EXAMINER ANNE WATANABE

BEFORE THE HEARING EXAMINER
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 NOS. S-15-001; S-15-002 T-5 INTERVENORS' REPLY IN SUPPORT OF POST-HEARING BRIEF

I. ARGUMENT

The Interpretation is clearly erroneous and must be reversed because it conflicts with the plain language of SMC 23.60A.906 and leads to absurd results. Worse, DPD *admitted* it made a mistake,[1] confessed that it relied on false factual assumptions and, when pushed, acknowledged that the activities of the Shell vessels at Terminal 5 fit every element of "cargo terminal" use as defined in the Code and even meet DPD's fabricated definition of "paying cargo." Taken individually or together, the Examiner can be left with no other determination than a "definite

[1] Examination of McKim, RP 8/13/15; 76:24-25; 80:1 (Q: So your understanding of how an oil rig operates is based on assumptions? A: Yes.); 77:5-6 (Q: ***Are interpretations supposed to be based on assumptions? A: No***.).

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and firm conviction that a mistake has been committed." *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011).

A. The Interpretation Is Clearly Erroneous Because It Is Inconsistent With The Plain Language Of SMC 23.60A.906

Appellants and the T-5 Intervenors met their burden by proving the Interpretation is clearly erroneous because DPD's theory that only "paying cargo" qualifies as "goods" within SMC 23.60A.906 is inconsistent with the plain language of the Code.[2] By adding the "paying cargo" language into the Code, DPD is misconstruing both the definition of "goods" and "cargo" and how those words are incorporated into and applied within the meaning of SMC 23.60A.906. The Shoreline Master Program ***actually*** defines a cargo terminal as follows:

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

SMC 23.60A.906. [emphasis added]. Nowhere does the actual definition include the phrase or concept of "paying cargo."

DPD tries to get around this by selectively parsing out only one portion of the unrefuted testimony of Messrs. O'Halloran, Johnson and Gallagher who all defined "cargo." All three testified that "cargo" fundamentally includes four subcategories—stores, provisions, gear and

[2] "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State v. Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

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paying cargo.[3] Even though it admits that stores, provisions and gear are within the plain meaning of "cargo,"[4] DPD tries to justify its outcome-based Interpretation by arguing that only "paying cargo" qualifies under SMC 23.60A.906 since that is the only type of "cargo" being transferred from one location to another. The Code, however, makes no such subcategorical distinction and permits all types of cargo to be loaded and unloaded at cargo terminals. Moreover, DPD's parsing ignores the fact that goods, stores and provisions ***are inherently*** being transferred to another location once they are loaded onto a vessel and that vessel leaves Seattle.

Worse for DPD, it was unable to prove how "goods" as described in SMC 23.60A.906 can be nothing more than "paying cargo" when such a proposition squarely contradicts the essential cannons of statutory construction. At trial, Mr. McKim admitted that all of the items loaded onto Transocean's Polar Pioneer, specifically tubulars, pipes and other materials, were "goods" under the definition DPD used in the Interpretation, which was "personal property having intrinsic value."[5] Mr. McKim also understood when he was preparing the Interpretation that other "goods" loaded onto the Polar Pioneer would include equipment, supplies, stores and provisions.[6] Together, Mr. McKim admitted the "goods" that were loaded onto the Shell vessels covered all four subcategories of "cargo," not just "paying cargo." When pushed, Mr. McKim conceded that when these "goods" are loaded onto the Polar Pioneer and taken to and unloaded in the Arctic, that this qualifies as the "transfer [of goods] to other locations" as stated in SMC

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[3] Mr. Knudsen described "paying cargo" as an item that, "someone has paid you to put on your vessel and move it to another location and take it off." Examination of Knudsen, RP 8/24/15; 73:7-8.
[4] See DPD Closing Argument, p. 37, line 12; p. 2, line 14; p. 3, line 4 (referring to "paying cargo" as the fourth type of cargo, conceding that stores, provisions and gear are the other three types of cargo within the definitional meaning of cargo).
[5] Examination of McKim, RP 8/13/15; 53:14-54:12.
[6] Examination of McKim, RP 8/13/15; 32:6-17.

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23.60A.906.[7] In its closing brief, however, DPD tries to distance itself from Mr. McKim's admissions by claiming that what "happens to the goods is key to determining whether the use is a cargo terminal use."[8] The Code, however, does not include any such extra-jurisdictional requirements and instead lists the permissible types of cargo operations (separated by intentionally inserted commas) that may occur at a cargo terminal. DPD cannot ignore the testimony of its own employee, ignore the plain meaning of the language in the Code, ignore the commas in the Code, and rewrite the Code to meet its desired outcome.[9]

To justify doing so, however, DPD proffers that unless the Interpretation and its fabricated definitions and distinctions are upheld, maritime anarchy will ensue where vessels of any and all nature, including unpopular ones, will begin mooring at cargo terminals to pick up supplies, gear or provisions but no "paying cargo."[10] DPD's hypothetical threat is absolutely absurd since Seattle's zoning laws already provide sufficient protections to bar such an outcome. A simple example proves this true: Without question, like cargo vessels and pleasure boats, which are of different types but have similar features and use similar "cargo," residential structures and commercial/industrial structures may both include similar features such kitchens, bathrooms and sleeping areas (called caretaker's quarters for industrial properties). Despite this, residential structures are not located willy-nilly in industrial areas and, vice-versa, industrial activities are not located throughout residential zones because the Code provides sufficient protections to separate such disparate uses without the need to ignore plain language and apply

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[7] Examination of McKim, RP 8/13/15; 77:15-23; 156:18-157:2.
[8] See DPD Closing Argument, p. 30, lines 12-13.
[9] *See State v. Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 10.
[10] DPD's Closing Brief, p. 1, line 7-12; p. 2, line 6-10;

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fabricated distinctions. Until DPD was requested to make the Interpretation, Seattle's cargo terminals similarly functioned without incident within the guidance provided by the Code.

