BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File: **S-15-001 and S-15-002**
FOSS MARITIME COMPANY	DEPARTMENT OF PLANNING AND DEVELOPMENT'S RESPONSE TO APPELLANTS' CLOSING ARGUMENTS
from an interpretation by the Director, Department of Planning and Development.	

The issue in this case is simple: is loading "stores, provisions and gear" onto the Polar Pioneer and its assisting vessels consistent with the cargo terminal use permitted at Terminal 5? Because the definition of cargo terminal states that "goods" at a cargo terminal are there in order to transfer them to another location, the answer must be no. Stores, provisions and gear are cargo that a ship consumes or uses on the ship's own mission – vessels can load these items from any use that has a pier. Therefore, the Interpretation correctly determines that to be consistent with the cargo terminal use a vessel must load something other than stores, provisions and gear. The evidence in the hearing shows such goods are called "paying cargo." That is the cargo that is transferred to another location. The evidence clearly supports upholding the Interpretation, and no argument in Appellants' post-hearing briefs shows they have met their burden to show the Interpretation is clearly erroneous.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

To decide this appeal, the Examiner need only consider the meaning of the definition "cargo terminal" and the scope of the permit for Terminal 5. No evidence in the record shows DPD determined that general moorage is within the scope of the cargo terminal use[1] – not the Port's business practices, not the permits for Terminal 91, not the pictures the Port introduced. The permit for Terminal 5 was based on Shoreline District Guideline E8 (a) for "cargo handling facility," not E8(d) "moorage."[2]

I. THE INTERPRETATION IS NOT ABOUT THE FISHING FLEET AT TERMINAL 91 OR CARGO VESSELS AT TEMINAL 18

Appellants and T-5 Intervenors, particularly, argue the Interpretation will have unintended, serious consequences for activities the Interpretation does not even address and that are outside the narrow scope of this appeal for Terminal 5. These arguments unduly complicate the real issue in this appeal.

The reasons why provisioning an oil rig at Terminal 5 is not a cargo terminal use have nothing to do with whether the permits for Terminal 91 allow the fishing fleet to moor there;[3] nor does the Interpretation address whether a cargo vessel that is not loading cargo at Terminal 18 may moor there while in transit to pick up cargo elsewhere.[4] These are different hypotheticals

---

[1] The Environmental Intervenors state it has been "officially recognized" that Terminal 91 is "devoted to commercial moorage." Foss Post–hearing Brief, p. 17: 13-21. But nothing in the record shows that is part of the container cargo terminal permit, or what DPD permit authorizes general commercial moorage.

[2] DPD Ex. 4, Resolution 27618, Attachment A, p. 26-27.

[3] In fact, McKim testified that he did not have all of the facts needed to make a determination about the hypotheticals he was asked about the fishing vessels and trawlers (Attachment K, McKim 8/13, p. 150:7-23), stated his testimony about the fishing fleet was an off the cuff remark when made at his deposition (Attachment K, McKim 8/13, p. 81:12 to 82:9), that it would need more analysis (Attachment K, McKim 8/13, p. 84:12-19); and stated it would take some effort to determine what is allowed at Terminal 91 (Attachment D to DPD's Closing, McKim, p. 137:18 to138:19).

[4] At the hearing McKim testified that the lay berthing at cargo terminals should be for cargo terminal vessels that actually had been loading and unloading at the site, and otherwise should be at commercial moorage (Attachment K, McKim 8/13, p. 58). But this is extraneous to this appeal, because the Interpretation concerns an oil rig and vessels DPD determined were not cargo terminal vessels at all. The Interpretation is more limited; it states, "We accept that lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal." Conclusion 11 (part).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

raised by Appellants that the Examiner does not need to address in order to resolve this appeal.

The Interpretation says (1) an oil rig carrying drilling equipment is not a cargo vessel, and the accompanying vessels carrying provisions for themselves and the oil rig are not cargo vessels; (2) vessels that are not cargo vessels may not moor at Terminal 5 for either loading or lay berthing. Terminal 5 only has a permit for cargo terminal and not for commercial or other moorage. The facts of the Interpretation are specific to the permit for Terminal 5 and to the oil rig and accompanying vessels that propose to overwinter there. The Interpretation, itself, does not have the expansive result Appellants claim.

Appellants claim it will wreak havoc on the maritime industry to apply the Interpretation's "logic" that a use permit controls what may happen at a site. But this precept assuredly applies to all permits and is nothing new. This is why the City regulates uses, particularly in the Shoreline District to implement the goals of the Shoreline Management Act. To the extent the Port, Foss and T-5 Intervenors are up in arms over DPD's position that a permit limits the scope of activities at a site, they are decrying well established law.[5]

Questions about other uses at other sites under other permits must be aired in a different forum.

II. FOSS ARGUMENTS

A. DPD's Non–existent "Admissions"

Foss's argument is laced with repeated claims that DPD Planner McKim made "admissions" at the hearing that show the oil rig and accompanying vessels are cargo vessels within the scope of the definition of cargo terminal. This characterization deserves no weight – the Examiner will determine the facts in this case, regardless of DPD "admissions." And, the

[5] *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed 303 (1926).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

record shows McKim "admitted" nothing material to this case. The Examiner should reject Foss's claims. The real admission in this case is by the Port – that it moors non-cargo vessels at cargo terminals because the Port hasn't provided adequate commercial moorage for them.[6]

1. Goods

Foss claims that McKim testified that "pictures of tubulars, pipes, and other materials loaded on to the Polar Pioneer and other vessels are goods,"[7] and that "myriad types of goods would be loaded and unloaded on to the various vessels" and "the City admitted that all of these materials are considered goods,"[8] citing McKim 8/13 at 53:14 to 54:12 or 54:25. These claims are incomplete representations of the testimony and grossly exaggerate McKim's actual testimony.

