sea ice, and anchor handlers are needed to position the drill rigs and move them  
9 out of harm's way as sea ice or the severe storms common in the Arctic approach. Gallagher Tr.  
10 (Day 4) at 130-31. One of the vessels that called at Terminal 5 – Aiviq – is a multi-purpose  
11 offshore vessel that serves as an ice breaker, anchor handler, tug, a helicopter pad, a floating  
12 hotel, and an oil spill response vessel that can deploy a containment boom and skimmer to  
13 recover oil from the water. PSA Exh. 47 at A-9; Gallagher Tr. (Day 4) at 23; *see also id.* at 22-  
14 23 (Tor Viking 2, which called at Terminal 5, is an ice breaker, anchor handler, and tug that  
15 recently rescued a vessel in distress). Ice breakers and anchor handlers are among the vessels  
16 that must remain in the vicinity of the drilling operation to be available as conditions necessitate.  
17 *Id.* at 136; PSA Exh. 46 at 13-4 to 13-6, 13-10.

18 Shell's federally approved and binding oil spill response plan obligates Shell to have  
19 more than 10 Shell-chartered oil-spill response vessels in the vicinity of the drilling operation or  
20 on call nearby to perform essential functions in the event of an oil spill. While blowout  
21 preventers, made infamous by the Deepwater Horizon catastrophe, are stowed on the drill rigs  
22 themselves, the oil spill response vessels carry other sophisticated emergency response  
23 equipment like capping stacks, containment domes, robots that assist in deploying blowout  
24

1 preventers, and ocean skimmer boats. Some, like the Aiviq, also carry supplies to be deployed in  
2 the event of a spill, such as containment booms and skimmer boats, and some are on call to burn  
3 or skim oil on the ocean's surface and store recovered oil. PSA Exh. 47 at A-2 to A-15;  
4 Gallagher Tr. (Day 4) at 132-37.

5 The Polar Pioneer is not a carrier hired to ship cargo. See Gallagher Tr. (Day 4) at 126  
6 (Polar Pioneer's principal purpose is to "drill[] holes for exploration"; "she's not a carrier, so she  
7 doesn't get paid by a third party to move cargo from port to port"). Even to the untrained eye, it  
8 would be impossible to mistake the Polar Pioneer for a cargo ship, as the photograph below  
9 shows.<sup>10</sup>



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

23  
24 <sup>10</sup> This image is cropped from Foss Exh. 104 at DPD000063.

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

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

14                  Foss has entered into a purchase contract with Shell that coincides with the two-year term  
15                  of the Foss lease for Terminal 5. Gallagher Tr. (Day 4) at 106-10. The purchase contract  
16                  obligates Foss to provide terminal dock facilities or slips, which Mr. Gallagher equated with  
17                  providing the facility for moorage. PSA Exh. 40 at FOSS\_00002; Gallagher Tr. (Day 4) at 111.  
18                  This year Foss did, in fact, provide moorage for the Polar Pioneer and more than half a dozen  
19                  other vessels in the drilling fleet. Gallagher Tr. (Day 4) at 20. While the drilling vessels did not  
20                  begin to arrive until April this year, the plan for next season is for them to arrive after the drilling  
21                  season ends in October-November and to stay until June of 2016. Foss Exh. 21 at RFP 4000975;  
22                  PSA Exh. 22 at CW-223.

23                  In its submission to the City, the Port compared the Shell homeport to the homeport on  
24                  Terminal 91 for the Alaska fishing fleet:

1 The Alaska drilling vessels to be hosted at Terminal 5 under the Foss lease are  
2 analogous to Alaska fishing industry vessels already hosted by the Port. Like the  
3 fishing vessels, the drilling and exploration vessels work in Alaska is seasonal,  
4 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.

