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BEFORE THE HEARING EXAMINER  
THE CITY OF SEATTLE

In the Matter of the Appeals of  
**FOSS MARITIME COMPANY AND  
PORT OF SEATTLE,**  
from an Interpretation Issued by the Director,  
DEPARTMENT OF PLANNING AND  
DEVELOPMENT.

Hearing Examiner File:  
S-15-001 and S-15-002  
  
(Director's Interpretation: 15-001)  
  
**PORT OF SEATTLE'S POST-  
HEARING RESPONSE BRIEF**

**I. INTRODUCTION**

This brief responds to the Department of Planning and Development's Closing Argument and to the Environmental Intervenors' Post-Hearing Brief.

**II. ARGUMENT**

**A. DPD's Own Closing Argument Helps Demonstrate That No Additional Shoreline Permit Is Required To Moor A Vessel At A Cargo Terminal**

**1. DPD's closing argument admits that no substantial development permit is required**

The Interpretation itself does not identify what kind of additional permit the Port must obtain:

An additional use permit is required for the proposed seasonal moorage at the Port of Seattle's Terminal 5 facility of a drilling rig and accompanying tugboats.

1           DPD then issued its Notice of Violation (Foss Exhibit 105) after the Interpretation (and  
2 after Andy McKim reviewed the NOV). McKim Hearing Transcript, 38:15-38:19. That is more  
3 specific: a shoreline permit is needed for either *commercial moorage* under the SMP in effect at  
4 the time, or for a *commercial marina* under the new SMP:

5           Remove the *Polar Pioneer* and the *Aiviq* from the property OR  
6           Obtain a permit establishing commercial moorage use (per existing  
7           Shoreline Code 23.60) or commercial marina use (if after the effective date  
8           of new Shoreline Master Program Ordinance 124750).

9           Both "commercial moorage use" and "commercial marina use" are permitted outright by the old  
10           and new SMPs, so the only permit that the NOV can be referring to is a shoreline substantial  
11           development permit.

12           DPD's Prehearing Brief, at page 3, then identified the issues for the hearing as *shoreline*  
13           issues arising under the SMP (emphasis added):

14           The issues before the Hearing Examiner are: (1) *what activities are allowed at*  
15           *an SMP "cargo terminal,"* as a matter of law; (2) what activities are being carried  
16           out on/by the oil rig and accompanying vessels at the cargo terminal, as a matter of  
17           fact de novo; (3) whether mooring the oil rig and its accompanying vessels at  
18           the cargo terminal is within the definition of "cargo terminal," as a matter of  
19           law; and (4) if not, whether such activities are "accessory" to a cargo terminal  
20           *under the SMP definition of "accessory use,"* as a matter of law.

21           DPD's Closing Argument, on page 24, then acknowledges that a shoreline substantial  
22           development permit is *not* required (emphasis added):

23           The SMP allows "boat moorage" over water if it is allowed in the shoreline  
24           environment; commercial moorage is allowed as a principal use in the UI  
25           environment and in the IG1 zone. The Port claims this is sufficient to  
26           authorize the use because no "substantial development permit" is required  
27           to use an existing structure, since there is no new substantial development.  
28           **DPD agrees there is no new substantial development and so no**  
29           **substantial development permit is required; however, the law is clear**  
30           **that the SMA and SMP still regulate the proposed use and that a City**  
31           **permit (not a substantial development permit) is required.**

32           DPD is making it up as it goes along. DPD's admission in its Closing Argument is  
33           inconsistent with what the NOV requires, even though the NOV was reviewed by the author of  
34           the Interpretation. And since a shoreline substantial development permit is not required (the  
35

1 Port's Post-Hearing Brief explains all the reasons why not), the only shoreline permit that can  
2 possibly be required is a shoreline conditional use permit, but DPD's brief, as discussed in the  
3 following subsection, also demonstrates that a shoreline conditional use permit is not required.

4 **2. DPD's brief demonstrates that no SCUP is required**

5 Under the SMA, there are three types of shoreline permits: a shoreline substantial  
6 development permit; a shoreline conditional use permit; and a shoreline variance: *e.g.*, WAC  
7 173-27-150, 160, and 170. The City's SMP adds creates two additional types of shoreline  
8 permit: a special use permit and a Council conditional use permit: *e.g.*, SMC 23.60A.032 and  
9 038. When determining which, if any, of these five types of permit apply to moorage, one finds:

- 10 • There is no need for a shoreline special use approval because, pursuant to SMC  
11 23.60A.032, moorage is not identified in the SMP as a use that requires special use  
12 approval.
- 13 • Similarly, no Council conditional use approval is needed because, pursuant to SMC  
14 23.60A.038, moorage is not identified in the SMP as a use that requires Council  
15 conditional use approval.
- 16 • DPD acknowledges on page 24 of its Closing Argument that no shoreline substantial  
17 development permit is required. The Port also demonstrated why this is so in its Post-  
18 Hearing Brief.
- 19 • No shoreline variance is needed because the Port is not requesting any "variance from  
20 bulk, dimensional, and performance standards." SMC 23.60A.036.

21 As a result, the only possible permit is the shoreline conditional use permit. SMC 23.60A.034.A  
22 states:

- 1 A. The shoreline conditional use process may be used if either:
- 2 1. A use or shoreline modification is listed in this Chapter 23.60A as  
3 requiring shoreline conditional use approval; or
  - 4 2. A use or shoreline modification is not identified in the shoreline  
5 environment where it is proposed to be located and is allowed in  
6 the underlying zone.

7 Moorage is not listed in the SMP as requiring shoreline conditional use approval, so a  
8 shoreline conditional use permit is required only if moorage is not identified as a use in the UI  
9 shoreline environment, but is allowed in the underling IG zone. DPD's Closing Argument,  
10 however, repeatedly acknowledges that moorage is a permitted use in the UI shoreline  
11 environment.

