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

2 These appeals arise within well-defined sideboards. First, the Department of Planning  
3 and Development (“DPD”) Interpretation on appeal must, by statute, be limited to applying and  
4 discerning the meaning of a City of Seattle development regulation “as it relates to a specific  
5 property.” SMC 23.88.020.A. The property is Terminal 5, and the activity is over-winter  
6 moorage of a drill rig and associated vessels. The Interpretation is not based on and offers no  
7 opinion as to the permits and activities at other terminals.

8 Second, the Port of Seattle, Foss Maritime Company, and the T-5 intervenors assert that  
9 the Interpretation would interfere with activities, like homeporting the Alaskan fishing fleet at  
10 Terminal 91. This testimony is speculative since the attorneys instructed the witnesses to assume  
11 that their businesses would be prohibited. *See, e.g.*, T-5 Intervenors Br. at 4 (“If I told you that  
12 this interpretation that’s on appeal would prohibit homeporting . . . what effect would that have?”  
13 and “if the interpretation were applied in such a way to ban or prohibit vessels coming into  
14 Seattle, that would have a negative impact on those jobs?”). It is also irrelevant and lacking in  
15 probative value because neither the Port nor Foss have proven that these other facilities are  
16 permitted only as a cargo terminal. DPD Br. at 17-20, 38-40.<sup>1</sup>

17 Third, in this appeal, the Interpretation must be given substantial weight, and the Port and  
18 Foss as the appellants bear “the burden of establishing to the contrary.” SMC 23.88.020.G.5.  
19 Throughout their post-hearing briefs, the Port and Foss assert that the City has failed to offer  
20 evidence to support various aspects of the Interpretation, but their assertions seek to shift their  
21 burden of proof to the City. The Interpretation and its grounding in the Shoreline Master

22 \_\_\_\_\_  
23 <sup>1</sup> Related, the Port (at 28) faults the City for failing to produce evidence that a new permit would  
24 be needed to protect the health, safety, and welfare of the people of Seattle, yet when  
Soundkeeper offered evidence of the water pollution and environmental harms that could occur  
from the homeport use, the Port and Foss objected on relevance grounds.

1 Program (“SMP”) speak for themselves. The core task for the Hearing Examiner is one of  
2 statutory construction, the fodder of lawyers and judges more than fact witnesses.

3         Setting these distractions aside, this appeal turns on: (1) the Port’s belief that it may  
4 convert Terminal 5 into a homeport for a drill rig without regard for the SMP; (2) the allowable  
5 principal and accessory uses of a cargo terminal as a matter of statutory construction; and (3)  
6 whether over-winter moorage and homeporting Polar Pioneer and associated vessels comports  
7 with the allowable uses of a cargo terminal.

8 I.         **THE PORT IS NOT EXEMPT FROM SHORELINE PERMITTING AND**  
9         **CONSISTENCY DETERMINATIONS FOR VESSEL MOORAGE.**

10         The Port argues a position of astonishing breadth – that it can moor and provision vessels  
11 anywhere and anytime at Port facilities without regard to its shoreline permits and without  
12 seeking authorization from the City. This argument flies in the face of Washington Supreme  
13 Court precedent, the SMP’s clear requirement for City approval of new uses or changes in use of  
14 shorelines, and the Shoreline Management Act’s (“SMA’s”) purpose, structure, and provisions  
15 establishing a zoning and permitting scheme to ensure coordinated uses of shorelines with  
16 conditions to minimize harm to environmental and other community values.

17         A.         The City Must Approve New Uses of Port Facilities, Even When No Shoreline  
18         Substantial Development Permit Is Needed.

19         The Port contends that the City’s authority is limited to permitting substantial  
20 developments and that it has no authority to require prior approval of uses of Port facilities. This  
21 contention has no merit.

22         First, the Washington Supreme Court rejected this argument in *Clam Shacks v. Skagit*  
23 *County*, 109 Wn.2d 91 (1987). Pointing to the SMA’s treatment of development as a subset of  
24 regulated uses, the court held that the county had the authority to regulate shoreline use, even if  
25 the use did not need a shoreline substantial development permit (“SSDP”). *Id.* at 96-98.

1 Second, persisting in its contention that the City can only regulate development, the Port  
2 argues that the City's sole authority to regulate moorage of Polar Pioneer would flow from the  
3 SMP's definition of "development" to include a project "that interferes with the normal public  
4 use of the surface of the waters." SMC 23.60A.908. None of the authorities cited by the Port (at  
5 3-5) remotely suggests that an SSDP is the only mechanism for ensuring that a use complies with  
6 the SMA. To the contrary, both the Court of Appeals and the Attorney General explicitly  
7 referenced the holding in *Clam Shacks* and stated that "the SMA regulates 'uses' of shoreline  
8 waters as well as 'developments' on them." *Washington Shell Fish, Inc. v. Pierce County*, 132  
9 Wn. App. 239, 249-50 (2006); Attorney General Opinion 2007 No. 1 (Jan. 4, 2007) (same). The  
10 Interpretation never addressed whether mooring Polar Pioneer at Terminal 5 interferes with  
11 public use of surface waters, and instead asked a very different set of questions: (1) whether  
12 mooring the drill rig is consistent with the legally established use of Terminal 5 as a cargo  
13 terminal; and (2) whether a permit must be obtained to establish a different use. The focus of  
14 these questions and the Interpretation is on whether moorage of Polar Pioneer is different in kind  
15 from incidental moorage of cargo ships at a cargo terminal, *i.e.*, whether it is a new use.<sup>2</sup>

16 Third, the Port embarks (at 10-12) on an exposition of the SMP as a creature of state law  
17 by virtue of the Department of Ecology's approval in an attempt to ignore the Land Use Code  
18 ("LUC"). However, the Port's citations concern constitutional takings, prohibitions on local fees  
19 on development, and the scope of the Shorelines Hearings Board's jurisdiction, which have  
20 nothing to do with the issues in this case. *See* Port's Post-Hearing Br. at 10-12 (citing *Orion*  
21 *Corp. v. State*, 109 Wn.2d 621 (1987) (constitutional taking liability); *Citizens for Rational*

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22 <sup>2</sup> The Port asserts (at 9) that it is not changing the use of any structures or premises, yet it  
23 authorized installation of heavy-duty bollards needed to moor the enormous Polar Pioneer drill  
24 rig. Foss Exh. 53. Moreover, even though the hearing did not address the Port's SSDP theory,  
evidence of interference with the public's use of surface waters emerged. *See infra* at § II.B.