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

11 At the hearing, Mr. Englin explained that when fishing vessels come into their homeport,  
12 “[t]hey repair and maintain every aspect of the vessel from the bridge to the keel, so the  
13 propulsion systems, the hydraulic systems, the electrical systems, the factories, the deck systems,  
14 the cranes . . . the hull structure,” including painting. Englin Tr. (Day 1) at 202. Harsh Arctic  
15 weather conditions and storms take their toll on these vessels, necessitating extensive off-season  
16 repairs and maintenance. When Mr. Englin identified the reasons why specific vessels were  
17 moored at Terminal 91 during select months in 2015, he described extensive repairs of  
18 mechanical and propulsion systems, servicing of navigation equipment, replacement of boilers,  
19 tank cleaning, and unspecified off-season repair, maintenance and servicing of many vessels.  
20 Englin Tr. (Day 1) at 201-204. Mr. Johnson, president of Glacier Fish Company, testified that,  
21 when his fishing vessels are at their homeport, his company conducts “maintenance, painting,  
22 sanding, grinding, lighter types of welding, factory repair, replacements of bearings, belting,  
23 things like that in the factory, cleaning the vessel, training our crews.” Johnson Tr. (Day 3) at 36.  
24 While some repairs must take place at a shipyard, vessels will conduct the full bridge to keel

1 maintenance and repairs – “[a]lmost anything and everything that doesn't require a haul out into  
2 a [. . .] dry dock” – at Terminal 91. Englin Tr. (Day 2) at 24. Mr. McLaughlin described an  
3 elaborate effort to repair the propulsion systems on the Polar Explorer using scaffolding and  
4 ballast to avoid the extra cost of going to a shipyard. McLaughlin Day 2 Audio (2 of 4) at  
5 0:34:45 – 0:36:39.

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

18 While the Port has tried to equate mooring the Polar Pioneer with the moorage of cargo  
19 ships that call at container terminals, the moorage is different in duration and the activities that  
20 take place. Container ships come and go on a schedule with the goal of spending little time idle.  
21 Lay berthing tends to be short-lived. Knudsen Tr. (Day 3) at 64, 75-76. When vessels return to  
22 their homeport, they tend to conduct regular servicing and turn to the backlog of repairs needed  
23 before the next season. Knudsen Tr. (Day 3) at 77-78.



1 Long-term moorage of the *Polar Pioneer* raises particular concerns because of its sheer  
2 size. When moored at Terminal 5, it juts further out into the West Waterway than the container  
3 ships that previously called at Terminal 5. Gallagher Tr. (Day 4) at 127-28. Vessels moored at  
4 Terminal 5 sit outside the outer harbor line and in waterways reserved by the state constitution  
5 for navigation. The Department of Natural Resources has questioned whether long-term  
6 moorage of the *Polar Pioneer* and associated vessels runs afoul of the constitution. Meyer Tr.  
7 (Day 3) at 84-85. Ms. Joerger, Puget Soundkeeper Alliance’s field director, testified that  
8 Soundkeeper has trained its staff to comply with a 100-yard Coast Guard exclusion zone around  
9 *Polar Pioneer*, which forces vessels heading south to move into the traffic lane normally reserved  
10 for vessels heading north. See Joerger Day 4 Audio (3 of 4) at 0:50:55 – 0:58:17 (describing  
11 potential safety risks in navigating around *Polar Pioneer*).<sup>11</sup> The potential interference with  
12 navigation and water safety provides further evidence that over-winter moorage of the *Polar*  
13 *Pioneer* is neither incidental nor intrinsic to cargo transshipment.

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

16 Shell and Foss entered into a purchase contract for the duration of the lease between Foss  
17 and the Port in which Foss “is responsible for the receipt, storage, staging, loading and unloading  
18 of all material used by [Shell] in the performance of its business.” PSA Exh. 40 at Foss 0003.  
19 Shell’s business, of course, is offshore exploratory drilling. Gallagher Tr. (Day 4) at 114-19,  
20 128-29. *Polar Pioneer* and other vessels that are part of Shell’s Arctic offshore drilling fleet

21 \_\_\_\_\_  
22 <sup>11</sup>Mr. Gallagher attempted to rebut Ms. Joerger’s testimony that the public would be affected by the safety zones  
23 around Shell vessels by pointing to a simulation conducted by Foss, the Port, the Coast Guard, and others before the  
24 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.