12 For example on page 24:

13 The SMP allows "boat moorage" over water if it is allowed in the shoreline  
14 environment; commercial moorage is allowed as a principal use in the UI  
15 environment and in the IG1 zone.

16 And again on page 47 of DPD's Closing Argument:

17 The type of permit needed is likely a permit to establish a commercial  
18 moorage/marina permit use, an allowed use in the UI Environment and IG1 zone.

19 Table A for SMC 23.60A.482 lists permitted uses in the UI shoreline environment, and  
20 includes "commercial marina" as permitted under the heading N.3 "Moorage." DPD's own  
21 Closing Argument, using DPD's own understanding of "use," thus demonstrates that no  
22 shoreline permit is required. Both the NOV and DPD's Closing Argument say that the Port  
23 should permit Terminal 5 as a commercial marina under the SMP, but no shoreline conditional  
24 use permit is needed because the use is permitted; and no shoreline substantial development  
25 permit is required because no shoreline substantial development is proposed.

26 DPD cites the case of *Clamshacks of America, Inc. v. Skagit County*, 109 Wn.2d 91, 743  
P.2d 265 (1987), in support of its argument, but *Clamshacks* is irrelevant because clam  
harvesting was not identified by Skagit County as a permitted use and therefore a shoreline  
conditional use permit was required. No party in this appeal of the DPD Interpretation is

1 disputing the holding of *Clamshacks* or arguing that a shoreline conditional use permit is not  
2 required for a use that is “not identified in the shoreline environment.” SMC 23.60A.034.A. But  
3 DPD itself acknowledges that moorage is a permitted use in the UI environmental where  
4 Terminal 5 is located, so no shoreline conditional use permit is required.

5 For the reasons summarized in the bullet points above, no other type of shoreline permit  
6 is required either. DPD insists that the Port must obtain a new shoreline permit in order to  
7 continue to moor vessels in the manner in which the Port always has moored vessels, but DPD  
8 itself concedes that moorage is a permitted use, so no shoreline conditional use permit can be  
9 required. In addition, DPD itself acknowledges that no substantial development is proposed, so  
10 no substantial development permit is required.

11 **3. There is no issue before the Hearing Examiner of whether a non-shoreline**  
12 **permit may be required to moor vessels**

13 DPD’s Interpretation interprets the definition of “cargo terminal” in both the old and new  
14 SMPs (SMC 23.60.906 and 23.60A.906). DPD’s Interpretation also interprets the definition of  
15 “accessory use” in the SMP (SMC 23.60.940 and 23.60A.940), which the Interpretation  
16 describes as “more stringent” than the definition in the land use code in SMC 23.84A.040, which  
17 the Interpretation does not interpret.

18 As quoted and summarized on page 2 above, the NOV (Foss Exh. 105) specifically says  
19 that permits are required under the SMP, and both DPD’s Pre-Hearing Brief and its Closing  
20 Argument assert that the Interpretation requires shoreline permits under the SMP.

21 The issue of whether DPD could require a non-shoreline permit, under regulations not  
22 included in the SMP, for a vessel to moor in navigable water is not the subject of the  
23 Interpretation or of DPD’s actions and briefing since the Interpretation. If DPD were to issue an  
24 Interpretation of non-SMP provisions of the code that requires the Port to obtain non-shoreline  
25 permits for vessels to moor in navigable waters, that would be a new and different Interpretation  
26 that would raise new issues, such as whether the City even has the authority to require a non-



1 shoreline permit for (and therefore potentially deny) vessel moorage that is allowed without a  
2 permit by the SMA. See *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 695, 169 P.3d 14  
3 (2007) (quoted at length in the Port's Post-Hearing Brief, where the plurality decision concludes  
4 that "[u]nder the Washington Constitution, local governments have no broad police power over  
5 shorelines." *Id.*); *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987) (the "right of  
6 navigation" is part of the *jus publicum* that is inherent in the State's ownership of tidelands and  
7 shorelands, and cannot be conveyed or given away by the state).

8 Such issues need not be addressed, however, because DPD's position, as reflected in its  
9 Interpretation, its NOV, its Pre-Hearing Brief, and its Closing Argument, is that a shoreline  
10 permit is required under the SMP.

11 DPD's Closing Argument then helps demonstrate, however, that no shoreline permit is  
12 required: no substantial development permit is required because no development is proposed;  
13 and no shoreline conditional use permit is required because moorage is a permitted use in the UI  
14 environment. There is no other permit that can even arguably be required under the SMP, and  
15 DPD's position is internally inconsistent and contradictory as well as inconsistent with the SMP  
16 itself.

17 **B. DPD's Closing Argument And Environmental Intervenors Post-Hearing Brief**  
18 **Disregard The Evidence Presented At The Hearing**

19 **1. DPD and Environmental Intervenors disregard the evidence showing that**  
20 **everything that the *Polar Pioneer* did at Terminal 5 is consistent with the**  
21 **definition of cargo terminal**

22 Before DPD wrote its Interpretation, Foss and the Port presented to DPD evidence that  
23 the activities under the lease at Terminal 5 would be consistent with cargo terminal use. In  
24 issuing its Interpretation, DPD disregarded this evidence, particularly in Conclusion 6 (emphasis  
25 in original):

26 **6. If the equipment on the drilling rig could be considered goods, would**  
**they be "stored without undergoing any manufacturing processes,**  
**transferred to other carriers, or stored outdoors in order to transfer**  
**them to other locations"? This provides three options for activities that**

1 might occur at a cargo terminal: storage without manufacturing, transfer to  
2 other carriers, or outdoor storage. The unifying theme is that the goods are  
3 at the cargo terminal **in order to be transferred to other locations**. The  
4 drilling rig would be at Terminal 5 only for purposes of seasonal storage.  
Terminal 5 would not serve as stop where the rig or the equipment on it  
would be stored or transferred in the course of transit from a starting  
location to an ultimate destination.