1 *Shoreline Planning v. Whatcom County*, 155 Wn. App. 937 (2010) (restriction on local  
2 government development fees)). The Port goes so far as to quote at length from the plurality  
3 opinion in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 (2007), without disclosing that  
4 five Justices – a majority – disagreed with the quoted language. In that challenge to a local  
5 moratorium on shoreline development, a four-Justice plurality concluded that local governments  
6 have no broad police power over shorelines because the Washington Constitution vests  
7 ownership of the beds and shores of navigable waters in the state. Justice Chambers supplied the  
8 fifth vote for overturning the moratorium, but he stated: “I disagree with the lead opinion’s  
9 conclusion that the city lacks authority to impose *any* shoreline moratoria” and with its  
10 conclusion that the Constitution “restricts a municipality’s power to regulate the shorelines and  
11 tidelines. The power to regulate does not ride like a parasite on the State’s title to some of the  
12 land in the state.” *Id.* at 703, 704 (emphasis in original). Rather than rest on local government  
13 authority, he found the moratorium invalid because it went on for too long. The four dissenting  
14 Justices would have upheld the moratorium as a valid exercise of local government authority. *Id.*  
15 at 706-14. A majority did not constrict the power of local government, toppling the scaffolding  
16 on which the Port’s argument depends.

17 Finally and most fatal to the Port’s argument, the Port entirely overlooks the pertinent  
18 SMP provisions when it erroneously claims that the City is relying solely on the LUC to assert  
19 authority to approve a change in shoreline use. The SMP approved by the Department of  
20 Ecology provides:

21 No development shall be undertaken, no shoreline modification shall be made,  
22 and no use, including a use that is located on a vessel, shall be established in the  
23 Shoreline District unless the Director has determined that it is consistent with the  
24 policy of the Shoreline Management Act and the regulations of this Chapter  
25 23.60A. This restriction applies even if no shoreline substantial development  
26 permit is required.

1 SMC 23.60A.012 (emphasis added). The SMP’s procedures expressly require City approval of a  
2 new use, even if it is not a substantial development. The DPD Director “shall” make  
3 determinations that “a use . . . that is not substantial development is consistent with the [SMP]”  
4 and “[i]f the . . . use does not require other authorizations, . . . the determination of consistency  
5 shall be made prior to any construction or use.” SMC 23.60A.06.A & A.3. The Port’s argument  
6 cannot stand in the face of the SMP’s explicit requirements.<sup>3</sup>

7  
8 B. The Port Cannot Moor Vessels at Port Facilities Without Regard to Shoreline  
Permits.

9 The Port claims the right to moor vessels at all of its facilities without regard to shoreline  
10 permits, as has been its past practice. However, the public trust doctrine, coupled with the  
11 SMP’s use regulation provisions discussed above, put this argument to rest.

12 Under Article XVII of the Washington Constitution and the public trust doctrine, the state  
13 holds the shorelines and state waters in trust for all the people of the state, and it cannot convey  
14 or give away the public’s interest in these public trust resources. *Caminiti v. Boyle*, 107 Wn.2d  
15 662, 668-70 (1987). The Washington Supreme Court has stated that “the legislatively drawn  
16 controls imposed by the Shoreline Management Act” are designed to meet the state’s public trust  
17 obligations. *Id.* at 670. It is the state, through the Department of Ecology, and the City, through  
18 its authority to administer its SMP, that are charged with implementing and enforcing the SMA.  
19 As a regulated entity, the Port must comply with the SMP. *See* Foss Exh. 36 at W-438 to -454  
20 (Port Management Agreement with the Department of Natural Resources makes the Port’s  
21 authority to manage state aquatic lands subject to its compliance with the SMA). The Port must

22 \_\_\_\_\_  
23 <sup>3</sup> The Port claims that it unsuccessfully searched for local permits for vessel moorage, but the  
24 Port’s attorneys framed their on-line research to conform to their theory of the case, not how the  
SMA works. The SMA regulates the use of shoreline facilities; the activities a vessel may  
undertake at a facility depend on the facility’s authorized use.



1 heed the SMA’s legislatively drawn controls, including the requirement to obtain City approval  
2 when it embarks on a new use of a Port facility.

3         The Port (at 9) asserts that the SMA is designed to preserve the public trust in  
4 navigational values. Not only does the SMA rely on zoning and permitting systems for doing so,  
5 but the Constitution imposes other limits on impeding navigation. Article XV of the Washington  
6 Constitution provides that: “[t]he state shall never give, sell or lease to any private person,  
7 corporation, or association any rights whatever in the waters beyond such harbor lines,” which  
8 create public water highways in navigable waters of harbors, bays, and inlets. The Department  
9 of Natural Resources (“DNR”) is charged with preserving such public waterways for navigation.  
10 RCW 79.120.010 (“All waterways shall be reserved from sale or lease and remain as public  
11 highways for watercraft”).

12         A lease allowing overwinter moorage of an oversized drill rig raises the specter of  
13 interference with navigation on the West Waterway and this constitutional prohibition. Polar  
14 Pioneer juts out into the West Waterway far more than the container ships that previously called  
15 at Terminal 5, and it will stay moored for far longer periods of time. Gallagher Tr. (Day 4) at  
16 127-28. In addition, the Coast Guard has imposed an exclusion zone around the vessels in  
17 Shell’s Arctic drilling fleet, including Polar Pioneer, closing off more of the channel. When  
18 moored, the exclusion zone is 100 yards; when vessels are in motion, the exclusion zone expands  
19 to 500 yards, which might entirely block passage through the West Waterway. *See* Joerger Day  
20 4 Audio (3 of 4) at 0:51:10 – 0:51:50. Ms. Joerger, field director for Puget Soundkeeper  
21 Alliance, attended the meeting at which the Coast Guard announced the exclusion zone. She  
22 trained Soundkeeper staff and volunteers to adhere to the exclusion zone, even though it could  
23 force the Soundkeeper patrol boat into oncoming traffic. Joerger Day 4 Audio (3 of 4) at 0:50:55  
24

1 – 0:58:17 & PSA Exh. 1.<sup>4</sup> In rebuttal testimony, Mr. Gallagher testified that Foss ran a  
2 simulation of navigation in the West Waterway with Polar Pioneer moored at Terminal 5, but the  
3 simulation assumed that the Coast Guard would automatically grant permission for vessels to  
4 pass through the exclusion zone so did not account for the 100- and 500-yard closures.  
5 Gallagher Tr. (Day 4) at 170-71. Substantiating the navigational concerns, DNR has sought an  
6 Attorney General’s Opinion on whether moorage of vessels in the West Waterway at Terminal 5  
7 runs afoul of the Constitution. Meyer Tr. (Day 3) at 84-85; <http://goo.gl/PBHVh5>.

8 While Foss and the Port have tried to equate the extensive vessel moorage that takes  
9 place at Terminal 91 with the Shell homeport at Terminal 5, there are fundamental differences,  
10 not only in the shoreline permits for the facilities, but also in the impacts on public navigation.  
11 At Terminal 91, moorage is within the outer harbor lines, while moorage at Terminal 5 is outside  
12 the outer harbor lines and in a public waterway set aside for navigation. Meyer Tr. (Day 3) at  
13 57-59; Foss Exh. 39 at W-188; Foss Exh. 20 at W-201. This difference highlights the need for  
14 the City to evaluate whether the homeport use – which will leave a large drill rig in the public  
15 water highway for months at a time – is consistent with the SMP.