1 moored at Terminal 5 to be loaded with materials to be used in Shell's offshore exploratory  
2 drilling business. Gallagher Tr. (Day 4) at 114-19. All of the materials loaded onto the drill rig  
3 and associated vessels were loaded to be available to Shell during its drilling operations and for  
4 no other use. *Id.* at 118-19.<sup>12</sup>

5           These are the activities that Foss and the Port previously called provisioning and  
6 outfitting as part of over-winter moorage of the drilling fleet. DPD Exh. 23 at 6, 21 (Transcript  
7 of Jan. 13, 2015 Commission Meeting); DPD Exh. 24 at 6 (CW-104) (Staff Briefing Mem. for  
8 Jan. 13, 2015 Meeting). In its submission to the City, Foss characterized the materials handling  
9 activities that would take place at Terminal 5 as the type of provisioning that prepares vessels for  
10 their next journey: "The provisioning of Shell's vessels at Terminal 5 for use in Alaska will be  
11 no different from the provisioning of the fishing vessels that takes place every year at Terminal  
12 91, to prepare those vessels for use in the same Alaskan waters." Foss Exh. 19 at RFP  
13 4000964.<sup>13</sup>

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

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16  
17 <sup>12</sup> Mr. Gallagher initially qualified his answers, by suggesting that some of the items might not actually be used this  
18 season and would then be available for drilling at a later time, and that some might be used by a vessel supporting  
19 the operation, like the Blue Marlin, which transported Polar Pioneer to Washington State but did not go up to the  
20 Arctic. *Id.* at 113-18. Eventually, he conceded that all of the materials were being loaded onto the Polar Pioneer for  
21 the purpose of being used in the offshore drilling operation and for no other business purpose. *Id.* at 118-19.

22 <sup>13</sup> Neither the Port nor Foss called the new use a cargo terminal before the Port was trying to justify invoking SMA  
23 permitting and SEPA exemptions. In fact, when the Port asked Mr. Gallagher how the use of the property should be  
24 described in the letter of understanding for the lease, he said "Vessel supply base and storage depot," rather than  
25 cargo terminal. PSA Exh. 29. Both the letter of understanding and drafts of the lease just days before it was  
26 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).

1 word “cargo” to encompass anything that can be loaded onto a vessel or as Mr. O’Halloran, the  
2 Seattle branch agent of the Sailors’ Union of the Pacific, testified “anything that isn’t nailed  
3 down.” O’Halloran Tr. (Day 3) at 16; Gallagher Tr. (Day 4) at 9 (“cargo is a term that refers to  
4 lots of different things that get moved on vessels”).

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

- 6 1. Provisions “would be items the crew would use . . . food, laundry, you know,  
7 blankets, milk.” O’Halloran Tr. (Day 3) at 15.
- 8 2. Stores “would be items the vessel would need to operate” and “could be lube oils,  
9 engine room parts, radar, you know, electronic parts, whatever operational  
10 necessities the vessel needs. Any time a ship docks it has to load stores.” *Id.*
- 11 3. Gear “could be mooring lines, again, lubrication greases, paint, and anything else  
12 the vessel needs to operate.” *Id.* at 16. Later in the hearing, the term “gear” was  
13 used to refer to items used by the vessel to engage in its business, *e.g.*, fishing nets  
14 on a fishing vessel. Gallagher Tr. (Day 4) at 105.
- 15 4. Cargo would be what generates revenue for vessels engaged in the transshipment  
16 of cargo. A ship transporting diesel to a tank farm would be shipping diesel as  
17 pay cargo; a ship loading diesel to consume in its voyage would be loading stores.  
18 O’Halloran Tr. (Day 3) at 22-24. As another example, Mr. O’Halloran explained  
19 that APL, which ran the container terminal at Terminal 5, is a shipping company  
20 that ships cargo from one place to another for a fee; it does not use the cargo as its  
21 provisions, stores, or gear. *Id.* at 25-26.

