

December 23, 2011

Diane Sugimura
Director, Department of Planning and Development
City of Seattle
PO Box 34019
Seattle, WA 98124-4019

*RE: Ash Grove Cement Company Comments on 2011 Draft Shoreline
Master Program Second Formal Draft*

Dear Ms. Sugimura:

We are counsel to Ash Grove Cement Company ("Ash Grove") and submit these comments on the second draft of the City of Seattle's proposed update to its Shoreline Master Program ("SSMP") on the company's behalf. Ash Grove appreciates the opportunity to review and comment on the draft SSMP.

Ash Grove is a leader in the manufacture and sale of portland cement and related construction products in the United States. Ash Grove is a family-controlled company that has been operating cement and lime plants since 1882, and has been an active participant in the Seattle economy and community for decades.

Ash Grove's Seattle Plant is located along the east side of the Duwamish River, in the Urban Industrial (UI) Shoreline Environment. Ash Grove employs almost 80 individuals in well-paying, industrial jobs in a tough economic climate, and has a significant broader economic impact throughout the region. In fact, Ash Grove's Seattle Plant is the only operating cement plant in Washington State because of the cost pressures associated with increased regulation and competition from cement imports from Asia. Its Seattle Plant depends on its shoreline location in the Duwamish Industrial Area to make this strategic economic and industrial asset economically viable, and needs to have regulatory certainty to continue providing necessary cement and concrete supplies to many public and private customers throughout the Pacific Northwest.

As stated in its letter commenting on an earlier draft of the SSMP update, Ash Grove's primary concern is that the update must implement the City of Seattle's Comprehensive Plan ("Plan") policies that direct the City in its planning to preserve industrial land for industrial uses. While the second draft is an improvement over the earlier draft, Ash Grove remains concerned that the proposal would make it more difficult for the company to maintain or

expand its industrial usage along the Duwamish River, in contrast to the expressed intent of the Plan and its several policies.

Ash Grove generally supports the comments on the second draft SSMP submitted by the Port of Seattle and by CalPortland. In addition, Ash Grove offers the following comments of its own.

1. The SSMP should allow vehicle storage and maintenance in the UI Environment. The draft SSMP would prohibit vehicle storage and maintenance on all waterfront lots in the UI Environment. See proposed Seattle Municipal Code (SMC) 23.60.482, Table A, N.10. Ash Grove currently stores and maintains a number of vehicles at its manufacturing plant. It does not have other property outside the Shoreline District that could be used for this purpose. Being able to store and maintain vehicles at its plant therefore is vital to Ash Grove's operations, just as it is for many industrial facilities along the Duwamish. This prohibition would make it very difficult for Ash Grove to continue its operations and is inconsistent with the City's policy to preserve industrial land for industrial uses. Table A should be changed so that vehicle storage and maintenance is allowed in the UI Environment.
2. The SSMP should exempt water-related uses, as well as water-dependent uses, from the 35-foot height restriction in the UI Environment. The draft SSMP would set a maximum height of 35 feet in the UI Environment. See proposed SMC 23.60.486.A. The height limit would not apply to "cranes, mobile conveyors, light standards and similar equipment necessary for the function of water-dependent uses or the servicing of vessels." (Emphasis added.) However, the height limit apparently would apply to water-related uses.

Based on the definitions in the draft SSMP, Ash Grove's cement manufacturing plant is a water-related use: its economic viability relies on a waterfront location because "it has a functional requirement for a waterfront location such as the arrival or shipment of materials by water." See proposed SMC 23.60.944. The height limit exception for water-dependent uses therefore would not apply to its plant.

The City should expand the exception so it applies to water-related uses, as well as water-dependent uses. Many water-related uses have the same need for cranes and other equipment that water-dependent uses have. Ash Grove has a

crane at our plant that is almost 100 feet high. Ash Grove relies on the crane to offload raw materials from ships. Without a crane of that height, Ash Grove would have no feasible way to move materials from ship to shore.