16 The Port argues emphatically that it must be allowed to moor vessels anywhere without  
17 heeding the shoreline permits for its facilities because it has done just that for decades. The  
18 hearing testimony revealed that the Port has run its moorage program without regard to, and  
19 generally without any knowledge of, the shoreline permits for the various Port facilities. Englin

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21 <sup>4</sup> In cross-examination, the Port’s counsel faulted Ms. Joerger for not reading the Federal  
22 Register notice published after the Coast Guard meeting and for not seeking Coast Guard  
23 permission to violate the exclusion zone. At the meeting, however, the Coast Guard never  
24 mentioned the ability to obtain permission to enter the zone. Joerger Day 4 Audio (3 of 4) at  
25 Joerger Day 4 Audio (3 of 4) at 0:51:10 – 0:51:50, 1:11:19 – 1:11:31. No one from the Coast  
26 Guard testified so there is no basis to assume it would freely dole out permission to violate the  
exclusion zone.

1 Tr. (Day 2) at 12, 18-21; Knudsen Tr. (Day 3) at 60-61. The Port has no more right to ignore its  
2 shoreline permits and the City's SMP approval authority than any scofflaw can continue to  
3 violate the law simply because it has repeatedly done so without being caught.

4 II. THE INTERPRETATION APPROPRIATELY INTERPRETS "CARGO TERMINAL"  
5 TO ALLOW VESSEL MOORAGE ONLY WHEN IT IS INCIDENTAL AND  
6 INTRINSIC TO THE TRANSSHIPMENT OF CARGO BY CARRIERS FROM ONE  
7 LOCATION TO ANOTHER.

8 This section addresses:

- 9 1. the meaning of the term "cargo terminal" and the parallel LUC definition,  
10 never acknowledged by Foss or the Port, which unravels their construction;
- 11 2. vessel moorage as an accessory use at cargo terminals, distinguishing between  
12 vessels supporting cargo transshipment and those lay berthing for other  
13 purposes; and;
- 14 3. the "primary function test" crafted by Port and Foss attorneys, which is  
15 neither laid out in, nor necessary to apply, the Interpretation.

16 Considering all relevant SMP provisions as a whole and putting extraneous arguments aside, it is  
17 beyond question that the Interpretation appropriately determined that transshipping cargo to  
18 other locations is the essence of a cargo terminal use and only those vessels engaged in or  
19 supporting such transshipment may moor at cargo terminal facilities.

20 A. Transshipping Paying Cargo is the Essential Feature of a Cargo Terminal.

21 The Interpretation got it right when it concluded that "the unifying theme is that the  
22 goods are at a cargo terminal **in order to be transferred to other locations.**" Interp. at 4, ¶ 6  
23 (emphasis in original). This conclusion is compelled by the definitions' use of the terms  
24 "cargo," "transfer to other carriers," and "stored outdoors in order to transfer them to other  
25 locations," and because any other reading would cause the cargo terminal use to swallow up the  
26 SMP's commercial marina and storage uses.

1 The Port never parses any definitions of “cargo terminal,” but rests on its view that all  
2 moorage can be allowed at a cargo terminal as an accessory use, without regard to any shoreline  
3 permits. Foss’s analysis of the cargo terminal definition is flawed because it omits the LUC  
4 definition, uses dictionary definitions that have little relevance in the maritime context, and  
5 mixes in what it claims are “admissions,” which are not borne out by the evidence as explained  
6 *infra* at Section II.A. This section addresses the meaning of cargo terminal as a matter of  
7 statutory construction in the full context of the SMP, LUC, and SMA, and the next section  
8 applies that construction applies to the Shell homeport activities at Terminal 5.

9 *1. Foss Ignores the LUC Definition of “Cargo Terminal.”*

10 Foss never acknowledges the LUC definition of “cargo terminal.” This omission is  
11 remarkable given that Foss convinced the Hearing Examiner to retain its first claim that the  
12 Interpretation misconstrues both definitions. Foss Opp’n Motion to Dismiss at 4-5; Order on  
13 Motion to Dismiss at 1, ¶ 6.

14 The LUC defines “cargo terminal” in SMC 23.84A.038:

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

18 The LUC definition identifies two, not three, cargo terminal activities: (1) the transfer of goods  
19 or container cargo to carriers; and (2) outdoor storage of goods or container cargo in order to  
20 transfer them to other locations. Yet Foss asserts (at 22) that “[i]n the Land Use Code,” the City  
21 has designated three categories of cargo terminal activity, adding storage of cargo without  
22 manufacturing. This third category is untenable in the face of the LUC definition as explained in  
23 Soundkeeper’s Post-Hearing Brief at 10, 15-16.

1 When the LUC definition is taken into account, Foss’s resort to the last antecedent rule  
2 loses any relevance because both types of cargo terminal activity involve transshipment; the  
3 cargo must be transferred to carriers or to other locations or both. The only allowable cargo  
4 terminal activities are both inextricably tied to the transshipment of cargo for hire by carriers  
5 from one location to another.

6 2. *Foss Draws Indiscriminately from Dictionary Definitions and Glosses*  
7 *Over the Definitions Most Relevant to the Cargo Terminal Context.*

8 The Hearing Examiner looks to dictionaries to ascertain the common meaning of words  
9 as an aid to discerning legislative intent in the context of the statute as a whole. Soundkeeper Br.  
10 at 7-8. Foss has pursued a different approach, listing a series of definitions of key terms and  
11 seizing upon ones with marginal relevance in the context of the SMP or cargo terminals.

12 For “carrier,” Foss (at 23) lists “an individual or organization engaged in transporting  
13 passengers or goods for hire” alongside several other definitions, including “one who delivers  
14 newspapers,” “a postal employee who delivers or collects mail,” “an entity . . . capable of  
15 carrying an electric charge,” and the generic definition: “one that carries.” Clearly, the first  
16 definition is the most relevant to a cargo terminal, and it calls for the transshipment of goods for  
17 hire. This meaning is confirmed by Black’s Law Dictionary, which refers to an organization  
18 such as a shipowner that “contracts to transport . . . goods for a fee,” the O.E.D., which, in the  
19 most pertinent definition, refers to an entity “undertaking for payment the transport of goods by  
20 land or water,” and the UCC, under which a “carrier” issues a bill of lading evidencing the  
21 receipt of goods for shipment and is engaged in the business of transporting or forwarding goods.  
22 PSA Exhs. 7 & 8; UCC § 7-102(2) & 1-201(6). All of these definitions depict a business entity  
23 that transships goods for another entity for a fee. It is not sufficient to load goods or cargo onto  
24

1 “a thing that carries,” as Foss suggests (at 24); this definition is so broad that any entity operating  
2 any vessel would be a “carrier.”

3 Foss’s witnesses confirmed that a carrier is a business that transports cargo for a fee from  
4 one location to another. Such transshipment for hire is the nature of businesses that call at cargo  
5 terminals. They load and unload what is commonly called paying cargo – a term used to refer to  
6 cargo transshipped for hire that is distinct from provisions, stores, or gear used by the ship in its  
7 operations. *See* Knudsen Tr. (Day 3) at 52, 54, 72-75; Gallagher Tr. (Day 4) at 93, 103.