5 In other words, DPD decided that moorage of the *Polar Pioneer* did not comply with the  
6 SMP's definition of "cargo terminal" because this vessel would be moored at Terminal 5 "only  
7 for purposes of seasonal storage," and such moorage would not be consistent with the definition  
8 of "cargo terminal" because the "unifying theme is that the goods are at the cargo terminal in  
9 order to be transferred to other locations." In order to reach these conclusions DPD not only had  
10 to ignore the rules of English syntax but had to ignore the evidence presented to it by the Port  
11 and Foss, which demonstrated that the *Polar Pioneer* would be loading goods and container  
12 cargo while moored at Terminal 5 in May and June, and would be both unloading and loading  
13 goods and container cargo when it returned in late October.

14 At the hearing Foss presented the testimony of Paul Gallagher, supported by scores of  
15 photographs and other exhibits, that demonstrated that all of the cargo activities conducted by the  
16 *Polar Pioneer* and its support vessels were consistent with the definition of cargo terminal in  
17 SMC 23.60A.906:

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

21 The *Polar Pioneer* itself, the *Aiviq*, and the other support vessels all loaded goods and  
22 container cargo for transport to Alaska: in other words, all the goods and container cargo at  
23 Terminal 5 were brought there to be loaded onto vessels and taken somewhere else. This  
24 un rebutted evidence at the hearing, which was consistent with the evidence that the Port and Foss  
25 presented to DPD before the Interpretation, makes irrelevant the parsing of the definition of  
26 "cargo terminal" in the Interpretation, and also makes irrelevant much of the content of DPD's

1 Closing Argument and the Environmental Intervenors' Post-Hearing Brief. The goods and  
2 container cargo brought to Terminal 5 to load onto the *Polar Pioneer* and its support vessels  
3 were brought there, in the words of the Interpretation, "in order to be transferred to other  
4 locations," and so there are *no* facts in the record to support the Interpretation.

5 The DPD's Closing Argument and the Environmental Intervenors' Post-Hearing Brief  
6 ignore these facts more egregiously than did the Interpretation, and devote many pages to parsing  
7 different definitions of "cargo" (DPD's Closing Argument, pp. 27 – 41; Environmental  
8 Intervenors's Posting Hearing Brief, pp.7 – 16) as if the evidence had not conclusively  
9 demonstrated that all of the *Polar Pioneer's* activities at Terminal 5 involved the loading of  
10 "goods or container cargo" for transport to Alaska.

11 **2. DPD and Environmental Intervenors disregard the evidence that moorage is**  
12 **intrinsic in cargo terminal use**

13 The Interpretation also is not supported by substantial evidence when it concludes that  
14 moorage of vessels "not used for transfer of goods to other locations" is not an accessory use as  
15 defined by the SMP:

16 "Use, accessory" means a use that is incidental and intrinsic to the function of a  
17 principal use and is not a separate business establishment unless a home  
18 occupation.

19 SMC 23.60A.940.

20 Before DPD wrote its Interpretation, the Port and Foss presented evidence to DPD that  
21 demonstrated that moorage of all kinds of vessels for all kinds of purposes is intrinsic to the  
22 operation of cargo terminals. The Interpretation acknowledges some of this evidence in Finding  
23 5 and Conclusion 10, but then disregards this evidence in Conclusion 11 and in the ultimate  
24 Conclusion.

25 Most of the hearing was devoted to additional, un rebutted evidence that demonstrates that  
26 moorage of all kinds of vessels for all kind of purposes is intrinsic to the operation of cargo  
terminals. Greg Englin, Mike McLaughlin, Paul Gallagher, Jim Johnson, Mark Knudsen, and



1 Vince O'Halloran all testified about the variety of vessels that moor – and the variety of reasons  
2 for such moorage – at cargo terminals, and the Port's Exhibits extensively document moorage by  
3 non-cargo vessels and moorage for non-cargo purposes. This testimony and these exhibits  
4 demonstrate in detail, with reference to hundreds of specific vessels and specific vessel calls, that  
5 moorage of non-cargo vessels, and of cargo vessels for non-cargo purposes, is essential to and  
6 inherent in the operation of cargo terminals and always has been.

7 These are the proven facts from the *de novo* appeal, yet these facts are ignored by DPD  
8 and Environmental Intervenors in their briefs. Both DPD and Environmental Intervenors do,  
9 however, cite dictionary definitions of “intrinsic” that are consistent with the evidence presented  
10 by the Port and Foss and that confirm that moorage is intrinsic to the operation of cargo  
11 terminals.

12 On page 41 of its Closing Argument, DPD cites part of the definition of “intrinsic” from  
13 *Webster's Third New International Dictionary*: “belonging to the inmost constitution or essential  
14 nature of a thing.” The Port, in its Closing Argument, quotes the same definition but includes all  
15 of the relevant language from the definition: “belonging to the inmost constitution or essential  
16 nature of a thing: essential or inherent and not merely apparent, relative or accidental.”

17 The Environmental Intervenors on page 19 of their Post-Hearing Brief quote portions of  
18 the definition of “intrinsic” from the Oxford English Dictionary: “[b]elonging to the thing itself,  
19 or by its very nature; inherent, essential, proper; ‘of its own;’” and from Black's Law Dictionary:  
20 “[b]elonging to a thing by its very nature; not dependent on external circumstances; inherent;  
21 essential.”