The Interpretation (Finding 12) cites a definition of goods with two senses:

> **3 . . . b** *pl* **:**personal property having intrinsic value . . .
> **d** *pl* **:** WARES, COMMODITIES, MERCHANDISE <canned ~s>

McKim was asked to look at Foss Ex. 61 (initially marked Ex. 14) and testified that he saw a lot of items that "could" be goods.[9] Mr. West then asked him to look at page 1 of Exhibit 61, and McKim agreed these were "tubular items" that he assumed to be "pipe."[10] He then testified that the "tubular items" "could be wares, commodities or merchandise" (the **3d** sense of definition) and that they were "at least something that has economic value" (under the **3b** sense).[11] West represented to McKim that the **3b** sense was the sense used in the Interpretation, McKim questioned that, West said that was so, and McKim agreed the tubular items were goods

---

[6] Foss Ex. 22 (Port lay berthing letter), p. W-217 (last paragraph) to W-218. *See*, Section I.B, re: Bullet 7.
[7] Foss Post-hearing Brief, p. 6: 20-22; p.19: 27-28.
[8] Foss Brief, p. 29:1-2; p.29:28 to 30: 2; p. 19:27-28.
[9] Attachment K, McKim 8/13, p. 52:2; and p. 52:17-18.
[10] Foss Exhibit 61 at p. 1; Attachment K, McKim 8/13, p. 53:10-13.
[11] Attachment K, McKim 8/13, p. 52:23-25, emphasis added.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

under "that definition,"[12] He then clarified that the tubular items "would qualify as goods under one of those definitions."[13] This is hardly the sweeping "admission" that goods generally or "myriad of types of goods" are goods under the complete definition, as Foss claims. McKim said tubular items were goods and then only under the **3b** sense of "personal property with intrinsic value and that pipes "could" be goods in the **3d** sense of "commodities, wares and merchandise."

Later Mr. McKim clarified that his understanding of "goods" with respect to the cargo terminal use is the **3d** sense, and he specifically excluded pipes used by the Polar Pioneer from "goods."[14]

Foss argues that the final Interpretation improperly used a definition of goods that differed from the definition in the first draft. The first draft cites the more general definition **(3b)**, and the final Interpretation adds the more specific contextualized definition **(3d)**. Foss decries this as "cherry picking the favorable parts" of the definition and asserts the definition must be examined as a whole, citing *State v. Elgin,*[15] but that case says nothing whatsoever about dictionary definitions. In fact, the Washington Supreme Court confirms that words should not be read to consider all possible meanings in the dictionary definition, but should be defined in the sense that is consistent with the intent of the statute being interpreted.[16] In this case, the more specific definition is the more appropriate. "Goods" under section **3b** would include "stores, provisions and gear," which are loaded onto all vessels at any site with moorage. "Goods" under **3d** differentiates the "goods" in the cargo terminal definition from the **3b** types and is

---

[12] Attachment K, McKim 8/13, p. 54:1-12, emphasis added.
[13] Attachment K, McKim 8/13, p. 54:21-25, emphasis added.
[14] Attachment K, McKim 8/13, p. 146:2 to 148:6.
[15] Foss Post-hearing Brief at 31:20-27.
[16] *State v. Lilyblad,* 163 Wn.2d 1, 9, 177 P.3d 686, 690 (2008); *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094, 1100 (2002).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

appropriate because it is linked to "transfer to other places," which is the code purpose for cargo terminals. Foss offers no reason why using this particular definition is wrong.

2. Containers

Foss repeatedly claims McKim admitted that the containers in Foss's photos were "containers" in the sense of the cargo terminal definition and that they were loaded onto the oil rig and vessels,[17] citing McKim 8/13, p. 52:21 to 53:9 and p. 54:13-25. All McKim says is goods are in what appear to be containers, generically. He did not testify these were the type of containers used in the definition's phrase "container cargo" or that the containers were consistent with the definition of "containerized cargo" in SMC 23.60.906, which has particular dimensions (8' x 8'x 20') that these boxes lack. "Container cargo" is used in the trade to mean something more than just something that is not loose cargo, but come in standardized sizes.[18] McKim never "admitted" these photos were container cargo in that sense.

3. Cargo loading activities and transfer

Foss repeatedly claims McKim admitted that the oil rig and vessels were engaged in cargo loading or unloading activities or were "transferring goods" consistent with the definition of cargo terminal,[19] citing McKim 8/13, p. 77:15-23 and p. 74:13 to 75:25 or 76:5. In fact, McKim's testimony is exactly the opposite.

Foss asked McKim whether laying pipe in the ocean floor was transferring material to another location.[20] McKim did not "admit" that it was: first, he testified, "in a broad sense, yes," which is the part cited by Foss. But when pressed in the questions immediately following

---

[17] Foss Post-hearing Brief p. 9:16-17; p. 22:2-3; p. 30:4-5.
[18] Attachment L, Knudsen, p. 74:20 to 75:10.
[19] Foss Post-hearing Brief, p. 6:1-3; p. 6:25 to 7:2; p. 9: 25-26; p. 10:1-2; p. 13:7-8; p. 29:3; p. 30:12-15.
[20] Attachment K, McKim 8/13, p. 77:15-23.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

whether this was transferring them in the sense of the cargo terminal definition, McKim replied, "No," twice in a row.[21] Foss omits this in its brief.

Also, McKim's alleged "admission" that the oil rig's support vessels primarily function as cargo vessels and are delivering cargo to the oil rig is based on Foss's inaccurate hypothetical. Initially, Mr. West asked McKim to assume generic "offshore supply vessels that are used to supply materials to off shore facilities and they transport these materials from all over the world." He asked whether such a vessel had the "primary function of moving cargo and goods from one place to another," and McKim said yes. McKim testified that would be the primary function for barges, as well. He also said that if the goods were delivered to an oil rig, the vessels' primary function would be consistent with the cargo terminal use. But Foss's hypothetical was not an accurate description of the vessels'/barges' function in this case, as the testimony of Foss's Paul Gallagher shows.