8 As another example, in listing dictionary definitions of “transfer,” Foss again draws on  
9 general concepts like “convey,” “transform,” and “change,” even though the bulk of the  
10 definitions recited by Foss call for a transfer of possession from one to another. Foss Br. at 24  
11 (“to convey from one person, place, or situation to another,” “to cause to pass from one to  
12 another,” and “to make over the possession or control of”). Other dictionaries reinforce that  
13 transfer of possession is a defining feature of the transfer of cargo via a carrier:

- 14 • Black’s Law Dictionary, PSA Exh. 7, defines “transfer” as “[t]o convey or  
15 remove from one place or person to another; to pass or hand over from one to  
16 another, esp. to change over the possession or control of” and as “[t]o sell or  
give.”
- 17 • The most pertinent definition of “transfer” in the O.E.D., PSA Exh. 8, is “trans.  
18 To convey or take from one place, person, etc. to another; to transmit, transport;  
to give or hand over from one to another.”

19 As used in the cargo terminal definition, “transfer” entails a change in possession once the  
20 paying cargo is moved from here to there. This meaning derives from both “transfer to other  
21 carriers” and stored outdoors “in order to transfer them to other locations.”<sup>5</sup>

22 \_\_\_\_\_  
23 <sup>5</sup>As it did in examining witnesses, Foss (at 20) draws on general definitions of “goods” as  
24 “something that has economic utility,” “personal property having intrinsic value,” and “cloth,”  
when the most pertinent definition to cargo terminals is “wares, commodities, merchandise.”  
McKim Tr. (Day 1) at 41-43, 53-54; Gallagher Tr. (Day 4) at 72; *see* PSA Exh. 6 (*Dictionary of*

1                   3.       *Foss Fails to Construe the Definition of “Cargo Terminal” in the Context*  
2                                   *of Other SMP Provisions and the SMP as a Whole.*

3                   Foss avoids reading terms together in the context of the SMP and LUC as a whole.

4                   Given the most relevant definitions of “transfer” and “carrier,” transfer to a carrier can only  
5                   mean handing over paying cargo so that the carrier can ship and transfer possession of it to  
6                   someone else. Similarly, the phrase “stored outdoors in order to transfer them to other locations”  
7                   calls for the transshipment and transfer of possession of cargo at the final destination. Any other  
8                   reading would allow the cargo terminal use to swallow both the storage and commercial marina  
9                   uses, contravening the SMP, which makes these uses distinct categories. *Soundkeeper Br. at 13-*  
10                   *14; DPD Br. at 31, 47-48.*<sup>6</sup>

11                   Foss suggests (at 23-24) that shipping cargo to a cargo terminal by truck or train could  
12                   satisfy the transshipment requirement. That may be the case in terms of a land-based cargo  
13                   terminal, but shorelines in the Urban Industrial Environment must have a water-dependent use,  
14                   which means the cargo must be transferred to or from a vessel that is a carrier in the business of  
15                   transshipping cargo for hire. *See SMC 23.60A.482.Table A, 484.*

16                   In sum, the SMP definition of cargo terminal requires that paying cargo be transferred to  
17                   carriers in order to be transshipped to another location with possession transferred at the final  
18                   destination to someone else. It is not enough for something to be loaded onto a vessel for use by

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19                   *Maritime and Transportation Terms* defines goods as “[w]hole or part of the cargo received from  
20                   the shipper”). Reading the word “goods” to encompass the types of noncontainerized cargo  
21                   defined in the prior SMP is the most logical reading in light the context of the SMP as a whole.  
22                   *See DPD Br. at 29-34.*

23                   <sup>6</sup> Foss emphasizes (at 32) that the LUC definition of warehouse is “an enclosed structure for the  
24                   storage of goods produced off-site, for distribution or transfer to another location.” SMC  
25                   23.84A.036. If Foss is conceding that transshipment of the stored goods and cargo is required by  
26                   extension for a cargo terminal use, *Soundkeeper* agrees, but making the warehouse and storage  
27                   accessory uses the principal use of a cargo terminal runs afoul of the SMP’s delineation of  
28                   principal and accessory uses. *Soundkeeper Br. at 14-15; DPD Br. at 31.*

1 the vessel in a business, like offshore drilling; that is not the transshipment of cargo for hire.

2 B. Moorage at a Cargo Terminal Must Be Incidental and Intrinsic to the  
3 Transshipment of Cargo from One Location to Another.

4 The Port and Foss are using the concept of idle moorage and lay berthing in both a  
5 specific and general sense and then conflating the two. The specific type is moorage of vessels  
6 engaged in the business of transshipping cargo when they are loading or unloading cargo or  
7 waiting for their next shipment. The general type is moorage of non-cargo vessels for purposes  
8 other than transshipping cargo, such as maintenance, repairs, provisioning, and homeporting.  
9 Soundkeeper and DPD agree that the specific type of moorage of cargo vessels engaged in and  
10 related to the business of transshipping cargo is an allowable accessory use at a cargo terminal.

11 Notably, when Foss applies the definition of accessory uses to moorage (at 45), it refers  
12 to the first type of moorage, *i.e.*, “vessels must moor in order to deliver goods or cargo” or to be  
13 loaded with goods or cargo; it argues that homeporting Polar Pioneer meets this definition, which  
14 is addressed *infra*. The Port is not so circumspect and consistently argues that lay berthing of  
15 any type is a normal, customary, and essential use of cargo terminals and all other Port facilities  
16 and therefore can take place anywhere without the City’s approval. Under the SMP, to state the  
17 obvious, moorage is allowed as an accessory use at a cargo terminal only if it meets the  
18 definition of accessory use. General lay berthing unrelated to cargo transshipment falls outside  
19 that definition.

20 First, it bears remembering that the SMP defines accessory use as “a use that is incidental  
21 and intrinsic to the function of a principal use and is not a separate business establishment.”  
22 SMC 23.60A.940. Moorage of a cargo vessel when it is unloading or loading cargo is both  
23 incidental and intrinsic to the transshipment of cargo. General lay berthing of noncargo vessels,  
24 however, lacks that connection to cargo shipping and is a separate business establishment.



1 Second, the Port's argument would make moorage the principal use at a cargo terminal.  
2 The definition of accessory use, however, prohibits turning an accessory use into a principal use  
3 or separate business establishment at the facility. Moreover, the SMP creates a separate moorage  
4 use, now called commercial marina, which must be established by permit in the Urban Industrial  
5 Environment. SMC 23.60A.482.Table.A.N.3.a.1.<sup>7</sup> It defies the SMP's provisions and structure  
6 to allow an accessory use to become and supplant the principal use designated for a facility.

7 Third, the Port supports its argument that general lay berthing is allowed at a cargo  
8 terminal with evidence of what takes place at other terminals, primarily Terminal 91. Such  
9 evidence is irrelevant because the Port has failed to prove that that the sole approved shoreline  
10 use of Terminal 91 (or the other terminals) is as a cargo terminal. *See* DPD Br. at 17-20, 38-40.