22 Thus the dictionary definitions offered by DPD, Environmental Intervenors, and the Port  
23 all agree that the word “intrinsic,” which is not defined in the SMP, means both “inherent” and  
24 “essential,” and the evidence presented at the hearing by the Port and Foss demonstrates that the  
25 moorage of all kinds of vessels for all kinds of purposes, including the moorage of the *Polar*  
26 *Pioneer* at Terminal 5, is inherent in and essential to the operation of cargo terminals.

1           DPD and Environmental Intervenors write their briefs as if this evidence did not exist,  
2 and as if the definitions of “intrinsic” that they cite are to be interpreted in a factual vacuum. But  
3 under the Land Use Petition Act, DPD’s Interpretation, if it is upheld by the Hearing Examiner,  
4 must be supported by “evidence that is substantial when viewed in light of the whole record,”  
5 and must not be “a clearly erroneous application of the law to the facts.” RCW 36.70C.130(1)(c)-  
6 (d). The facts matter, and the application of the law (the definition of “cargo terminal”) to the  
7 facts (how cargo terminals operate and how Foss conducts its operations at Terminal 5)  
8 demonstrates that the Interpretation is not supported by substantial evidence and it is clearly  
9 erroneous.

10           In addition, the evidence affirmatively demonstrates that the second half of the definition  
11 of “accessory use” is met: moorage of non-cargo vessels “is not a separate business  
12 establishment.” The Port’s tariff (Port Exh. 22) demonstrates, and Mr. Englin explained in  
13 detail, that the Port provides moorage to vessels that need moorage without discrimination, and  
14 the Port charges vessels according to what they do at a cargo terminal (dockage, wharfage, etc.),  
15 not according to the type of vessel or its reason for mooring, *e.g.*, the Port does not have a  
16 different business model or different business practices for lay berthing a fishing trawler than for  
17 loading a container ship. The record unequivocally demonstrates that moorage of non-cargo  
18 vessels is not a “separate business establishment” from the moorage of cargo vessels, and  
19 therefore both halves of the test for moorage as an accessory use are met.

20           **3.     DPD and Environmental Intervenors write their briefs as if DPD had not**  
21           **articulated the “primary function” test**

22           The “primary function” test does not appear in the Interpretation or in the definition of  
23 cargo terminal, but Andy McKim articulated the test as the rationale behind the Interpretation,  
24 McKim Hearing Transcript 70:24-71:6. Mr. McKim also stated the Port should use the test in  
25 determining which vessels can moor at cargo terminals, McKim Hearing Transcript, 118:13-  
26 118:16, August 13, 2015), and Mr. McKim used the test to identify many kinds of vessels that

1 cannot moor at cargo terminals for any purpose because their "primary function" is not the  
2 "transfer of goods to other locations." See, e.g., McKim Hearing Transcript 121:18-129:10.

3 DPD's Closing Argument does not even refer to the primary function test, and  
4 Environmental Intervenors' Post-Hearing Brief refers to it only once, in an egregious  
5 misrepresentation of the evidence:

6 Second, throughout their examination of witnesses, the Port and Foss  
7 attorneys concocted what they called a "primary function test," even though  
8 no such test is spelled out in the interpretation, nor is one required to apply  
9 the interpretation.

10 The "primary function" test was not "concocted" by the "Port and Foss attorneys," it was  
11 created by Mr. McKim to provide the rationale for the Interpretation, McKim Hearing Transcript  
12 70:24-71:6.

13 Q. Is the word primary function in the definition?

14 A. No.

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

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

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

19 A. Yes.

20 Even though DPD's Closing Argument never refers to the "primary function" test by  
21 name, DPD applies the test on pages 37 -38 of its Closing Argument to the *Polar Pioneer* and  
22 the "tugs" prohibited by the Interpretation, and concludes:

23 Therefore, the Interpretation (Conclusion 7) is correct that merely putting  
24 provisions on tugs is not sufficient to be a cargo terminal use. The additional  
25 detail that stores, provisions and gear were loaded onto the *Polar Pioneer* and  
26 several other accompanying vessels adds information, but does not change the  
result of the Interpretation.

DPD's Closing Argument, p. 38.

This analysis and conclusion by DPD directly contradicts the testimony of Mr. McKim,  
who testified that if the vessels that accompanied the *Polar Pioneer* were offshore supply  
vessels, they could moor at a cargo terminal because their primary function was transporting  
cargo:

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

3 A. Correct.

4 McKim Hearing Transcript 85:23-86:1. Mr. Gallagher then testified that the *Aiviq* and the other  
5 vessel referred to (but not named) in the Interpretation were offshore supply vessels, not tugs, so  
6 the evidence demonstrates that even under DPD's primary function test they can moor at cargo  
7 terminals to load and unload cargo. DPD's argument to the contrary on page 38 of its Closing  
8 Argument (quoted above), simply demonstrates DPD's indifference to the evidence presented at  
9 the hearing.

10 All the evidence about moorage presented to the Hearing Examiner demonstrates that  
11 moorage of non-cargo vessels for non-cargo purposes is intrinsic to the function of cargo  
12 terminals. In addition, the evidence demonstrates that the *Polar Pioneer* and its support vessels  
13 were "used for transfer of goods to other locations," so even the Interpretation's own test is  
14 satisfied by the facts presented at the hearing. The only remaining basis for preventing the *Polar*  
15 *Pioneer* from mooring is the "primary function" test, but the "primary function" test is unlawful  
16 for all the many reasons discussed in the Port's Post-Hearing Brief (see in particular sections II  
17 .D, E, and F), and DPD and Environmental Intervenors do not even attempt to defend the  
18 lawfulness of the test in their briefs.