22 Mr. Johnson explained that the fishing industry loads and unloads “supplies and  
23 provisions in support of the vessels, and then we have the production itself that – of the vessel,  
24 which is frozen fish that we produce from . . . harvest.” Johnson Tr. (Day 3) at 33, 39-40.  
25 Almost all of the fish product is unloaded as frozen fish in Alaska for shipment by break bulk  
26 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

1 he also called “cargo for carriage.” Knudsen Tr. (Day 3) at 52, 54. He elaborated on the  
2 meaning of “paying cargo” calling it “cargo that’s there for hire” and explained that it would be  
3 cargo “someone has paid you to put on your vessel and move it to another location and take it  
4 off.” *Id.* at 73. When asked whether vessels loaded up with container cargo would use the cargo  
5 inside the containers in transit, he responded: “Not unless they are pirates.” *Id.* at 74. His  
6 response clarified the clear industry differentiation between transshipment of paying cargo by  
7 carriers for a fee and loading vessels of any type with provisions, stores, and gear to be used in  
8 their voyages and business operations.<sup>14</sup>

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

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

- 18 1. Provisions – “if it’s things consumed by the crew, it would be groceries, paper  
19 towels, laundry soap, things like that along those lines.” *Id.* at 143.
- 20 2. Stores “are generally referred to as things go on the shelf and will be used over  
21 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

22 <sup>14</sup> Mr. Meyer agreed that the bulk lumber, steel, and construction materials shipping operations at Terminal 5  
23 transshipped cargo from one location to another, but then went so far as to suggest that the ships might use the  
24 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.

1 people would argue that lubricating oils and WD-40, that those would be stores as  
2 well that would get loaded.” *Id.*

- 3 3. Gear - Mr. Gallagher testified that “the other things that were loaded were to be  
4 used in the drilling enterprise. They were cargo that we loaded to put on board so  
5 that it can be used to perform the mission of the vessel.” *Id.* at 144. Gear would  
6 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.

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

12 None will be transshipped and delivered to some other entity for a fee. *Id.*<sup>15</sup>

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

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

21  
22 <sup>15</sup> In questioning witnesses, the Foss attorneys focused on the fact that drill casings might be left in the ground and  
23 chemical-laden drill muds might be disposed and left in the ocean. But the drill casings would be left only with the  
24 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.

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

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

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

22 Similar to compliance requirements at all port marine cargo terminals, continuing  
23 Terminal 5 marine cargo operations must be consistent with prior approvals and  
24 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.

1 PSA Exh. 20 at CW-162. At the hearing, he testified that the Port might need to apply to the  
2 City for approval of an additional use if the DPD interpretation is upheld and the term “cargo  
3 terminal” does not encompass the use of Terminal 5 under the Foss lease. Meyer Tr. (Day 3) at  
4 70-73.<sup>16</sup>

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

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

21  
22  
23 <sup>16</sup> The Port obtained an exemption from shoreline permitting requirements for replacing the bollards at Terminal 5.  
24 The Port did not ask the City to determine whether the Foss lease constituted a change of use, *see* Blomberg Tr.  
25 (Day 4) at 21, 23, 26, 32-33, and the City conditioned the shoreline exemption by providing that “[n]o change in use  
26 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.

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

10 Mr. Meyer also argued that loading pipes onto a drill rig is not a “commercial” use.  
11 Meyer Day 2 Audio (4 of 4) at 1:01:00 – 1:11:45. However, the word “commercial”  
12 distinguishes “commercial” from “recreational marinas” in the SMP. Under the SMP,  
13 commercial and recreational marinas are defined separately. *See* SMC 23.60A.926. Mr.  
14 Gallagher understood that calling vessels “commercial” means they are different from  
15 recreational vessels, Gallagher Tr. (Day 4) at 90, and Mr. Knudsen testified that commercial  
16 vessels are “used in some kind of business-related activity.” Knudsen Tr. (Day 3) at 70.  
17 Moreover, only 75% of a commercial moorage must be taken up by commercial vessels. SMC  
18 23.60A.926(“Marina, commercial”)(1). Word-smithing aside, it would strain credulity to  
19 conclude that Foss’s activity pursuant to its purchase contract with Shell – mooring and loading  
20 materials onto the Polar Pioneer for use in Shell’s offshore drilling operation – could be  
21 characterized as anything other than a commercial activity. Moorage of these vessels and the  
22 associated maintenance, repair, and outfitting activities constitute a plain vanilla commercial  
23 marina use.