McKim responded to questions about vessels and barges as independent vessels; but Gallagher testified the primary – the only – function of these support vessels is to support the oil drilling operation;[22] their activities are not independent from the drilling. West did not ask McKim to assume these vessels and barges were part of the same operation as the oil rig. But, when presented later with that scenario, McKim answered differently. He testified that it would make sense to look at the fleet as a whole and not at what individual vessels were loading, and in that circumstance "the ultimate purpose being served was the drilling rather than the delivery of goods,"[23] just as Gallagher testified. McKim made no "admission" that these vessels were transporting goods. This same reasoning applies to Foss's assertion that McKim testified goods

[21] Attachment K, McKim 8/13, p. 77:25 to 78:11.
[22] Attachment J to DPD Closing, Gallagher, p. 118:25 to 119:13.
[23] Attachment K, McKim 8/13, p. 150:25 to 152:20.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

would be transferred if stores, provisions and gear were loaded and offloaded between the Polar Pioneer and the assisting vessels while at the drilling site.[24] They are all on the same drilling mission.

Foss also repeatedly contends that McKim "admitted" "goods" were transferred,[25] citing McKim 8/13, p. 156:18 to 157:2. But in fact, in that testimony McKim spoke only about pipes put in the ground in Alaska as part of the drilling process, and he clarified in the very next question that the pipes were not being transferred in the sense of changing ownership – "it is still their own, they have just placed it there."[26]

B. The Interpretation includes all relevant facts

Foss contends the Interpretation is erroneous because it considers "a fraction of the activities occurring at Terminal 5 – namely the proposed overwintering of the oil rig and two accompanying barges – rather than considering the full scope of Foss Operations."[27] The information the Interpretation sets out is consistent with the full scope of "Foss Operations" for this project in all material respects: receiving and loading stores, provisions and gear[28] onto the oil rig and vessels, which would consume or use those materials to achieve their collective mission. The Interpretation concluded these materials were not "goods" in the sense of the cargo terminal definition, and they were not stored or loaded "in order to transfer them to other locations." The Interpretation accurately reflects the relevant elements of "Foss Operations."

---

[24] Foss Post-hearing Brief, p. 26:4-13.

[25] Foss Post-hearing Brief, p. 19:28 to 20:1-2 (re: "goods"); p. 25:15-28 (re: pipe and tubulars); p. 29:3 (re: "goods"); p. 30:14-15 (re: "goods"). *See also,* Section II.A.3 re: Foss's erroneous claims of admitting "goods were transferred" based on other testimony.

[26] Attachment K, McKim 8/13, p. 157:3-5.

[27] Foss Post-hearing Brief, p. 10:16-20.

[28] The Interpretation referred to them as drilling equipment on the Polar Pioneer (Interpretation, Conclusion ¶ 5) and "provisions" (Interpretation, Conclusion ¶ 7).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Foss then sets out a list of omissions and errors[29] in the Interpretation in an attempt to carry its burden that the Interpretation is clearly erroneous – but the Interpretation omits nothing material to its conclusion.

Bullet 1 - Foss claims that its letter to DPD explained a whole fleet of vessels would be present at Terminal 5. Whether there were two vessels, or eight, or a "fleet" is immaterial to whether these vessels' activities are consistent with the definition.

Bullet 2 - Foss claims DPD ignored Foss's characterization of what was loaded. That begs the question whether Foss's description was accurate. DPD's conclusions in the Interpretation was that the items loaded were "provisions" on the tugs (Conclusion ¶ 7) and drilling equipment on the oil rig (Conclusion ¶ 5). The description Foss provided - "goods, cargo, equipment, supplies, stores, provisions and other materials"[30] was broader than what was listed in the Interpretation, but at the hearing the evidence of what was actually loaded is consistent with the Interpretation. The material fact is everything that Foss identified as loaded was loaded for the vessels' and oil rig's own use, regardless of whether they fall into the category of "stores" or "gear" as well as "provisions."

Bullet 2 – Foss claims DPD incorrectly assumed that only equipment was loaded onto the oil rig (Interpretation, Conclusion ¶ 5). This is immaterial because, again, equipment is "gear," used by the oil rig in its mission, and the testimony showed everything loaded onto the oil rig was similarly used by the rig (even if it included stores and provisions, as well as gear), not for other purposes.

Bullet 2 – Foss claims DPD admitted all the things that were loaded were "goods," but DPD did not. *See*, Section A.1 above.

---

[29] Foss Post-hearing Brief, pp. 29 to 30.
[30] Foss Ex. 21, emails and Foss letter, p. 2 (RFP 4000974), 2nd full paragraph.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Bullet 3 (or #1 on p. 30) – Foss claims DPD did not verify that "in fact" a substantial number of containers were loaded. This is not material, because the evidence shows the SMP has a specific definition of "containers" (SMC 23.60.906), different from the boxes Foss employed and containers are specialized.[31] DPD did not admit such containers constitute "container cargo." *See*, Section A.2, above. Moreover, the contents of the boxes were materials for the vessels' and oil rig's own use, not the "goods" in the cargo terminal definition.

Bullet 4 – Foss claims the Interpretation erroneously failed to acknowledge that what would occur on the oil rig during its seasonal storage was demobilization and mobilization – loading and unloading. Again, such loading and unloading does not change the result, given the nature of the materials that were loaded/unloaded – stores, provision and gear (including submarines and trash) – were materials used by the rig itself for its drilling mission.

Bullet 5 – Foss says DPD incorrectly assumed that the material that was loaded onto "vessels supporting the Foss Operations" would not be transferred to other locations. On the contrary, DPD correctly categorized the materials loaded onto other vessels as "provisions" in the sense that they are materials the vessels and rig would use or consume themselves for their mission. Foss's claim that DPD admitted the "goods were transferred to other locations" is wrong. *See*, Section A.3, above.

Bullet 6 – Foss claims DPD ignored historical operations at Terminal 5 and other cargo terminals and Port facilities. No evidence of "historical operations at Terminal 5" shows exploratory oil rigs and assisting vessels have operated at Terminal 5 or that any activity at Terminal 5 has been other than transferring goods in the sense of definition **3d**. The sole exception in the record is a recent order from the Coast Guard to allow a vessel to be repaired

[31] Attachment L, Knudsen, p. 74:20 to 75:10.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

there. No evidence shows DPD has approved mooring non-cargo terminal vessels at "other cargo terminals."[32] And, evidence of what happens at "other Port facilities" is irrelevant.