19 The evidence before the Hearing Examiner, to which DPD and Environmental  
20 Intervenors have no response in their post-hearing briefs, demonstrates that the Interpretation is  
21 not supported by substantial evidence and is a clearly erroneous application of the law (the  
22 definitions of "cargo terminal" and "accessory use") to the evidence presented at the hearing.  
23 DPD and Environmental Intervenors have no response to this evidence, they simply write their  
24 post-hearing briefs as if the evidence does not exist.

1 **C. None Of The Permits That DPD Has Issued Purport To Regulate Moorage As A Use**  
2 **Instead Of Moorage As A Development**

3 Both DPD and Environmental Intervenors attempt to argue that there is significance to  
4 the different permitting histories of Terminal 5 and Terminal 91, and that somehow the shoreline  
5 substantial development permits issued for Terminal 91 allow moorage by a variety of vessels,  
6 but that the shoreline substantial development permits at Terminal 5 only allow moorage by  
7 cargo vessels that are loading or unloading cargo.

8 There are multiple problems with these arguments, beginning with the fact that they are  
9 inconsistent with Mr. McKim's testimony that the "cargo terminal" permits at Terminal 91 are  
10 the only permits that DPD has issued that could authorize the moorage of the different kinds of  
11 vessels that moor there:

12 Q. Since you've studied the permits at terminal 91 now, are you aware of any  
13 permit there, besides the cargo terminal -- excuse me, the cargo facility  
14 permit, that would allow longterm moorage of fishing boats and tugs and  
15 other large vessels?

16 A. Not that I'm aware of, no.

17 Q. So it is either the cargo terminal use or nothing, right?

18 A. Exactly. Not that -- I don't know of anything else that would be pointing  
19 to.

20 McKim Hearing Transcript at 115:5-115:13. The many permits in the record for Terminal 91 all  
21 authorize substantial development, not moorage, and while DPD asserts for purposes of this  
22 appeal that a permit for development of a cruise ship facility authorizes moorage by cruise ships,  
23 the permit does not say that, and the testimony in the record, particularly that of Mike  
24 McLaughlin, demonstrates that cruise ships have been mooring at the Port's cargo terminals for  
25 decades without any permits being issued for cruise ship development:

26 Q. I want to go back to the photograph you mentioned of your son, so that was 30 plus years  
ago?

A. Well it wasn't 30 plus years ago. I've only been at the Port 30 years. So it was... he was  
still holding your hand when you went out, got out of the car. I can't remember exactly  
how old he was. But it was an example of the early years where cruise ships would come  
to Seattle and we tried to find a facility for them to allow their passengers to get off, bring  
buses to the terminal, take them through the city for the day, and then leave in the



1 afternoon. At that time there was no near security requirements as there are today. So  
2 it's fairly easy to do at any one of our facilities.

3 Q. So those long ago days were the cruise ships mooring at, at Cargo Terminals?

4 A. Yes.

5 Q. And did that ever change?

6 A. What do you mean change? Anytime we had a berth available to accommodate them and  
7 there wasn't another committed activity scheduled. As an example, cruise ships would  
8 berth at Terminal 91 when we didn't have a cruise passenger terminal. At times we put a  
9 tent up to handle the weather conditions for the passengers. Sometimes we'd use a chill  
10 facility that may not have been occupied to process passengers through. Several different  
11 facilities were used for cruise terminals.

12 Hearing Transcript, Day 2 (2 of 4), 11:43:17-11:47:37.

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DPD also does not attempt to identify all the different permits for development that might  
authorize moorage by all the different kinds of vessels that moor at Terminal 91. In fact, DPD  
admits on page 18 of its Closing Argument that it has not even tried:

But McKim testified that in order to accurately determine what uses are  
established for Terminal 91, it would take considerable research.

What the permitting history of Terminal 91 demonstrates, and what all the other  
permits in the record demonstrate, is that DPD has never issued a shoreline permit for moorage  
as a use instead of for moorage as a substantial development; and that none of the shoreline  
substantial development permits issued by DPD impose any limitation on the kinds of vessels  
that can moor, or on the purpose for which vessels can moor. To the extent that moorage as a  
use is even mentioned in 11 the shoreline substantial development permits in the record, moorage  
is acknowledged as an existing use *E.g.*, Foss Exhibit 89, (the Director's Decision approving  
development of the cruise ship terminal at Terminal 91, identifies "short-and-long-term moorage  
for tugs, barges and other large vessels" as one of the "marine uses" at Terminal 91).

DPD's similar but contrary effort to *limit* vessel moorage at Terminal 5 is also  
unsupported by the record. The substantial development permit for the existing development at  
Terminal 5 (Foss Exhibit 33) concludes with a dozen pages of conditions, none of which purport

1 to either authorize or limit the right of vessels to moor. The fact that the decision, in its  
2 discussion, did not refer to the particular shoreline policy regarding moorage that DPD identifies  
3 on page 8 of its Closing Argument simply reflects the fact that the permit at issue is a permit for  
4 development, not use, as reflected in the conditions of the permit itself.

5 The SMP regulates development, and only regulates a use that is not development when  
6 that use “interferes with the normal public use of the surface of the waters.” RCW  
7 90.58.030(3)(a). Moorage is a use that is inherent in navigation and therefore inherent in the  
8 normal public use of the surface of the waters. Nothing in the substantial development permit for  
9 the existing development at Terminal 5 purports to limit the moorage of vessels. The permits in  
10 the record, including the substantial development permit for Terminal 5, demonstrate that the  
11 subject Interpretation is DPD’s first attempt ever to regulate moorage as a use. The permits in  
12 the record support the appeal of the Port and Foss, not DPD’s attempt to defend its first-of-a-kind  
13 Interpretation.