1 Properly classifying the use category for Terminal 5 matters because a shoreline permit  
2 must mitigate harm to shorelines, the environment, and public access from the use. After  
3 extensive review of environmental and community impacts, the prior shoreline permit imposed  
4 conditions to lessen community and shoreline harm from container terminal operations, focusing  
5 for example on lighting, noise, and train and truck traffic. Foss Exh. 33 at 2. The focus of that  
6 permit did not include the impacts from homeporting the drill fleet, which will entail longer-term  
7 moorage and more extensive vessel repairs and maintenance in the off-season than when  
8 container ships called at Terminal 5 to load and unload. Blomberg Tr. (Day 4) at 35-37. The  
9 commercial marina use identifies vessel repair as an accessory use, and presumably the permit  
10 writer would impose conditions to reduce environmental harm from such activities. In writing a  
11 new permit to cover the over-wintering moorage of the drill rig, the City would also address  
12 obstruction of navigation in the West Waterway from mooring Polar Pioneer there. The 1995  
13 shoreline permit never addressed this issue since it found that “[n]o part of the proposal, once  
14 completed, would present hazards or obstructions to navigational channels.” Foss Exh. 33 at  
15 65.<sup>17</sup> These and other novel or intensified impacts from homeporting the drill rig at Terminal 5  
16 should be considered and subject to conditions in the shoreline permitting process to protect  
17 shoreline and public resources.

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21 <sup>17</sup>Terminal 91 has been used for commercial moorage, quite apart from cargo terminal activities, since at least 1998.  
22 PSA Exh. 2 at 4. Terminal 91 is located entirely within the outer harbor line, while Terminal 5 ends at the outer  
23 harbor line, meaning ships moored at Terminal 5 are in the West Waterway, which is a water highway designated as  
24 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.

1 CONCLUSION

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

10 DATED this 10th day of September, 2015.

11 

12 PATTI A. GOLDMAN, WSBA No. 24426

13 MATTHEW R. BACA, WSBA No. 45676

14 Earthjustice

15 705 Second Avenue, Suite 203

16 Seattle, WA 98104-1711

17 (206) 343-7340 | Phone

18 (206) 343-1526 | Fax

19 pgoldman@earthjustice.org

20 mbaca@earthjustice.org

21 *Attorneys for Intervenors Puget Soundkeeper*

22 *Alliance, Seattle Audubon Society, Sierra Club*

23 *and Washington Environmental Council*

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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of:	)	Hearing Examiner File No. S-15-001
	)	(DPD Project No. 3020324)
FOSS MARITIME COMPANY	)	
	)	
from an Interpretation by the Director, Department	)	
of Planning and Development.	)	
	)	
	)	
	)	Hearing Examiner File No. S-15-002
In the Matter of the Appeal of the:	)	(DPD Project No. 3020324)
	)	
PORT OF SEATTLE,	)	
	)	DECLARATION OF SERVICE
from Interpretation No. 15-001 of the Director of	)	
the Department of Planning and Development.	)	
	)	

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:

1 John C. McCullough  
MCCULLOUGH HILL LEARY, PS  
2 701 – 5th Avenue, Suite 6600  
Seattle, WA 98104  
3 (206) 812-3388 | Phone  
(206) 812-3389 | Fax  
4 jack@mhseattle.com  
*Attorney for Appellant Foss Maritime Company*

- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner E-File System
- via e-mail