Bullet 6 - Foss claims the evidence shows the City's misunderstanding of how maritime businesses operate in Seattle and throughout the world. How "maritime businesses" operate is irrelevant – the issue in this case is the meaning of "cargo terminal." Whether other businesses "operate" consistent with that definition has no bearing on what the definition means. And, the question is the meaning of the definition of "cargo terminal" in the Seattle Land Use Code, not worldwide.

Bullet 7 – Foss contends Foss told DPD that lay berthing for "vessels of various types" occurs at cargo terminals, but DPD ignored that information. The Interpretation acknowledges the Port provided this information about its facilities (Interpretation, Finding ¶ 5), so it was not ignored.

Foss then says (without citation) that McKim acknowledged he had no evidence to support ignoring that information. But the nature of the information, itself, shows its irrelevance to the Interpretation. Regardless of whether the Port or Foss factually reported the Port's lay berthing activity, the issue is whether such lay berthing is consistent with a permit for cargo terminal use. The Port's explanation for providing this lay berthing was not that it was part of the cargo terminal permit, but rather the unavailability of commercial marinas (due to Port's failure to apply for permits for this use at suitable sites): "Commercial marinas in the Seattle area typically lack the necessary physical infrastructure to safely moor these vessels" and "large ocean going vessels cannot access commercial marinas in Lake Union and Lake Washington"

[32] *See*, DPD Closing, Section IV E.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

due to the vessels' size.[33] The Port's rationale has nothing to do with lay berthing being allowed under a cargo terminal permit, and confirms that commercial moorage is the correct use for sites providing lay berthing to non-cargo terminal vessels. This is the real admission in this case. The Port needs to apply for the appropriate permits.

McKim correctly determined that vessels that are cargo vessels may lay berth at a cargo terminal; since the oil rig and its attendant vessels are not cargo vessels, because they carry only materials that are consumed by the rig and ships on their drilling mission (equipment on the oil rig and provisions on the tugs), an additional permit is needed for them to lay berth. As noted in Section I above, other questions, such as whether other Port facilities have permits authorizing additional lay berthing or whether lay berthing is allowed for vessels that are cargo vessels that are passing through, are questions outside the scope of the appeal of this specific Interpretation.

Foss has failed to show the Interpretation was erroneous based on these contentions. Further, DPD is not required to reconfirm its Interpretation at the hearing, as Foss contends.[34] The burden is on Appellants, and the Examiner's determination is de novo. SMC 23.88.020.G.

C. Foss's arguments fail to carry its burden

Foss makes a variety of other arguments that the Examiner should reject.

1. Shell charters are not independent cargo terminal activities

Foss asserts the Aviq and the Harvey vessels are "cargo vessels" because they loaded materials at Terminal 5 that were "transferred" to other locations in Everett and Port Angeles.[35] But, the testimony Foss cites shows that these trips were to bring supplies to the Polar Pioneer in Port Angeles and to the Noble Discoverer, another exploratory oil rig, in Everett. Therefore,

---

[33] Foss Ex. 22 (Port lay berthing letter), p. W-217 (last paragraph) to W-218.
[34] Foss Post-hearing Brief, p. 31, lines 1-3.
[35] Foss Post-hearing Brief, p. 6 lines 3-7.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

these trips were all part of the same exploratory oil drilling mission, and not independent cargo terminal activities.

Foss also argues it "transferred goods to other carriers" because Shell has chartered the Polar Pioneer, the offshore supply vessels, and "specialty vessels" Aviq and Tor Viking II, making them "carriers" since they are allegedly "carrying goods for hire" or "paying cargo."[36] Not so. Shell hired the vessels to carry Shell's materials as part of Shell's own mission to drill for oil. Foss's arguments that the materials are "paying cargo" and were "transferred" are wrong.

Moreover, Foss's transfer argument still ignores the overarching requirement that "in order to transfer them to other locations" applies to all activities listed in the definition. The stores, provisions, and gear that are the cargo of the chartered rig and vessels are all to be consumed/used by the vessels, themselves, and are not transferred to another location in any way different from any other vessel – cruise ship to motorboat.

2. Transfer is required

Foss argues for applying the last antecedent rule to change the meaning of the cargo terminal definition from the meaning in the Interpretation, which found the phrase "in order to transfer them to other locations" to be the "unifying theme" of the definition. (Interpretation, Conclusion ¶ 6.)[37] But Foss concedes that this rule applies "unless contrary intention appears in a statute."[38] As explained in the City's Closing Argument, that intention appears in this definition, when read in the context of the Code. First, SMC 23.84A.038 shows this contrary

---

[36] Foss Post-hearing Brief, p. 5:16-17; p. 24:1-5; p. 35:18-22 ("paying cargo").

[37] *See also*, Attachment K, McKim 8/13, p. 64:25 to 65:2 (McKim testified he did not ignore the Code, he determined the comma was not relevant) and p. 143:3-20 (McKim explained how he addresses rules of statutory construction.

[38] Foss Post-hearing Brief, p. 27:1. (And in this instance, the phrase at the end of the sentence hardly "leaps across stretches of text," since the word "them" in the phrase refers to the word "goods" at the beginning of the sentence.)

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

intention: it applies the phrase to all activities at a cargo terminal; the Examiner has ruled this definition applies, as well as the ones in the SMP,[39] and Meyer, the Port's permit manager, testified twice that the definitions are the same.[40] Second, a cargo terminal in the Shoreline District must be water-dependent or water-related, which requires linking the activities of "stored" and "transferred to other carriers" to transfer by a vessel.[41] Third, "storage" is a different use from a "transportation use."[42]

Foss argues that there is no need to apply this phrase to goods that are "stored" because "warehouse," one type of storage use, already contains the concept of transfer by using the phrase "for distribution or transfer to another location" in its definition. But such storage is not sufficient to be a cargo terminal use. It would mean a site would qualify as a cargo terminal simply as a result of colocation of a warehouse and commercial moorage, even if nothing other than stores, provisions and gear (which are never transferred to another location, because they are consumed/used by the vessels themselves) were loaded onto the vessels that moored there. The unique cargo terminal purpose of transferring paying cargo would be eliminated, and there would be no distinction between a commercial marina and a cargo terminal, other than the presence of a storage facility that might be wholly unrelated to the moorage function.