3. The definition of "grading" is overly broad. Because the definitions of "land disturbing activity" and "shoreline modification" incorporate the definition of "grading," they too are overly broad. In the draft SSMP, the City has proposed to define these terms as follows:

"Grading" means excavation, filling, in-place ground modification, removal of roots or stumps that includes ground disturbance, stockpiling of earth materials, or any combination thereof, including the establishment of a grade following demolition of a structure.

"Land disturbing activity" means any activity that results in a movement of earth or a change in the existing soil cover (both vegetative and non-vegetative) or the existing topography. Land disturbing activities include, but are not limited to, clearing, grubbing, grading, filling, excavation, or addition or replacement of impervious surface.

"Shoreline modifications" means those actions that modify the physical configuration or qualities of the shoreline area, usually through the construction of a physical element such as a dike, breakwater, pier, weir, dredged basin, fill, bulkhead, or other shoreline structure. Shoreline modifications can be other actions, such as clearing, grading, adding impervious surface, altering vegetation, or applying chemicals.

See proposed SMC 23.60.914, 23.60.924, and 23.60.936 (emphasis added). Ash Grove receives shipments of limestone, gypsum, and other materials on a regular basis. These materials, which are essential raw ingredients in the manufacture of cement, are stockpiled at the plant until they are needed in the production process. Being able to stockpile these materials is critical to Ash Grove's business.

However, if limestone and gypsum are considered "earth materials," then stockpiling them would appear to constitute "grading" under the draft SSMP. That in turn could restrict Ash

Grove's ability to stockpile these materials. Under proposed SMC 23.60.185.C, for example, grading "is limited to the minimum necessary for development." This suggests that DPD could control the amount of limestone and gypsum that Ash Grove stockpiles at the plant.

Ash Grove may need to stockpile more material at certain times of the year due to production demands or seasonal availability, or to take advantage of favorable prices. Business needs, not the SSMP, should dictate the quantity of raw materials on hand.

The draft SSMP also would limit the location of Ash Grove's raw material stockpiles. Ash Grove currently stockpiles some materials less than 15 feet from the shoreline. However, the draft SSMP would require a shoreline setback of 15 feet from the OHW mark. No shoreline modification—including "grading," which is currently defined to include "stockpiling of earth materials"—would be allowed within the setback, except the "minimum necessary for shoreline modifications allowed, or allowed as a special use or a conditional use in the UI environment for water-dependent and water-related uses." See proposed SMC 23.60.490.B. Again, this language appears to give DPD the power to determine how much—if any—raw material Ash Grove could stockpile within the 15-foot shoreline setback.

To avoid these problems, DPD should revise the definition of "grading" so it excludes stockpiling of raw materials to be used in a manufacturing process. Since the definitions of "land disturbing activity" and "shoreline modifications" refer to "grading" as otherwise defined in the SSMP, changing the definition of "grading" would fix the problems posed by the other two terms.

4. Public access should not be required in the UI Environment. Certain types of developments are required to provide public access. As we interpret the draft SSMP, however, public access would not be required on privately-owned waterfront lots that are either water-dependent or water-related. See proposed SMC 23.60.494.A.3. We would appreciate it if you would confirm our interpretation.

If our interpretation is not correct, Ash Grove strongly opposes any requirement for public access to its water-related, heavy-industrial facility. Ash Grove could not guarantee the safety of

members of the public who entered onto its property. Furthermore, it has no land to spare for public access facilities; Ash Grove's business operations occupy the entire parcel. Finally, Ash Grove does not believe that a requirement for private property owners to provide public access to the shoreline is consistent with the Supreme Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

5. Exemptions should be self-implementing. The draft SSMP creates certain exemptions from the requirement to obtain a shoreline permit. Ash Grove supports the exemptions but believes they should relieve landowners of the time and expense involved in seeking regulatory approvals.