14 **D. Liberal Construction Of The SMA Requires Invalidation Of The Interpretation**

15 Both DPD (page 49 of its Closing Argument) and Environmental Intervenors (page 2 of  
16 their Post-Hearing Brief) refer to the requirement for “liberal construction” of the SMA that is  
17 set forth in RCW 90.58.900 (and echoed in SMC 23.60A.014):

18 This chapter is exempted from the rule of strict construction, and it shall be  
19 liberally construed to give full effect to the objectives and purposes for which it  
was enacted.

20 Neither DPD nor the Environmental Intervenors, however, identify an objective or  
21 purpose of the SMA that would be given “full effect” by DPD’s Interpretation, which limits the  
22 right of vessels to moor at cargo terminals in navigable waters. In fact, DPD’s Interpretation  
23 thwarts the objective and purpose of the SMA to protect public rights of navigation:

24 It is the policy of the state to provide for the management of the shorelines of the  
25 state by planning for and fostering all reasonable and appropriate uses. This  
26 policy is designed to insure the development of these shorelines in a manner  
which, while allowing for limited reduction of rights of the public in the navigable  
waters, will promote and enhance the public interest. This policy contemplates

1 protecting against adverse effects to the public health, the land and its vegetation  
2 and wildlife, and the waters of the state and their aquatic life, while protecting  
generally public rights of navigation and corollary rights incidental thereto.

3 RCW 90.58.020.

4 Contrary to the unsupported assertions of DPD and Environmental Intervenors, the SMA  
5 is a balanced law, one that requires "planning for and fostering all reasonable and appropriate  
6 uses," and these reasonable and appropriate uses expressly include both "navigation" and "port"  
7 uses. The SMA is not the "environmental protection" law that DPD and Environmental  
8 Intervenors vaguely assert it to be: it is, in fact, compromise legislation prepared by the  
9 Legislature in response to Initiative 43, which was drafted by the Washington Environmental  
10 Council. The Legislature presented both the WEC-drafted Initiative 43 and the Legislature's  
11 compromise measure, Alternative Measure 43B, to the voters in November 1972, and the voters  
12 chose the compromise measure which is codified today as the SMA.<sup>1</sup>

13 Ecology's Guidelines for development of local SMPS, Chapter 173-26-176 WAC,  
14 summarize the balancing required by the SMA (bold and italics in original; highlighting added):

15 (1) The guidelines are designed to assist local governments in developing,  
16 adopting, and amending master programs that are consistent with the policy and  
17 provisions of the act. Thus, the policy goals of the act are the policy goals of the  
18 guidelines. The policy goals of the act are derived from the policy statement of  
19 RCW 90.58.020 and the description of the elements to be included in master  
20 programs under RCW 90.58.100.

21 (2) The policy goals for the management of shorelines harbor potential for  
22 conflict. The act recognizes that the shorelines and the waters they encompass are  
23 "among the most valuable and fragile" of the state's natural resources. They are  
24 valuable for economically productive industrial and commercial uses, recreation,  
navigation, residential amenity, scientific research and education. They are fragile  
because they depend upon balanced physical, biological, and chemical systems  
that may be adversely altered by natural forces (earthquakes, volcanic eruptions,  
landslides, storms, droughts, floods) and human conduct (industrial, commercial,  
residential, recreation, navigational). Unbridled use of shorelines ultimately could  
destroy their utility and value. The prohibition of all use of shorelines also could  
eliminate their human utility and value. Thus, the policy goals of the act relate  
both to utilization and protection of the extremely valuable and vulnerable  
shoreline resources of the state. The act calls for the accommodation of "all

25 <sup>1</sup> Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423-24  
26 (1974); Richard L. Settle, *Washington Land Use and Environmental Law and Practice*, Butterworth  
Legal Publishers, 1983, pp. 130-31.



1 reasonable and appropriate uses" consistent with "protecting against adverse  
2 effects to the public health, the land and its vegetation and wildlife, and the waters  
3 of the state and their aquatic life" and consistent with "public rights of  
4 navigation." The act's policy of achieving both shoreline utilization and protection  
5 is reflected in the provision that "permitted uses in the shorelines of the state shall  
6 be designed and conducted in a manner to minimize, in so far as practical, any  
7 resultant damage to the ecology and environment of the shoreline area and the  
8 public's use of the water." RCW 90.58.020.

(3) The act's policy of protecting ecological functions, fostering reasonable  
utilization and maintaining the public right of navigation and corollary uses  
encompasses the following general policy goals for shorelines of the state. The  
statement of each policy goal is followed by the statutory language from which  
the policy goal is derived.

(a) **The utilization of shorelines for economically productive uses that are  
particularly dependent on shoreline location or use.**  
RCW 90.58.020:

"The legislature finds that the shorelines of the state are among the most valuable  
and fragile of its natural resources and that there is great concern throughout the  
state relating to their utilization, protection, restoration and preservation."

"It is the policy of the state to provide for the management of the shorelines by  
planning for and fostering all reasonable and appropriate uses."

"Uses shall be preferred which are . . . unique to or dependent upon use of the  
state's shoreline."

"Alterations of the natural condition of the shorelines of the state, in those limited  
instances when authorized, shall be given priority for single-family residences  
and their appurtenant structures, ports, shoreline recreational uses including but  
not limited to parks, marinas, piers, and other improvements facilitating public  
access to shorelines of the state, industrial and commercial developments which  
are particularly dependent on their location on or use of the shorelines of the  
state and other development that will provide an opportunity for substantial  
numbers of the people to enjoy the shorelines of the state."