Foss also argues that McKim's understanding of a cargo terminal would allow truck to rail transfer of cargo, but not require transport by vessel.[43] Transport by vessel is triggered only if the cargo terminal is on a waterfront lot, in which case the use is required to be water-

---

[39] Order on Motion to Dismiss, p. 1.
[40] Hearing Examiner Record, Day 3, Tape 2 starting at 40:25 and through 44:20; Attachment G to DPD Closing, Meyer, p. 68:4-19 and 69:19 to 70:8.
[41] SMC 23.60A.944: water-dependent means "cannot exist in other than a waterfront location;" water-related means (1) "product or material arrive by vessel," (2)"material that is transported by vessel," (3) ". . . storage of items that come off a vessel."
[42] *See* Attachment D to DPD Closing, McKim 8/13, p. 144:18 to 145:24.
[43] Foss Post-hearing Brief, p. 33:18-25.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

dependent or water-related, both of which require transfer by vessels in at least one direction.[44] McKim's analysis is correct.

3. Legality of the "primary function" test is a straw man argument

The Interpretation does not include a "primary function test." McKim used this term in a long deposition to try to explain his thinking.[45] Arguing its legal validity as a basis to reverse the Interpretation is a straw man argument. Appellants used it at the hearing, and use it now in their briefs, to raise questions about vessels completely outside the scope of the Interpretation to foster their arguments about wide-spread uncertainty and economic impacts. The Examiner should review the Interpretation on its merits.

However, the test makes common sense and reflects the structure of the City's Land Use Code, which regulates uses, as McKim explained.[46] Another word for "primary" is "principal," and another word for "function" is "use." The concept of a "principal use" is well-established. A "use" is "the purpose for which land or a structure is designed, built arranged, intended, occupied, maintained, let or leased."[47] So when the definition of the permitted use for a site, such as a cargo terminal, states that the activity taking place must achieve a certain purpose, such as "in order to transfer them [goods] to another location," one looks at whether the purpose of the activities on the site (the loading and moorage of an oil rig and vessels) is consistent with the purpose of the use. Then one determines whether that activity is the "principal use" – "not incidental to another use."[48]

---

[44] Table A for SMC 23.60A.482.N.2; SMC 23.60A.944: water-dependent means "cannot exist in other than a waterfront location;" water-related means (1) "product or material arrive by vessel," (2)"material that is transported by vessel," (3) ". . . storage of items that come off a vessel."
[45] Attachment K, McKim 8/13, p. 117:16 to 118:12.
[46] Attachment K, McKim 8.13, p. 112:20 to 114:15.
[47] SMC 23.84A.040.
[48] *Id.*

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

This analysis is useful when the material loaded onto the oil rig and vessels at Terminal 5 are stores, provisions and gear, which can be loaded onto any vessel at any site with moorage. The question becomes: will the function of the cargo terminal definition – "in order to transfer them [goods] to another location" - be carried out if the purpose for which the oil rig and vessels are loading these provisions is to use them to operate the oil rig and vessels, themselves?

The concept of the rig and vessels having a primary function is so intuitive that both Englin and Gallagher had no hesitation in stating that the oil rig's primary purpose is to drill (Englin)[49] or that the "principal purpose," "job," or "mission" of the oil rig is to drill exploratory holes or as an offshore drilling operation (Gallagher).[50] That is what they do, not transfer goods from one location to another.

The validity of the Interpretation does not turn on the primary function test.

4. The Interpretation is consistent with the SMP and the SMA

Foss argues that the Interpretation frustrates the SMP purpose in the UI environment; but requiring a permit to carry out the activities authorized in that environment does not thwart the SMA or SMP purpose of regulating uses in the Shoreline District.

Foss also asserts the City erroneously failed to consider Comprehensive Plan Policies, [51] though Foss does not cite any policies and makes no argument on how they might impact the decision.

Foss claims the Interpretation ignores the term "cargo terminal" in other contexts, citing the exception in the definition of "tugboat services" that reclassifies some tug activities as "cargo

---

[49] Attachment F to DPD's Closing, Englin, p. 26:14-16.

[50] Attachment J to DPD's Closing, p. 128:2-7; p.21:2; p. 117:25 to 118:24.

[51] DPD erroneously stated in its Prehearing Brief that the Comprehensive Plan does not apply to interpretations (which is a general rule for regulations in the zoning code), but DPD's Reply on Motion to Dismiss (p. 22:20-22) and Closing Argument (p. 4:11-13) both cite the SMP requirement to be consistent with the Comprehensive Plan with respect to interpretations of the SMP.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

terminal," instead of tugboat services.[52] This definition is intended to define "tugboat services," not "cargo terminal." Still, the exception is consistent with the analysis in the Interpretation: barges loading and unloading need to be at a cargo terminal and may, as cargo vessels, lay berth there, with their assisting tugs, as well. Any requirements for "cargo terminal" use will also apply to the tugs and barges loading, unloading and mooring at a cargo terminal.

Foss argues that the City could have limited the types of cargo terminal uses or type of vessels that can use a cargo terminal if it wanted to restrict the oil rig mooring at Terminal 5;[53] this begs the real question at issue here: is provisioning the oil rig and its assisting vessels a cargo terminal use at all? Foss's contention avoids the real issue in this case.

5. Terminal 91 activities and permits are not applicable to Terminal 5

Foss points to testimony about activities at Terminal 91 and Terminal 18 as evidence that these activities are appropriate at a cargo terminal. The business decisions by these terminals' operators are not evidence of a determination by DPD that the activities are allowed under a cargo terminal permit. A complaint triggering the City's enforcement and investigation would be unlikely, given the multiple activities at Terminal 91 and the similarity of lawful container activity at Terminal 18 with the occasional lay berthing described. Even if the City has erroneously failed to enforce a violation, that does not bar correct enforcement at Terminal 5.[54] Terminal 5 has never had the variety of activities or permits issued for Terminal 91, and there is no evidence in the record that Terminal 5 was used inconsistently with its cargo terminal permit, except once at the request of the Coast Guard.