5 David R. West  
6 Donald B. Scaramastra  
Dan Vecchio  
7 GARVEY SCHUBERT BARER  
1191 Second Avenue, 18th Floor  
8 Seattle, WA 98101-2939  
(206) 464-3939 | Phone  
9 (206) 464-0125 | Fax  
drwest@gsblaw.com  
10 dscar@gsblaw.com  
DVecchio@gsblaw.com  
11 *Attorneys for Appellant Foss Maritime Company*

- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner E-File System
- via e-mail

12 Eleanore S. Baxendale  
Assistant City Attorney  
13 SEATTLE CITY ATTORNEY'S OFFICE  
701 Fifth Avenue, Suite 2050  
14 Seattle, WA 98104-7097  
(206) 684-8232 | Phone  
15 (206) 684-8284 | Fax  
eleanore.baxendale@seattle.gov  
16 *Attorney for Respondent Department of Planning  
and Development*

- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner E-File System
- via e-mail

17 Traci Goodwin  
18 Senior Port Counsel  
PORT OF SEATTLE  
19 PO Box 1209  
Seattle, WA 98111  
20 (206) 787-3702 | Phone  
(206) 787-3205 | Fax  
21 goodwin.t@portseattle.org  
*Attorney for Appellant Port of Seattle*

- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner E-File System
- via e-mail

1 Patrick J. Schneider  
Adrian U. Winder  
2 FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3400  
3 Seattle, WA 98101-3299  
(206) 447-4400 | Phone  
4 (206) 447-9700 | Fax  
schnp@foster.com  
5 winda@foster.com  
*Attorneys for Appellant Port of Seattle*

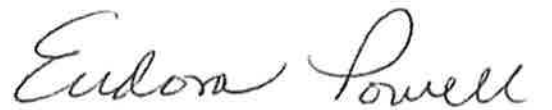
- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner
- E-File System
- via e-mail

6  
7 Joshua C. Allen Brower  
Molly K. D. Barker  
VERIS LAW GROUP PLLC  
8 1809 Seventh Ave., Suite 1400  
Seattle, WA 98101  
9 (206) 829-9590 | Phone  
(206) 829-9245 | Fax  
10 josh@verislawgroup.com  
molly@verislawgroup.com  
11 *Attorneys for Intervenors Alaska Marine Lines;*  
*American Seafoods Company; American Waterway*  
12 *Operators; Arctic Fjord, Inc.; Arctic Storm, Inc.;*  
*Ballard Oil Company; Crowley Maritime Corporation;*  
13 *Glacier Fish Company; Premier Pacific Seafoods;*  
*Sailors' Union of the Pacific; SSA Terminals, LLC;*  
14 *Transportation Institute and Vigor Industrial LLC*

- via legal messenger
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Hearing Examiner
- E-File System
- via e-mail

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

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

18  
19   
20 EUDORA POWELL, Litigation Assistant

# **ATTACHMENT 1**

# Oxford English Dictionary | The definitive record of the English language

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## incidental, *adj.* and *n.*

**Pronunciation:** /ɪnˈsɪdɪntəl/

**Etymology:** < INCIDENT *n.* + -AL *suffix*<sup>1</sup>. Compare modern French *incidentel*.

### 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 Privateers undertake the passage.
- 1736 BP. J. BUTLER *Analogy of Relig.* II. Concl. 291 In Scripture, whether in incidental Passages, or in the general Scheme of it.
- 1790 W. PALEY *Horæ Paulinæ* Rom. ii. 19 A circumstance as incidental, and as unlike design, as any that can be imagined.
- 1871 B. JOWETT in tr. Plato *Dialogues* II. 14 The simple and apparently incidental manner in which the last remark is introduced.
- 1876 E. MELLOR *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 expence, 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. PEARD *Pract. 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.

1876 J. BERNSTEIN *Five Senses* 120 The incidental colours..which are formed in the eye, are most interesting.

**2. incidental to:** liable to happen to; to which a thing is liable or exposed. **incidental upon:** following upon as an incident.