11 Fourth, the Port argues (at 17) that because the Port told the City that lay berthing is a  
12 normal, customary and essential practice at cargo terminals, the City was compelled to accept  
13 that characterization and deem such moorage an allowable accessory use. The Interpretation  
14 recited what the Port represented without accepting it as true or giving the representation the  
15 legal meaning sought by the Port. *Interp.* at 5, ¶ 10. The City acted appropriately, particularly  
16 since the Port's submission to the City conflates general lay berthing and moorage for the  
17 specific purpose of loading and unloading cargo. *Foss Exh. 22* at 1-2.

18 Finally, for its part, Foss seeks to re-litigate whether the SMP's definition of accessory  
19 use, which requires that a use be both incidental and intrinsic, controls, because it differs from  
20 the LUC definition. However, the Hearing Examiner rejected Foss's claim in its Order on  
21 Motion to Dismiss at 2, ¶ 9. Foss nevertheless contends at (44-45) that "intrinsic" adds nothing  
22 to "incidental." Under common dictionary definitions, the two have different meanings.

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23 <sup>7</sup> The fact that a permit is required to establish a commercial marina in the UIE confirms that  
24 moorage cannot be deemed an allowable use at all Port facilities.

1 “Incidental” means subordinate or likely to ensue as a minor consequence, while intrinsic means  
2 belonging to the thing by its very nature, inherent, and essential. *See* Soundkeeper Br. at 19;  
3 DPD Br. at 10. It is easy to see why Foss wants to jettison “intrinsic”; moorage of an offshore  
4 drilling fleet could hardly be characterized as essential to or inherent in the business of  
5 transshipping cargo or belonging to that business by its very nature.

6 The Interpretation lays out a workable test, drawn from the controlling definitions and the  
7 SMP as a whole. It is easy to discern which vessels are in the business of transshipping cargo for  
8 hire. Several witnesses identified the shipping companies by name or particular vessels as cargo  
9 shipping vessels. Knudsen Tr. (Day 3) at 58 (“It’s a cargo ship. It’s a Matson containership. . . .  
10 Carries autos, carries containers, carries break bulk cargo, carries a mix of things.”); Englin Tr.  
11 (Day 1) at 201 (describing Hanjin Copenhagen as “a container ship”). Moreover, since vessels  
12 transshipping cargo for hire need a license, the universe is defined and knowable, particularly to  
13 the Port and those in the maritime business. Knudsen Tr. (Day 3) at 73. It is also not hard to  
14 identify cargo transshipping activities. Mr. Englin, easily identified which vessels were loading  
15 or unloading cargo and which were lay berthing for maintenance, repairs, or homeporting. In  
16 addition, it is part of the Port’s business model to make such distinctions since its tariff scheme  
17 varies depending on whether a vessel is actively engaged in cargo loading or is lay berthing.  
18 Englin Tr. (Day 1) at 185-222 & Port Exh. 22; Johnson Tr. (Day 3) at 38-39 (same).

19 C. The Attacks on the So-called “Primary Function Test” Fail in the Face of the  
20 SMP’s Plain Meaning.

21 The Port and Foss direct much vitriol at the so-called “primary function test.” It is  
22 important to understand what this test is and is not. It is neither spelled out in, nor necessary to  
23 apply, the Interpretation, which allows moorage as an accessory use at a cargo terminal if the  
24

1 vessel is in the business of loading or unloading cargo, or is in between shipments and is  
2 “otherwise used for transporting goods in the stream of commerce.” Interp. at 5, ¶ 11.

3 Attorneys for the Port and Foss crafted the “primary function test” as a straw man first in  
4 Mr. McKim’s deposition and then at the hearing. *See* McKim Tr. (Day 1) at 117-18. It often is  
5 reflected more in the attorneys’ questions, than in the witness responses. *See, e.g., id.* at 49-50.  
6 Tellingly, the Port and Foss disagree as to the number and contents of the elements of the  
7 “primary function test.” *Compare* Port Br. at 20 (two parts), *with* Foss Br. at 14-15 (three parts).

8 If, through the “primary function test,” the Port and Foss are contesting that vessels must  
9 be engaging primarily in a function related to transferring goods in the stream of commerce, they  
10 are lamenting what the Code requires, not any new test. It is a perfectly reasonable requirement  
11 – and one ensconced in the Code – that vessels be engaged in or supporting the business of  
12 transshipping cargo to moor at a cargo terminal.

13 *I. The Code Defines Allowable Uses By Reference to the Purpose and*  
14 *Function of the Use and Business Establishment.*

15 The Port and Foss are mistaken in asserting that “function” is nowhere to be found in the  
16 SMP. The SMP defines “principal use” as “any use, whether a separate business establishment  
17 or not, that has a separate and distinct purpose and function from other uses on the lot.” SMC  
18 23.60A.940 (emphasis added). It defines “accessory use” as “intrinsic and incidental to the  
19 function of a principal use” and not a separate business establishment. *Id.* These definitions call  
20 for an inquiry into the purpose and function of a use or business establishment to determine  
21 whether it is an allowable use at a site.

22 Mr. McKim paraphrased the SMP’s principal use definition when asked whether the  
23 “primary function test” has any basis in the SMP:  
24

1 [W]e regulate principal uses of sites, and so to the extent that we are looking at  
2 the principal use of the site, I would say that, you know, that might equate to the  
primary function of what is going on at the site. . . .

3 As I was just saying, we look at the principal use of what is going on at the  
4 property, so principal use, primary function, I think that that is basically what we  
are getting at when we are looking at how to categorize a use in the code, which  
5 we routinely and regularly do; we are looking at the main thing that is going on.  
We have to decide what use is dominant in extent and purpose on the property, so  
6 it makes -- it is consistent with the way that we regularly routinely evaluate uses  
of property.

7 McKim Tr. (Day 1) at 113.

8 Under the SMP, principal and accessory uses hinge on the purpose and function of the  
9 use of a facility and its business. It is not a stretch to apply that same inquiry to determine  
10 whether a fleet of vessels not ordinarily engaged in cargo shipment can use the facility. This  
11 reading is not made out of whole cloth, but derives from the SMP.

12 2. *Hypotheticals About How a "Primary Function Test" Might Apply to*  
13 *Other Vessels or Facilities Lack Probative Value.*

14 Attorneys for the Port and Foss asked witnesses to apply the "primary function test" to an  
15 array of vessels mostly at other facilities. Since an Interpretation applies only to a specific  
16 facility, and this Interpretation is based on a discrete use of Terminal 5 for over-winter moorage  
of a drill rig, it covers only that use.

17 Foss and Port attorneys, nonetheless, asked witnesses to apply the primary function test  
18 to other uses and facilities, and they treat the responses as admissions. *See* Foss Br. at 13, 15;  
19 Port Br. at 19, 21. Such evidence lacks probative value because neither the Port nor Foss proved  
20 that these other facilities are established under the SMP only as a cargo terminal. Some Port  
21 facilities, like Terminal 91, have multiple uses and purposes. DPD Br. at 17-20, 38-40;  
22 Soundkeeper Br. at 17-18. The testimony elicited lacks credibility also because the main  
23 witness, Mr. McKim, indicated he did not have familiarity with the various business  
24

1 establishments and vessels and that he would need to conduct factual research to apply the cargo  
2 terminal definition to them, as exemplified by the following exchange:

3 Q. All right. Okay, now turning to a few of the hypotheticals Mr. West asked you  
4 about, he asked you about fishing boats, about trawlers I think was another type --  
5 other vessels that call at other terminals. Do you remember generally that line of  
questioning?