---

[52] " 'Tugboat services' means a transportation facility use that consists of moorage for more than one tugboat and dispatch offices, except that facilities that include barge moorage and loading and unloading facilities for barges as well as tugboat moorage are not tugboat services and are classified as cargo terminals." SMC 23.60A.938.

[53] Foss Pre-hearing Brief, p. 42:2-4.

[54] *Buechel v State Dept. of Ecology*, 125 Wn.2d. 196, 211, 884 P.2d 910 (1994); *Mercer Island v. Steinman*, 9 Wn. App. 479 (1973). *Dykstra v. Skagit County*, 97 Wn. App.670, 677, 985 P.2d 424 (1999), *rev. denied* 140 Wn.2d 1016 (2000).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Foss argues the Interpretation is inconsistent with DPD's past acknowledgment of activities at Terminal 91, citing the background statements in land use decisions in DPD Ex. 11 and Foss Ex. 111. For the reasons set out in DPD's Closing Argument,[55] these are not DPD authorizations or approvals. In particular, "background statements" in land use decisions do not determine whether a use was legally established.[56]

Nor did McKim agree that general moorage or moorage for the fishing fleet at Terminal 91 would be appropriate under that terminal's cargo terminal permit, as Foss suggests. Foss asked McKim whether he found a permit for any other use that would authorize such general moorage, and McKim said no.[57] But that does not mean he agreed that a cargo terminal could authorize that activity.[58] And again, this issue is outside the scope of this appeal.

Foss contends that because the legislature is presumed to know how courts construe a statue, the City Council should be presumed to know how DPD has "interpreted the Code," referring apparently to the background statements in the land use decisions for Terminal 91. Foss then argues if the Council fails to change the Code in light of those statements, the Council is presumed to agree with the construction of the decisions that Foss asserts. The Examiner should reject this attenuated argument. There is no logical or legal basis for this analogy. As set out above and in the City's Closing, cited above, background statements are not the basis for determining what has been approved by permit, and lack of enforcement sets no precedent.

Foss's argument on "past implementation" should be rejected.

---

[55] DPD Closing Argument, pp. 17-20 and pp. 38-41.
[56] Attachment D to DPD Closing, McKim, p.136:21 to 137:17; and Testimony 8/25, Tape 4 at 2:99 to 4:57.
[57] Attachment K, McKim 8/13, p. 115:5-13.
[58] Environmental Intervenors' Post-hearing Brief (p. 17) states that Terminal 91 "has been officially recognized as devoted to commercial moorage in addition to cargo transshipment." The document referred to is an agreement between the Port and DNR – not an approval by DPD.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

6. Lay berthing by non-cargo vessels is not accessory to a cargo terminal

DPD agrees that moorage by a vessel while it is loading and unloading cargo terminal goods (not solely stores, provisions and gear) is an inherent part of the principal use "cargo terminal." With respect to "accessory uses," the Interpretation states: "We accept that lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal." Conclusion 11 (part). Knudsen's testimony with respect to cargo terminal vessels, cited by Foss,[59] is consistent with this. But general moorage of other types of vessels is not an accessory use at a cargo terminal, and Foss offers no argument to support that contention.

7. The Interpretation does not regulate the operation of vessels

Foss Issue 16 claims the Interpretation is inconsistent with SMC 23.60A.018 by regulating activities on vessels. The regulation reads in relevant part:

> Except as specifically provided otherwise, the regulations of this Chapter 23.60A do not apply to the operation of boats, ships and other vessels designed and used for navigation, other than moorage of vessels and uses on vessels unrelated to navigation . . . .

(Emphasis added.)

Foss's argument is a single sentence: "regulating in the shoreline by making judgments on the vessel's purpose or use at its ultimate destination essentially regulates vessels in direct violation of its own Code."[60] The Interpretation determines whether moorage of certain vessels and the oil rig at Terminal 5 is consistent with the definition of cargo terminal. It will not otherwise affect their operation. This argument is meritless.

---

[59] Foss Post-hearing Brief, p. 45:19-27.
[60] Foss Post-hearing Brief, p. 36:20-22.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

8. Foss Issues 15 is abandoned

Foss made no argument on its Issue 15: "The Interpretation erroneously determines the Director lacks authority to interpret or define unlisted uses under the [SMP]." Foss has abandoned Issue 15, and DPD's Closing (p. 44) showed the Interpretation is correct on this point.

III. PORT ARGUMENTS

A. A City permit is required for new uses

The Port argues a shoreline substantial development permit is not required. The Examiner does not need to decide this issue as part of this appeal. DPD is not relying on SMC 23.40.002 to require a substantial development permit. As explained in DPD's Closing, a substantial development permit is a permit required under the SMA and is submitted to the Washington State Department of Ecology. DPD has never taken the position that a substantial development permit is required.[61] Whether a substantial development permit is required or not, a City permit is always required. The Port's Issue 4, last sentence, contests this.

The law is clear that the Shoreline Management Act requires uses that are not "substantial development" to comply with the standards in a shoreline master program and with the policies of the SMA. *Clam Shacks v. Skagit County*, 109 Wn.2d 91, 95, 743 P.2d 265 (1987). The Port does not cite this seminal case. To ensure this requirement is implemented, the Washington State Department of Ecology (which is charged with establishing rules to implement the SMA[62]) addresses this requirement by requiring specific language in shoreline master programs and recognizing this will be enforced through the local permit process:[63]

---

[61] DPD agrees that the proposed activity does not require a shoreline substantial development permit, unless it is determined that the location of the proposed activity "interferes with the normal public use of the surface waters," which would constitute "development." DPD has not made that determination at this time.

[62] RCW 90.58.060.