B. The Interpretation Is Clearly Erroneous Because It Leads to Absurd Results Inconsistent With The Intent Of The Code

The Interpretation as posited by DPD would actually prohibit permitted activities from occurring at Seattle' cargo facilities because only "cargo vessels" (i.e., vessels that meet DPD's fabricated "primary function" test) involved in the transport of "paying cargo" from one location to another can moor at Terminal 5. Another simple example proves this true. For example, a container cargo vessel (i.e., it meets DPD's primary function test) conveying "paid cargo" from Long Beach, California to Vancouver, British Columbia needs to moor in Seattle because its life safety and emergency response gear has failed and it needs to take on more provisions and stores. While it will load and unload its gear, provisions and stores in Seattle, it will neither load nor unload any of its "paying cargo" here. Under DPD's Interpretation, the cargo vessel cannot moor at Terminal 5 or any other cargo terminal because its gear, provisions and stores are not what DPD considers "goods" under the Interpretation. As a result, a vessel that otherwise is permitted at a cargo terminal cannot moor for life-safety reasons unless it drops off or picks up a single piece of "paying cargo." This real-world example demonstrates the Interpretation leads to absurd results all because the City does not want an unpopular vessel to moor at Terminal 5. Absurd consequences, like the one above, were not intended by SMC 23.60A.906.

C. The Interpretation Is Clearly Erroneous Because It Relies On Factually False Assumptions

Even accepting, *arguendo*, the City's paradigm of defining "goods" only to mean "paying cargo," the Appellants and the T-5 Intervenors still meet their burden that the Interpretation is

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clearly erroneous because the evidence proved DPD issued the Interpretation based on false assumptions instead of actual facts. During his testimony, Mr. McKim admitted that DPD's Interpretation was based on his uninformed assumptions instead of the actual facts and activities involved with the Shell vessels.[11] Had DPD bothered to read the information provided to it by Foss and the Port or inquire about the activities involved, it would have learned that the Shell vessels still meet DPD's fabricated "primary function" test of moving "paid cargo" from one location to another because Shell hired Transocean's Polar Pioneer to do exactly that:

> Q: […] The Polar Pioneer, is it owned by Shell?
> A: No, it's not.
> Q: Who –
> A: It's owned by a company called Transocean.
> Q: And does Shell operate it?
> A: No.
> Q: Are the members of the crew Shell employees?
> A: No, sir. They all work for Transocean.
> Q: And I think earlier you said that the vessel was on charter to Shell; is that right?
> A: I believe it's on a multi-year charter to Shell.
> Q: And could you describe in a little bit more detail what a charter is?
> A: So a charter would be a contract between a ship owner and someone who wants to have a service provided, and they would agree to a term for financial payment to go perform a mission. […]
> Q: Did Shell pay someone to transport all of that material from Terminal 5 to the Arctic?
> A: They paid Transocean to use the vessel to move the cargo from Terminal 5 up to the drilling site.
> […]
> Q: So that would make the cargo, cargo for pay, as being –
> A: I guess if they're getting paid to put it on board and move it, it seems to me like a good definition.[12]

[11] Examination of McKim, RP 8/13/15; 76:24-25; 80:1 (Q: So your understanding of how an oil rig operates is based on assumptions? A: Yes.); 77:5-6 (Q: Are interpretations supposed to be based on assumptions? A: No.).
[12] Examination of Gallagher, RP 8/25/15; 163:6-22, 164:7-15.

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Mr. McKim admitted, however, that he did not rely on these ***facts*** in drafting the Interpretation. Had he done so, he would have realized that the Polar Pioneer's "goods" meet the plain meaning in the Code's as well as the Interpretation's narrow definition of the term as "paying cargo."[13] At the end of the day, it does not matter—as the Environmental Intervenors attempt to argue—that Transocean's vessel does not look, to "the untrained eye,"[14] like a container vessel because the Polar Pioneer was hired to move goods and cargo from one location to another. Means-driven requirements fabricated out of whole cloth into the Code cannot erase this simple fact. The Examiner can be left with no other determination than a firm conviction a mistake has been committed. The Interpretation must be reversed.

II. CONCLUSION

If the Interpretation stands, any vessel calling into Seattle will be forced to guess whether, when and if its business becomes unpopular and whether, when and if its permits will be revoked *ex post facto* by DPD based on a fabricated Interpretation not grounded in law or facts. Seattle's maritime industry requires a steady foundation based on facts and a proper interpretation of the Code. Having met their burden of proof, the T-5 Intervenors respectfully request that the Hearing Examiner reverse the Interpretation as it is clearly erroneous.

DATED this 21st day of September, 2015.

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[13] Examination of McKim, RP 8/13/15; 74:
[14] Environmental Intervenors' Post-Hearing Brief, p. 26, line 7.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

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

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