6 A. Yes.

7 Q. Okay. Does the interpretation itself say that it applies to the specific facts that  
might be an issue with fishing vessels?

8 A. No.

9 Q. And when you answered those questions, did you have all of the facts in front  
10 of you that you would need if you were issuing an interpretation specific to  
fishing vessels?

11 A. No.

12 Q. How about for trawlers?

13 A. No.

14 McKim Tr. (Day 1) at 151; *see also id.* at 84 (“Again, I don’t have a good understanding about  
15 how fishing vessels operate, either”). Mr. McKim offered the same caveats in response to  
16 questions about marine construction vessels, saying “I don’t have an expert opinion, not being  
17 familiar with general practices about how those vessels are used.” *Id.* at 122; *see also id.* at 127  
(providing caveat that he is not an expert on ships of state).

18 In the face of inadequate knowledge, Mr. McKim was told to base his responses on  
19 assumptions or assertions made by counsel:

20 Q. So there was a vessel there called the Aiviq. Have you ever heard of the  
21 Aiviq?

22 A. When I looked through the exhibits, I saw pictures of it, but I -- otherwise, no.

23 Q. So do you know what the function of the Aiviq is?

24 A. No.

1 Q. Does the department know what the function of the Aiviq is?

2 A. I don't know if others in the department know or not. . . .

3 Q. If the Aiviq is an offshore supply vessel, you would agree there would be no  
4 reason for it not to be able to load and unload at terminal 5, correct?

4 A. Correct.

5 Q. And so far as you know, you don't know whether the Aiviq is an offshore  
6 supply vessel?

6 A. I don't know.

7 Q. You don't know whether it carries cargo that it is going to deliver to the Polar  
8 Pioneer in Alaska?

9 A. I don't know.

10 *Id.* at 85-86. This response piggybacked on a prior exchange in which Mr. McKim was told that  
11 offshore supply vessels “are used to supply materials to offshore facilities and they transport  
12 those materials from docks all over the world” and then asked “[w]ould that meet your definition  
13 of a vessel that has a primary function of moving cargo or goods from one place to another?”  
14 Mr. McKim replied “yes.” *Id.* at 74.

15 The hearing elicited far more relevant evidence about the primary function of Polar  
16 Pioneer, Aiviq, and other vessels in Shell's Arctic drilling fleet from Mr. Gallagher, who is  
17 familiar with the vessels, and from Shell's federally approved exploration and oil spill response  
18 plans, which describe the vessels that must accompany the drill rigs in the Arctic offshore  
19 drilling operation. Gallagher Tr. (Day 4) at 20-23, 76-77, 124-37; PSA Exh. 47 at A-6 to -18. It  
20 is easy to discern that the purpose and function of Polar Pioneer is to drill and not to transship  
21 cargo for hire. It is also clear that the other vessels perform functions like towing, ice breaking,  
22 handling anchors, carrying supplies, and oil spill containment and response that are part of  
23 Shell's Arctic drilling business, not some cargo shipping enterprise. *Id.*

1                   3.       *The Interpretation Comports with DPD's Assigned Role Under the Code*  
2                                   *and the Constitution.*

3                   Toward the end of its brief (at 23-27), the Port accuses the City of usurping legislative  
4 functions and violating the void for vagueness rule. These charges are directed at the primary  
5 function test, not the Interpretation itself, and each crumbles on examination of the facts.

6                   The Interpretation on appeal does what DPD is charged with doing. It ascertains the  
7 meaning of particular Code provisions as applied to a specific property. SMC 23.88.020.A.  
8 Interpreting and applying the law is the function of the executive branch, not a lawmaking  
9 function. The Port's real concern is that the Interpretation rejects the Port's view that it can moor  
10 any vessel at any Port facility without regard to City shoreline permits and approvals. *See* Port  
11 Br. at 25. In fact, it dubs this outcome an "absurd" result. *Id.* at 21, 23. However, regardless of  
12 the Port's past behavior, if the law requires permits for moorage, which it does, then saying so is  
13 within the City's purview and does not change the law by interpretation.

14                   The Port's void for vagueness charge is leveled at the primary function test, disregarding  
15 the fact that it is the Code that prescribes the principal and accessory uses at a cargo terminal,  
16 and the Interpretation applied the pertinent Code provisions. In support of its vagueness charge,  
17 the Port contends that maritime industry witnesses did not interpret cargo terminal in the same  
18 way as the Interpretation. However, those witnesses had no familiarity with the SMP or the  
19 applicable shoreline permits, and several testified that they didn't care which permit the Port  
20 obtained for a Port facility, as long as they could conduct their business. Englin Tr. (Day 2) at  
21 12, 18-21; Knudsen Tr. (Day 3) at 60-61; Meyer Tr. (Day 3) at 12-15; Johnson Tr. (Day 3) at 46.

22                   The Port even invokes *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and contends (at 26)  
23 that the City ran afoul of the admonition that we are a nation of laws, not people, by issuing an  
24 interpretation targeted at a specific use of a Port facility. This charge is perplexing given that an

1 interpretation, by definition and authority, must address how development regulations apply to a  
2 specific property. SMC 23.88.020.A.

3 In the end, the Port and Foss would prefer a different Code definition of “cargo terminal,”  
4 one that does not require cargo be transferred to carriers and other locations. It is the Port and  
5 Foss that wish to change or disregard the law.

6 III. DPD PROPERLY DETERMINED THAT HOMEPORTING POLAR PIONEER IS  
7 NOT AN ALLOWABLE USE OF A CARGO TERMINAL.

8 Polar Pioneer is not in the business of transshipping paying cargo. It is a drill rig whose  
9 mission, purpose, and job is offshore oil drilling. Gallagher Tr. (Day 4) at 20-21, 76-77, 124-28.  
10 Polar Pioneer and the associated drilling vessels will be using Terminal 5 for overwinter  
11 moorage, but such moorage is not incidental or intrinsic to transshipping cargo for hire. It is for  
12 the separate purpose of providing a homeport where the fleet can undergo maintenance,  
13 servicing, repairs, and be provisioned and readied for the next season. *Id.* at 84-86, 101-19. The  
14 materials loaded onto Polar Pioneer are not paying cargo, but provisions, such as food, paper  
15 towels, and laundry soap for the crew, stores, such as oil filters, WD-40, paint, and brooms for  
16 the vessel, and gear, such as drill bits, chemicals and cement to form the drill muds, blowout  
17 preventers, a weather station, a small submarine, and other highly sophisticated equipment for  
18 use in the offshore drilling operation and in trying to contain an oil spill. *Id.* at 31, 35, 40-42, 48-  
19 49, 111-19, 143-44. Virtually all ships undergo provisioning when they call at Port facilities,  
20 e.g., for cruise ship passengers to disembark, for ship repairs, or for long-term moorage, *id.* at 33,  
21 but that does not convert the vessels into cargo ships.