[63] WAC 173-26-191(2)(a)(iii)(A) (emphasis added).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

> The Shoreline Management Act's provisions are intended to provide for the management of all development and uses within its jurisdiction, whether or not a shoreline permit is required. . . . Local governments have the authority and responsibility to enforce master program regulations on all uses and development in the shoreline area. There has been, historically, some public confusion regarding the Shoreline Management Act's applicability in this regard. Therefore, all master programs shall include the following statement:
>
> "Except when specifically exempted by statute, all proposed uses and development occurring within shoreline jurisdiction must conform to chapter 90.58 RCW, the Shoreline Management Act, and this master program."
>
> In addition to the requirements of the act, permit review, implementation, and enforcement procedures affecting private property must be conducted in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property. . . .

This WAC also authorizes shoreline master programs to be integrated into existing development regulations rather than being standalone programs; this is what the City has done by making its shoreline master program a part of Title 23.[64]

As explained in DPD's Closing (pp. 22-27), the City's SMP includes this required statement. The SMP uses the City's own permitting process to make the required compliance determination as described in the Closing and below. A substantial development permit is an additional permit that is required if the activity is development.[65] Adopting the Port's position would be a radical change in the City's program, and so additional information is provided below.

---

[64] WAC 173-26-191(2)(c), which states in part: "Local governments may integrate master program policies and regulations into their comprehensive plan policies and implementing development regulations rather than preparing a discrete master program in a single document."

[65] The Environmental Intervenors call this a shoreline permit, which is part confusing because that term usually refers to a substantial development permit that is sent to the Washington State Ecology. But if Intervenors mean a permit that establishes compliance with SMA standards, then their position and DPD's agree: a permit is required.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

The Land Use Code has standards for uses in both the zoning code part of the Code and the overlay part of the Code (Chapter 23.60A is in the overlay part); the Code has regulations that apply to all parts of the Code, including the requirement for a use permit when a new use is proposed. Both the general overlay provisions (Chapter 23.59) and the SMP, itself, require compliance with both parts of the Code. The SMP is clear that even when no substantial development permit is required, "any other regulations apply"[66] and that the regulations in the SMP are "intended to supplement other regulations of this Title 23 as set out in subsections 23.60A.016.B and 23.60A.016.C."[67] SMC 23.60A.016.B states, "To be allowed in the Shoreline District, a use . . . must be allowed in both [*sic*] the shoreline environment, the underlying zone, and any other overlay district in which it is located." Therefore, although no substantial development permit is required, a City permit is.

Even if DPD could not a require a City permit to demonstrate compliance with the standards in the SMP, the provisions in SMC 23.60A.016.B require uses to be allowed in the underlying zone, and SMC 23.40.002 requires a permit to establish use in the underlying zone. The permit requirement in the Interpretation should be upheld.

Lastly, DPD does not issue permits "for vessels to moor," as the Port mischaracterizes this Interpretation. DPD issues permits to property owners, such as the Port, authorizing a proposed use of the property as being consistent with the Land Use Code, including the SMP if the property is in the Shoreline District.

[66] SMC 23.60A.020.A.2.b.
[67] SMC 23.60A.016.A.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

B. Port's other arguments do not carry the Port's burden

1. Standard of proof

The Port cites the LUPA standards[68] for reviewing the Examiner's decision: this does not relieve the Port of its burden under SMC 23.88.020.G.

2. Factual record supports the Interpretation

DPD's Closing and its Response to Foss's factual assertions above (Sections II A and B) demonstrate the facts in the Interpretation and in the hearing support DPD's Interpretation. The Port's claim that DPD's lack of expertise renders the Interpretation defective is irrelevant since it is the Examiner who will make the final determination based on all the evidence. Moreover, the expertise required - to read the SMP, discern its intent, understand the information provided by the Port and Foss, and construe dictionary definitions - is sufficient. Certainly, the Examiner has this expertise. The information provided at the hearing was supplemental, but does not contradict the basic conclusions drawn in the Interpretation.

The Port chastises DPD for not accepting the information presented by the Port and Foss as true, singling out the issue of lay berthing (pp. 15-18); yet McKim testified he did accept the Port's letter concerning lay berthing,[69] as evinced in Interpretation, Conclusion ¶ 10, which then informs Conclusion ¶ 11, authorizing lay berthing, except for vessels not used for transfer of goods, which would be a separate principal use. This limitation is consistent with reasons the Port initially gave DPD for allowing lay berthing of other large vessels at cargo terminals: it wasn't because this moorage is part of a cargo terminal permit, it is because the Port hasn't provided appropriate commercial moorage.[70]

---

[68] Land Use Petition Act 36.70C.130; Port Post-hearing Brief p. 13:25 to 14:15.
[69] Attachment K, McKim 8/13, p. 37:8-16.
[70] *See*, Section II.B, Bullet 7 above.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Ultimately, the issue before DPD was not whether the Port accurately described its business practices, but whether the Code, in fact, allowed them. This distinction arises with respect to lay berthing because initially McKim considered accessory uses under the wrong standard: SMC 23.42.020.A, which relies on the standard "customarily incidental," a standard McKim subsequently concluded was inapplicable[71] (which is why one writes first drafts of decisions) and that the Examiner has ruled is inapplicable to this Interpretation.[72] So the standard for part of the Interpretation shifted away from "customary" activities to those that are intrinsic and incidental.

The Examiner must determine the nature of lay berthing that is allowed at Terminal 5 based on all the evidence, because the appeal is de novo.

3. The result is consistent with LU270 (former 257) - Port Issue 11

Port Issue 11 contends that the Interpretation is inconsistent with the Comprehensive Plan policy LU 270 to meet the moorage needs of all vessels, citing section 4, particularly with respect to fishing vessels. As noted in Section I, above, the Interpretation does not address fishing vessels, uses at Terminal 91, or the evolution of fish processing and its impact on earlier land use permits. The "absurd results" or violation of Comprehensive Plan policies with respect to the fishing homeport are outside the scope of this appeal.