However, proposed SMC 23.60.062 would require a "Letter of Exemption or other documentation satisfactory to DPD" before any construction may begin. The draft ordinance does not indicate how long it will take for the Director, or how much information the Director will need, to make an exemption determination. Ash Grove is concerned that the process for obtaining the exemption may be as lengthy and as burdensome as the permitting process itself.

Ecology's regulations do not require letters of exemption for all exempt developments; such letters are required only for those developments that need permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. See WAC 173-27-050(1). Ash Grove urges the City not to require letters of exemption in any circumstances beyond those identified in Ecology's regulations. We note that the person undertaking the development, rather than the City, will bear the risk of acting without a permit. The City will still have enforcement authority to require corrective action if a development for which a permit should have been obtained is conducted.

6. DPD should provide adequate opportunity for public comment on the Director's rules. Proposed SMC 23.60.027 would authorize the Director of the Department of Planning and Development to establish a Shoreline Habitat Unit and Mitigation Program for use in meeting mitigation requirements under the SSMP and under SEPA. This program, which the Director would establish by rule, would adopt methods for measuring impacts to ecological functions from proposed land use or water disturbing activity.

The program also could authorize payment in lieu of physical actions to mitigate such impacts.

The mitigation program will be very important, since it will, in essence, quantify the SSMP's mitigation requirements. Given the significance of the mitigation program, Ash Grove believes the public should have the same opportunity for review of and comment on the Director's rule as it would have for ordinances adopted by the City Council. Our understanding is that DPD would be required to notify the public of the proposed mitigation program only 14 days before adopting it, unless the SSMP specifies a different time. See SMC 3.02.030.A. Fourteen days is not sufficient to review and provide comments on a mitigation program. Ash Grove suggests that DPD revise the draft SSMP to state that the Director must provide at least 60 days advance notice before adopting the mitigation program rule.

7. The SSMP should allow renovations of nonconforming uses. Seattle's existing SSMP allows conforming structures or developments that contain a nonconforming use to be maintained, repaired, renovated, or structurally altered. See proposed SMC 23.60.122.B.1. However, the draft SSMP update proposes to delete "renovated" from this list of allowable activities. We do not understand this proposed deletion. At a minimum, deleting the term will create confusion.

As we understand the term, "renovation" is very similar to the other activities still allowed under the proposed ordinance, especially repair and structural alteration. It is therefore unclear to us which activities the City intends to allow and which it intends to prohibit. Ash Grove is concerned, however, that deleting the term will be interpreted as limiting the activities that can be undertaken. Unless this issue is clarified in amendments to the draft SSMP, we're afraid that it will have to be resolved in future discussions with City permitting staff, possibly with inconsistent results.

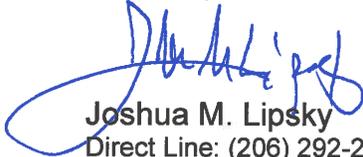
In addition to the provisions discussed above, there are other provisions of the draft SSMP that Ash Grove believes are inappropriate. For example, proposed SMC 23.60.182.C would limit certain dredging operations to accommodate existing navigational uses. Ash Grove believes this provision should apply to new navigation uses, not just those that already exist. However, we have not included comments on this or other provisions that appear to be expressly required by the Department of Ecology's Shoreline

Master Program Guidelines, WAC 173-26. Ash Grove understands that the City cannot adopt an SSMP that is inconsistent with Ecology's regulations.

Ash Grove understands that the City is attempting to balance competing interests in drafting the update to the SSMP, but Ash Grove also believes it is critically important for the City to take the time necessary to carefully work with the regulated community to craft an SSMP that will be effective, predictable, and implementable. The City's own Plan sets as a policy goal to preserve industrial land for industrial uses. Ash Grove is concerned that the present draft of the SSMP will have the opposite effect. We ask that the City revise the draft SSMP as suggested in this letter, and that it make a third draft of the SSMP available for public review and comment before seeking City Council approval.

Thank you for your consideration of these comments.

Sincerely,



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