17 No objective or purpose of the SMA is furthered by restricting moorage at cargo  
18 terminals so that the only vessels that can moor are those whose primary function is transporting  
19 cargo, and then only when such cargo vessels are mooring for the purpose of loading or  
20 unloading cargo. Substantial, un rebutted evidence at the hearing demonstrates that moorage of  
21 all kinds of vessels for all kinds of purposes is essential to the functioning of cargo terminals, to  
22 navigation, and to the operations of the maritime community that the Port serves and that the  
23 SMA protects.

24 The evidence admitted at the hearing in fact demonstrates that the Interpretation *harms*  
25 public rights of navigation rather than protects them, and does so without giving effect to any  
26 other objective or purpose of the SMA. By limiting moorage in navigable waters (apparently for

1 the first time in the history of the SMA) for reasons that have nothing to do with the objectives  
2 and purposes of the SMA, DPD's Interpretation thwarts the SMA, and liberal construction of the  
3 SMA requires that the Interpretation be invalidated.

4 **E. DPD And Environmental Intervenors Gratuitous Aspersions On The Port Are**  
5 **Unsupported By The Record**

6 Both DPD and Environmental Intervenors inappropriately characterize the Port as a  
7 scofflaw, e.g., Environmental Intervenors' brief asserts on page 18:

8 Mr. Englin is only vaguely aware of what permits exist and what they might allow;  
9 indeed, the Port believes it can allow vessels to moor and undertake any activity at  
10 any Port facility without regard to the permits for the facility. Englin Tr. (Day 2) at  
11 18-21; Meyer Tr. (Day 3) at 12-15. It is that activity, mooring vessels with no  
12 awareness of or respect for permitting requirements, which the Port seeks to defend  
13 in this appeal.

14 DPD casts a similar aspersion on page 49 of its Closing Argument:

15 The true absurdity is that the Port has been assuming that every facility it  
16 controls can provide moorage for any type of vessel, regardless of the City  
17 permit for the facility.

18 These gratuitous aspersions assume that this appeal already has been decided in DPD's  
19 favor, and they assume, contrary to the evidence presented at the hearing, that DPD has a history  
20 of issuing permits that regulate moorage as a use instead of moorage as a substantial  
21 development.

22 The Port has been mooring vessels at its cargo facilities since shortly after its creation in  
23 1911, and when the City adopted its first SMP in 1977 it made no attempt to regulate moorage of  
24 vessels as a use rather than as a substantial development. The City also made no attempt to  
25 regulate moorage as a use when it adopted the definition of "cargo terminal" in 1987; or when  
26 the City engaged in its recent, comprehensive, multi-year process to update the SMP. And none  
of the City permits in the record purport to regulate use. Yet both DPD and the Environmental  
Intervenors accuse the Port of mooring vessels despite the City's permitting requirements. These  
aspersions are not only unsupported by anything in the record, they provide a telling example of  
the concern expressed more than once by Mike McLaughlin, e.g.:



1 Q. (by Ms. Baxendale): You mentioned concerns about the effect of the  
2 interpretation both on City and Port relations and in general. Did the  
3 interpretation affect the historic deal that you just did with  
4 Norwegian... I've forgotten what the proper name is, but did it affect that  
5 particular deal?

6 A. No. I don't believe it played into that. My, my expression of feeling  
7 troubled about the deteriorating relationship between the Port of Seattle  
8 and the City of Seattle is, is more related to for all the years that I've been  
9 in different roles at the Port, we worked harmoniously with the  
10 Department of Construction and Land Use, now DPD, and other  
11 departments, Economic Development Department, and one recent  
12 example is the need that surfaced in the City project for the sea wall where  
13 they had to relocate the fire station. We've always been opened-armed  
14 and ready to sit down and roll up our sleeves and figure out the best path  
15 forward. If it had to do with a substantial development permit or  
16 Shoreline Master Use permit or a revision in a permit or rezoning act, or  
17 anything like that, it always seemed to be an engaging, harmonious,  
18 helpful situation. And from my observation of what we are dealing with  
19 today in this interpretation it's troubling to me. And it, it's concerning  
20 that the the individuals involved in my observation of comments that was  
21 made in the last day about that whole process is someone was put in a  
22 position to write an interpretation that had very little knowledge about  
23 maritime activity. And we'd also find that at times back working with the  
24 DCLU when we come to talk about a maritime project, maritime projects  
25 are unique. It's not like building a high rise downtown or a new park  
26 across the street or activities at a land site, maritimes a unique  
activity. And when you start talking about bollards and dolphins and  
camels, all of those are known references in the maritime industry, but it  
can add an element of confusion for someone that's not as versed in  
maritime. And it feels to me that this interpretation may have been a  
product of not really knowing and understanding all the activities that  
happen at Port terminals.

18 Hearing Transcript, Day 2 (3 of 4), 1:29:21-1:31:45.

19 **DPD's Own Closing Argument Helps Demonstrate That The Interpretation Is**  
20 **Unworthy Of Deference**

21 Both DPD and Environmental Intervenors ask the Hearing Examiner to defer to the DPD  
22 Interpretation, but neither party explains why deference is due to this Interpretation, and the  
23 evidence introduced at the hearing demonstrates that the substantial weight given by the code has  
24 been overcome by the facts.

25 DPD was unable to demonstrate that the Interpretation was anything other than a hurried,  
26 one-off attempt to find a way to prohibit a specific vessel from mooring. DPD did not explain

1 how the Interpretation does *anything* to further the public health, safety, and welfare; and the  
2 evidence demonstrates that application of the Interpretation to other non-cargo vessels – fishing  
3 boats, ice-breakers, research vessels, construction vessels, oil-spill response vessels, etc –  
4 actively harms the public health, safety, and welfare by prohibiting these essential vessels from  
5 mooring.