The Port's quotation of LU 270 omits its introduction and section 1, which are set out below, showing old text struck out and new text underlined:

> **LU270** ((~~257 Citywide~~))Identify and designate appropriate land for water-dependent business and industrial uses as follows:
> ((~~objectives for different types of water-dependent businesses and industries:~~))
> 1. Cargo Handling Facilities:

[71] Foss Ex. 2, p. 3 (RFP 1000006) Section III; Attachment K, McKim 8/13, p. 82:16to 83:25.
[72] Order on Motion to Dismiss, p. 2 ¶ 9, Foss Issue 5.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

> a. Reserve space in deep water areas with adequate vessel maneuvering areas((~~backup space~~)) to permit the Port of Seattle and other marine industries to remain competitive with other ports.[73]

The policy of LU270 is to "identify and designate appropriate land," and to do so for both cargo terminals and general moorage. Land is "designated" by assigning it to a particular "shoreline environment" that allows the uses identified in the policy, such as Urban Industrial for both Terminals 5 and 91. Determining the meaning of cargo terminal does not "thwart" the intention to designate areas for fishing vessels. Requiring a permit for commercial moorage to allow that use is not inconsistent with the Plan.[74]

4. Primary Function Test

This argument is addressed in Section II.C.3 above, and should be rejected. The Port is using this straw man argument to raise issues outside the scope of the Interpretation to bolster the Port's contention that the results are absurd. The result with respect to the Polar Pioneer and its assisting vessels at Terminal 5, the subject of the Interpretation, is not absurd. The Port also contends that no one in the maritime industry understands this test. However, it is clear that no one, even the Port, considers the scope of land use permits in conducting business. *See*, DPD Closing, Section IV F. The Examiner should ignore this straw man argument.

5. Scope of Interpretation is not "extraterritorial"

Terminal 5 is in the City of Seattle. Its permitted use is limited to cargo terminal. For this use to be meaningful under the SMA, Comprehensive Plan Policy 270, and the SMP, the use "cargo terminal" must be distinguishable from the use "commercial moorage/marina," and other uses, here in Seattle. Stores, provisions and gear can be loaded at both facilities, indeed at any

---

[73] DPD Closing, Attachment B, Ordinance 124105, excerpt.

[74] *Chevron USA, Inc. v. Central Puget Sound Growth Management Hearing Board*, 123 Wn. App. 161, 167-168, 93 P.3d 880 (2004); *see* discussion, DPD Closing, p. 46-47.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

facility with a pier. Therefore, what differentiates a cargo terminal is that the material loaded is "paying cargo," such as "container cargo," which is included in the definition. That differentiation can be made whether the vessel is transferring goods within the City or elsewhere. DPD is not enforcing its Code outside the City, it is enforcing the cargo terminal use permit at Terminal 5.

6. Statutory construction by the Examiner is not limited

The Port argues that because DPD found the definition of "cargo terminal" to be unambiguous, that is the limit of the Examiner's determination.[75] The Examiner is not limited to DPD's assessment, because this is a question of law. Even under the unambiguous standard, the Examiner has broad authority to consider the definition in its context, including other related legislation and documents available under judicial notice.[76]

IV. CONCLUSION

The Interpretation correctly determines that loading cargo that is provisions or equipment (or stores, provisions and gear) does not effectuate the particular purpose for a cargo terminal use: to transfer goods to other locations. Cargo that is consumed or used by a vessel is not transfer to another location. One of the key goals of the Shoreline Management Act is to regulate uses of the shoreline. If the intended function of a specific use in a shoreline master program is expanded to the point where the definition is meaningless, then the goals of the Act are not achieved. The City's earlier Guidelines E8 in resolution 27618 (DPD Ex. 4) and the very similar current policies in Comprehensive Plan Policy 270 recognize that cargo handling facilities and general moorage are distinct uses. No evidence in the record supports Appellants'

[75] Port Post-hearing Brief, p. 23:24-25.
[76] *See*, DPD Closing, Section III.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

or T5 Intervenors argument to conflate them by allowing moorage of any vessel at a cargo terminal.

This Interpretation is specific to Terminal 5 and the oil rig and assisting vessels that propose to overwinter (mobilize and demobilize) there. Concerns over other issues at other sites should be resolved through other avenues. The Examiner should uphold the Interpretation.

DATED this 17th day of September, 2015.

PETER S. HOLMES
Seattle City Attorney

By: s/Eleanore S. Baxendale, WSBA #20452
Assistant City Attorney
eleanore.baxendale@seattle.gov
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
Ph: (206) 684-8232
Fax: (206) 684-8284
Attorneys for Respondent
Department of Planning and Development

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the **Department of Planning and Development's Response to Appellants Closing Arguments** with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same document was sent to the following parties listed below in the manner indicated:

John C. McCullough McCullough Hill Leary P.S. 701 Fifth Avenue, Suite 6600 Seattle, WA 98104-7006 *Attorneys for Appellant* *Foss Maritime Co.*	(X) email: jack@mhseattle.com
David R. West Donald B. Scaramastra Daniel J. Vecchino Garvey Schuber Barer 1191 – 2nd Avenue, 18th Floor Seattle, WA 98101-2939 *Attorneys for Appellant* *Foss Maritime Co.*	(X) email: drwest@gsblaw.com (X) email: dscaramastra@gsblaw.com (X) email: dvecchio@gsblaw.com
Traci Goodwin Senior Port Counsel Port of Seattle P. O. Box 1209 Seattle, WA 98111-1209 *Attorneys for Appellant* *Port of Seattle*	(X) email: goodwin.t@portseattle.org
Patrick J. Schneider Foster Pepper PLLC 1111 Third Ave., Suite 3400 Seattle, WA 98101-3299 *Attorneys for Appellant* *Port of Seattle*	(X) email: schnp@foster.com

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Patti A. Goldman
Matthew R. Baca
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
Attorneys for Intervenors Puget Soundkeeper Alliance, Seattle Audubon Society, Sierra Club, and Washington Environmental Council

(X) email: pgoldman@earthjustice.org
(X) email: mbaca@earthjustice.org

Joshua C. Allen Brower
Molly K.D. Barker
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101-1394
Attorneys for T-5 Intervenors

(X) email: josh@verislawgroup.com
(X) email: molly@verislawgroup.com

the foregoing being the last known address of the above-named parties.

Dated this 21st day of September, 2015, at Seattle, Washington.

Rosie Lee Hailey

ROSIE LEE HAILEY

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200