22 The Port and Foss accuse the City of disregarding the facts, but these charges have no  
23 basis in the record. The Port and Foss are complaining about minor factual discrepancies that  
24 would not change the outcome. Piercing through the accusatory rhetoric, it becomes apparent



1 that the pertinent facts on which the Interpretation rests are uncontested.<sup>8</sup>

Facts Set Out in the Interpretation	Facts Adduced at the Hearing
Terminal 5 is a cargo terminal (at 3, Conclusion ¶ 1).	SSDP permits establish Terminal 5 as a cargo terminal and for no other use. No permits establish other uses at Terminal 5. DPD Br. at 6-9.  All the uses at Terminal 5 described in the Port's submission to DPD involved the transshipment of cargo for hire or have been demolished and discontinued. Soundkeeper Br. at 4-7; Meyer Tr. (Day 3) at 47-52, 55-56.
Polar Pioneer is a drill rig ( <i>passim</i> ).	Polar Pioneer is a highly specialized drill rig designed for offshore exploratory drilling and equipped with drilling equipment, blowout preventers, and other sophisticated drilling and oil spill response equipment; its purpose, job, and mission is to drill for oil. Gallagher Tr. (Day 4) at 20-21, 48-49, 60, 76-77, 124-28; PSA Exhs. 46 at 1-16 to 1-17 & 47 at 1-14.  Polar Pioneer is not a carrier in the business of transshipping paying cargo for hire. Gallagher Tr. (Day 4) at 128-30.
Two tugs will accompany Polar Pioneer at Terminal 5 (at 1-3).	Aiviq and Tor Viking II are highly specialized offshore drilling vessels that perform functions as tugs, ice breakers, anchor handlers, and oil spill response vessels. They called at Terminal 5 in 2015 for moorage and provisioning. Gallagher Tr. (Day 4) at 22-23, 130-31, 136; PSA Exh. 46 at 13-4 to 13-6, 13-10; PSA Exh. 47 at A-9. <sup>9</sup>

20 <sup>8</sup> The Port (at 14) and Foss (at 8-9, 14, 29) suggest that the City is not qualified to issue an  
21 interpretation because it lacks maritime expertise. This charge could be made for most land use  
22 and shoreline permits and interpretations, as DPD is comprised of land use and shoreline  
planners, rather than specialists in all types of land use subject to the Code. By way of analogy,  
the City need not employ a stable of restaurateurs to apply the LUC to restaurants.

23 <sup>9</sup> Mr. Gallagher's descriptions of Aiviq and Tor Viking II are substantiated by Shell's approved  
24 exploration and oil spill response plans. PSA Exh. 46, at 13-4 & 47 at A-9. Oddly, Foss's  
attorney instructed Mr. McKim to assume that Aiviq is an off-shore supply vessel, McKim Tr.  
(Day 1) at 85-86, and on that basis, the Port contends (at 15) that Aiviq is, in fact, an offshore

	Other vessels in Shell’s Arctic drilling fleet also called at Terminal 5 and engaged in the same moorage and provisioning activities to prepare for the Arctic drilling mission. Gallagher Tr. (Day 4) at 21-24.
Polar Pioneer and two tugs will use Terminal 5 for over-winter moorage for approximately six months of the year (1-3).	Polar Pioneer, two tugs, and other vessels in Shell’s Arctic drilling fleet moored at Terminal 5 in 2015 and will moor at Terminal 5 over the winter. Gallagher Tr. (Day 4) at 21-24, 88, 139-42.
<p>Polar Pioneer and associated vessels will be provisioned with equipment, supplies, stores, provisions and other materials (at 2, ¶ 3).</p> <p>Polar Pioneer will not stop at Terminal 5 in transit from a starting to an ultimate destination (at 4, ¶ 6).</p> <p>The tugs will likewise not bear cargo in the process of being transhipped to other locations (at 4, ¶ 7)</p>	Foss loaded provisions, stores, and gear onto Polar Pioneer, the tugs, and associated vessels. All the materials loaded onto the vessels are to be used in Shell’s offshore drilling activities. None is paying cargo that will be transhipped and turned over to others for a fee. Gallagher Tr. (Day 4) at 26-27, 92-94, 101-19, 143-44; PSA Exh. 40 at Foss 0003.
“Based on information received from the Port,” the Port provides moorage for temporary, seasonal, and sometimes indefinite lay berthing of both cargo and other types of vessels (at 5, ¶ 10). Such lay berthing includes, but is not limited to, moorage of cargo vessels not actively loading or unloading materials (at 5, ¶ 10).	<p>The Port runs a moorage program in which it provides moorage of vessels at all Port facilities without regard to the shoreline permits for those facilities. Englin Tr. (Day 2) at 12, 18-21.</p> <p>Some moorage is for the purpose of loading cargo; much is for other purposes like homeporting, maintenance, repairs, servicing, or other general lay berthing. <i>See, e.g.,</i> Englin Tr. (Day 1) at 196-97.</p>

supply vessel without noting its many highly specialized offshore drilling functions.

1 As this table shows, none of the critical facts is contested:

- 2 • Terminal 5 is permitted as a cargo terminal.
- 3 • Polar Pioneer is a drill rig, whose mission and purpose is offshore drilling, and the  
4 tugs accompanying it are highly specialized offshore drilling support vessels that  
5 are an integral part of the Arctic drilling operation.
- 6 • The drilling fleet will over-winter and use Terminal 5 as a homeport.
- 7 • Foss will load provisions, stores, equipment, supplies, and other materials onto  
8 the drill rig and associated vessels. The sole purpose of the materials is for use in  
9 Shell's Arctic drilling operation.
- 10 • Neither Polar Pioneer nor any of the other vessels in the drilling fleet will be  
11 transferring paying cargo for hire and delivering possession of that cargo to  
12 another entity elsewhere.

13 The main target of the attack on the factual basis for the Interpretation focuses not on the  
14 facts themselves, but on the inferences DPD has drawn from the facts and disagreements over  
15 legal conclusions. For example, Foss characterizes the provisioning and outfitting of Polar  
16 Pioneer as loading cargo for transshipment, but the City distinguished between provisioning a  
17 vessel and loading cargo onto a vessel for it to be transshipped for hire. Undercutting Foss's  
18 argument, the Port's submission to DPD described provisioning a ship separately from loading  
19 cargo and represented that all ships need to take on stores and supplies before heading out to sea.  
20 Foss Exh. 20 at 1, 3. In addition, the Port (at 15) faults DPD for not accepting the representation  
21 that lay berthing is a normal, customary, and essential practice at marine cargo terminals. In the  
22 Interpretation (at ¶¶10-11), DPD recited the representations made by the Port to this effect, but  
23 its analysis distinguished between moorage for the purpose of loading and unloading cargo and  
24 general lay berthing for other purposes.<sup>10</sup>

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25 <sup>10</sup> Foss criticizes Mr. McKim for deviating from the language in an initial discussion draft. Foss  
26 Br. at 1-2, 10, 12. Mr. McKim characterized that document as "something initially, just laying  
out what the issues were" and "a draft for discussion purposes." McKim Tr. (Day 1) at 7.