6 Washington law is clear that in order for DPD to take advantage of the substantial weight  
7 standard in the code, DPD must prove at the evidentiary hearing that the Interpretation reflects  
8 DPD policy:

9 *If an agency is asserting that its interpretation of an ambiguous statute is entitled*  
10 *to great weight it is incumbent on that agency to show that it has adopted and*  
11 *applied such interpretation as a matter of agency policy. It need not be by formal*  
12 *adoption equivalent to an agency rule, but it must represent a policy decision by*  
13 *the person or persons responsible. Nothing here establishes such an agency*  
14 *policy, and nothing shows any uniformly applied interpretation. The evidence*  
15 *establishes that the application and “interpretation” here was nothing more than*  
16 *an isolated action by the Department. Therefore, even if we were to assume for*  
17 *the sake of argument that the statute was ambiguous, and thus the Hama Hama*  
18 *analysis applicable, the Department has not established an agency interpretation*  
19 *entitled to great weight. Instead, it attempts to bootstrap a legal argument into the*  
20 *place of agency interpretation.*

21 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 815, 828 P.2d 549(1992) (emphasis  
22 added). Just last year the Washington Supreme Court made this point even more forcefully:

23 The statute [LUPA] does not require a court to show complete deference, but  
24 rather, “such deference as is due.” *Id.* Thus, deference is not always due—in fact,  
25 even a local entity's interpretation of an ambiguous local ordinance may be  
26 rejected. *See Sleasman v. City of Lacey*, 159 Wash.2d 639, 646, 151 P.3d 990  
(2007). Instead, the interpreting local entity “bears the burden to show its  
interpretation was a matter of preexisting policy.” *Id.* at 647, 151 P.3d 990 (citing  
*Cowiche Conservancy v. Bosley*, 118 Wash.2d 801, 815, 828 P.2d 549 (1992)).  
No deference is due a local entity's interpretation that “was not part of a pattern of  
past enforcement, but a by-product of current litigation.” *Id.* at 646, 151 P.3d 990.  
A local entity's interpretation need not “be memorialized as a formal rule” but the  
entity must “prove an established practice of enforcement.” *Id.* (citing *Cowiche*,  
118 Wash.2d at 815, 828 P.2d 549).

27 *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn. 2d 737, 753, 317 P.3d 1037(2014).

28 Not only did DPD not prove an “established pattern of enforcement,” the evidence at the hearing  
29 demonstrates that two weeks before DPD issued its Interpretation, it produced a draft

1 interpretation that reached the opposite conclusion, and the conclusion of the draft interpretation  
2 is consistent with DPD's practice since the advent of the SMA. In addition, DPD presented the  
3 testimony of Faith Lumsden in an attempt to demonstrate, among other things, that DPD is  
4 unlikely to enforce the Interpretation against other vessels unless there is a complaint (or a  
5 request for another interpretation), and DPD's Closing Argument emphasizes this testimony of  
6 Ms. Lumsden on pages 20 and 40.

7 In other words, DPD's own testimony and its Closing Argument help demonstrate that  
8 the Interpretation does not express an "established pattern of enforcement" and therefore is not  
9 entitled to any deference. The evidence in fact goes much further than demonstrating that the  
10 Interpretation is unworthy of deference; the evidence affirmatively demonstrates that the  
11 Interpretation is an unprecedented effort to target a single vessel for disparate treatment without  
12 any legally cognizable justification for doing so.

### 13 III. CONCLUSION

14 DPD brought no knowledge of the maritime industry to its Interpretation; DPD ignored  
15 the evidence that the Port and Foss presented to it before the Interpretation; and now DPD and  
16 Environmental Intervenors, in their post-hearing briefs, ignore the evidence presented at the  
17 hearing that is inconsistent with their positions, which means almost all the evidence presented.

18 Foss loaded the *Polar Pioneer* and its support vessels with goods and container cargo that  
19 these vessels transported to Alaska, and these activities were entirely consistent with the  
20 definition of "cargo terminal," even if the definition is interpreted as DPD does, without regard  
21 to its syntax and plain meaning.

22 When the *Polar Pioneer* and its support vessels return from Alaska, Foss's activities will  
23 also be entirely consistent with the definition of cargo terminal, and with the activities that take  
24 place, and always have taken place, at cargo terminals.

25 The SMP does not require a shoreline conditional use permit for a vessel to moor because  
26 moorage is an inherent part of navigation and is permitted outright by the City's SMP.

1 The SMP does not require a shoreline substantial development permit because no  
2 development is proposed or needed for moorage at existing cargo terminals.

3 DPD has never attempted to regulate moorage as a use until it issued the subject  
4 Interpretation, which is not entitled to any deference because it is an unprecedented attempt to  
5 prohibit moorage of a specific vessel, without regard to the public health, safety and welfare.

6 DPD's Interpretation should be reversed and invalidated for all the reasons discussed in  
7 this Response Brief and in the Port's original Post-Hearing Brief. The Interpretation is not  
8 supported by any evidence, let alone substantial evidence, and is a clearly erroneous application  
9 of the law to the facts presented at the hearing.

10 RESPECTFULLY SUBMITTED this 21<sup>ST</sup> day of September, 2015.

11 PORT OF SEATTLE

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1 **DECLARATION OF SERVICE**

2 The undersigned declares under penalty of perjury under the laws of the State of  
3 Washington that I am now and at all times herein mentioned a resident of the State of  
4 Washington, over the age of eighteen years, not a party to the above-entitled action, and  
5 competent to be a witness herein.

6 On September 21, 2015, I caused the foregoing document to be served as follows:

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DATED this <sup>21st</sup> 10th day of September, 2015.

  
\_\_\_\_\_  
Brenda Bole