1616 CORYAT in J. Taylor *Wks.* (1630) II. 83 If I should happen to be destitute; a matter very incidentall 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. INGLIS *Tent Life Tigerland* 148 The dangers incidental to pigsticking.

### 3.

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

1856 J. CUMMING *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. ELIOT' *Daniel Deronda* III. v. xxxviii. 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.*<sup>1</sup> 7. *Obs. rare.*

1813 T. BUSBY 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.

## COMPOUNDS

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).

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# Oxford English Dictionary | The definitive record of the English language

## intrinsic, *adj.* and *n.*

**Pronunciation:** /ɪnˈtrɪnsɪk/

**Forms:** ME–16 *intrinsique*, (ME *intrynsique*), 15 *intrynsyke*, 16 *intrinsike*, *intrinsicke*, *intrinseque*, *intrinsec(k)*, 16–17 *intrinsick*, 16– *intrinsic*.

**Etymology:** < French *intrinsèque* (13–14th cent. in Godefroy *Compl.*), < medieval Scholastic Latin *intrinsecus* adjective (Fr. Mayron *a1325*; Herveus Natalis *a1322* has an adverb *intrinsece* : 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 edyfyces *intrinsique* of y<sup>e</sup> cyte.
- ?1541 R. COPLAND *Guy de Chauliac's Questyonyary Cyrurgyens* ii. sig. Cij<sup>v</sup>, How many maners of skynnes or lether 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 Cycl. 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. ALLBUTT 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. *Eneydos* xix. 71 By gret yre gadred by inmenge sorow intrysique wythin her hert.  
 1605 BACON *Of Advancement of Learning* i. sig. F4<sup>v</sup>, There are..other..peccant humors..not so secret and  
 intrinsike, but that they fall vnder a popular obseruation.  
 1658 *Hist. Mem. K. James* 66 Not only..the publick but most intrinsick actions of the State.  
 1689 Bp. G. BURNET *Tracts* I. 16 When there are Intrinsic diseases in a state.

†b. Intimate. *Obs.*

- 1613 A. SHERLEY *Relation Trav. Persia* 65 We must haue a more intrinsicke acquaintance to perfect  
 that knowledge.  
 1651 J. SAINT-AMARD tr. F. Micanzio *Life Father Paul* p. liii, in P. Sarpi *Hist. Council of Trent* (1676)  
 The General of the Servi..being an intrinsick friend of the Fathers.

3.

a. Belonging to the thing in itself, or by its very nature; inherent, essential, proper; 'of its own'.

*intrinsic 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 Sermon*. III. 57 As if every such single Act could by its own Intrinsick Worth merit  
 a glorious Eternity.  
 1691 J. LOCKE *Money in Wks.* (1727) II. 67 The intrinsick Value of Silver consider'd as Money, is that  
 Estimate which common Consent has placed on it.  
 1693 R. BENTLEY *Boyle Lect.* VII. 25 By an intrinsec [1699 intrinseck] Principle of Gravity or Attraction.  
 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.

1862 WALTON in *Q. Jrnl. Math.* V. 260 (*title*) On the Discontinuity of the Intrinsic Equations to Curves.

**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<sub>12</sub> ('extrinsic factor').

1930 *Amer. Jrnl. 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<sup>12</sup> deficiency through lack of intrinsic factor (I.F.), as in pernicious anæmia, has stimulated efforts to purify and isolate I.F.

1965 A. DOSCHERHOLMEN *Stud. Metabolism Vitamin B<sub>12</sub>* 4 The intrinsic factor has not yet been isolated in pure form., but it is believed to be a mucoprotein or mucopolypeptide... 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 *Jrnl. 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.

1962 J. H. SIMPSON & R. S. RICHARDS *Physical Princ. Junction Transistors* viii. 167 The region near the

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.
- a1734 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).

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# **ATTACHMENT 2**

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

INCIDENTAL

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Abbreviations

**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>.

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

INTRINSIC

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Abbreviations

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

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