1 Foss and the Port try to discredit the factual basis for the Interpretation by characterizing  
2 some witness testimony as admissions. *E.g.*, Foss Br. at 6-7, 9-10, 19-20, 25, 29. As explained  
3 *supra* at Section II.C.2, the attorneys were playing a game of “gotcha” by presenting convoluted  
4 hypotheticals not grounded in evidence, directing the witness to assume certain facts, and then  
5 treating those assumed facts as admissions. None of the so-called admissions changes the  
6 uncontested facts set out above.

7 In terms of allegedly dispositive facts, Foss offers three. First, Foss (at 5-6) points to the  
8 fact that additional vessels in the drilling fleet beyond Polar Pioneer and two tugs called at  
9 Terminal 5. This year, 6-7 vessels joined Polar Pioneer at Terminal 5. Some of the vessels are  
10 offshore supply vessels that bring supplies for the drilling operation up to the drilling site,  
11 although they often play multiple roles in the drilling operation by, for example, having a science  
12 and research mission linked to the drilling samples or assisting in oil spill response. Gallagher  
13 Tr. (Day 4) at 38-39, 57-58, 130-37. The materials loaded onto all of the vessels were  
14 provisions, stores, and gear for Shell’s Arctic drilling business, not paying cargo that would be  
15 transshipped and turned over to some other entity. Polar Pioneer is the heart of the drilling  
16

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17 Tellingly, the document contains embedded italicized questions presenting counter-arguments,  
18 which makes it clear no firm conclusions had been reached. Foss Exh. 2 at RFP1000005, 006,  
19 007. While the initial text suggested the phrase “in order to transfer them to other locations”  
20 might be limited to goods stored outdoors, this statement was followed by an italicized question  
21 asking whether “this is a reasonable assumption? Or is it presumed that goods at a cargo terminal  
22 are in transit . . . ? *Id.* at RFP1000006. Mr. McKim testified that he changed his mind through  
23 discussions with other City staff. The Port and Foss repeatedly hint at political motivations. *See*  
24 Port Br. at 17 (accusing DPD of “disregard[ing] inconvenient facts”), 18 (same), 20 (accusing  
25 DPD of “seeking to find a rationale for making unlawful the moorage of the Polar Pioneer”), 27  
26 (accusing DPD of disregarding principles “in order to accomplish a specific agenda”); Foss Br.  
at 2 (“Faced with this unpalatable result”), 41 (accusing City of attempting “simply to justify the  
end result”); *see also* T-5 Intervenor Br. at 2 (accusing City of attempting “to reach a pre-  
determined outcome”). Not only are these charges not borne out by any evidence, but the  
Hearing Examiner has already ruled that political and other motivations are irrelevant. Order on  
Motion to Dismiss at 3, ¶ 16.

1 operation in the Arctic and of the Terminal 5 homeport; it was the reason why Foss had to install  
2 heavy duty bollards and conduct numerous tests of the strength of Terminal 5. *See id.* at 158;  
3 PSA Exh. 22 at CW-228. The other vessels in the fleet are intrinsic to the drilling operation, but  
4 play a supporting role. The fact that more than two members of Shell’s Arctic drilling fleet  
5 joined Polar Pioneer at Terminal 5 does not change the nature of their business activities at or  
6 their use of Terminal 5.

7         Second, Foss claims that the fact that Shell has chartered Polar Pioneer from its owner,  
8 Transocean, means Shell is paying to transport cargo to the Arctic Ocean. Foss Br. at 23-24, 35;  
9 Gallagher Tr. (Day 4) at 21, 59, 163-64. Polar Pioneer is a drill rig chartered to be part of Shell’s  
10 Arctic drilling operation. The chartering arrangement does not convert the drill rig into a carrier  
11 engaged in the business of transshipping cargo for hire. Nor does Shell’s chartering of drilling  
12 support functions make those vessels anything other than an integral part of Shell’s Arctic  
13 drilling operations. *See* PSA Exh. 47 at A-6 to A-15 (describing tugs, ice breakers, anchor  
14 handlers, offshore supply vessels, and oil spill response vessels).

15         Third, Foss argues (at 5-7, 25) that inserting drill casings into the seabed as part of the  
16 drilling activity and leaving them there is a transfer of goods or cargo to another location. Foss  
17 (at 5) goes so far as to contend that leaving chemical-laden drill muds in the ocean is a transfer of  
18 cargo that makes its use of Terminal 5 a cargo terminal use. This argument contorts the concept  
19 of transferring cargo. It would suggest that discharging pollution like bilge water might  
20 constitute a transfer of cargo. Moreover, Foss’s assertion (at 6-7, 19-20, 25, 29-30) that Mr.  
21 McKim conceded that leaving drill casings and mud in the ocean would constitute a transfer of  
22 goods to another location is contrary to the full testimony. Mr. McKim testified that the purpose  
23 of bringing and leaving such materials in the Arctic “is to – to take it up there in order to use it  
24

1 there . . . I would say it is a use rather than a delivery, so I wouldn't regard that as a transfer, no."

2 McKim Tr. (Day 1) at 78. He elaborated:

3 Q. In the sense used in the definition of a cargo terminal, isn't that transferring it  
4 from one location to another?

5 A. Again the -- the reason -- the purpose is like in order to -- it is in order to  
6 conduct a particular operation as opposed to being in order to move the  
7 equipment, so I would say no.

8 *Id.* at 77-78. He rejected the notion that leaving drill casings in the ground is transferring cargo  
9 because "assuming they lease that space, it is still their own, and they have just placed it there."

10 *Id.* at 157.

11 The fact remains that all of the material loaded by Foss onto Polar Pioneer and other  
12 vessels in Shell's Arctic drill fleet is either owned or controlled by Shell and is "material used by  
13 [Shell] in the performance of its business." PSA Exh. 40 at Foss 0003; Gallagher Tr. (Day 4) at  
14 108-19, 128-29. The fleet's mission is to drill, and the materials loaded onto the vessels are  
15 needed for that mission, not to be transferred to someone else's possession for a fee.

16 No one would mistake Polar Pioneer for a cargo ship or assume that such an enormous  
17 and unwieldy drill rig that can barely propel itself would be hired to transship cargo. It is  
18 contrived at best to assert that the fact that Polar Pioneer has been chartered or will leave casings  
19 and drill muds in the ocean at its exclusive drill site -- where it plans to return -- constitutes  
20 transshipment of cargo. It, along with its tugs, ice breakers, anchor holders, oil spill response  
21 vessels, and offshore supply vessels, comprise a drilling fleet approved by the federal  
22 government to conduct an offshore drilling venture in the Arctic. Providing an off-season home  
23 to ready the fleet for its specialized, exploratory mission supports offshore drilling, not cargo  
24 shipping.

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CONCLUSION

The Hearing Examiner should affirm the DPD Interpretation.

DATED this 21st day of September, 2015.



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