BEFORE THE BOARD OF COUNTY COMMISSIONERS

IN AND FOR SKAGIT COUNTY, WASHINGTON

In the Matter of the Appeal of Shoreline Substantial Development Permit PL 15-0302 Granted to Tesoro Anacortes Refining and Marketing Company, LLC (Tesoro) and the Associated SEPA Environmental Impact Statement	Case No.: PL15-0302 Appeal No.: PL17-0629 **APPELLANTS' REBUTTAL BRIEF**

Appellants Stand.earth, RE Sources for Sustainable Communities, Friends of the San Juans, Evergreen Islands, Friend of the Earth, and the Sierra Club submit the following joint rebuttal to the two response briefs filed by the Skagit County Planning & Development Services ("PDS") and Tesoro Refining and Marketing Company, LLC ("Tesoro").

Appellants reaffirm their request that the Board of County Commissioners ("Board") deny the Shoreline Substantial Development Permit ("SSDP"), adopt findings and conclusions that a Shoreline Conditional Use Permit ("SCUP") is required, and remand the Final Environmental Impact Statement to PDS for further analysis of environmental impacts.

With respect to **Issue 1**, the core question for the Board is whether the transfer of approximately 230 million gallons of purified mixed xylenes per year into marine vessels for export and the associated vapor collection and enrichment activities are "new activities" at Tesoro's wharf, which is a bulk liquid transfer facility. Purified mixed xylenes have never before been produced at Tesoro's refinery or handled by Tesoro within the shoreline area. To do so, Tesoro must install new Marine Vapor Emissions Control ("MVEC") equipment and a new 3-inch natural gas pipeline on its wharf.

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The new activities in the shoreline area include:

a) piping purified mixed xylenes from the uplands to the marine vessels on the wharf;

b) loading purified mixed xylenes into marine vessels from the wharf;

c) collecting volatile hydrocarbon emissions escaping from marine vessels;

d) delivering natural gas through a new pipeline on the wharf;

e) enriching captured hydrocarbon vapors with natural gas on the wharf; and

f) transferring those enriched vapors as a waste product to an onshore combustion unit through an existing aerial 12-inch pipeline on the wharf.

The new MVEC system is required by the new air quality permit issued to Tesoro by the Washington Department of Ecology ("Ecology") for the mixed xylenes project. Pursuant to Sections 2.04.2, 7.10.2.A(6)(b), 7.11.2.A(6), and 7.18.2.A(6)(a) of the Master Program, Tesoro must apply for and obtain a SCUP for these new industrial activities on State-owned lands in the shoreline area.

The response briefs submitted by Tesoro and PDS fail to plug the holes in the Environmental Impact Statement or the Hearing Examiner decision that Appellants identified at **Issue 2**. Neither of the response briefs showed that Appellants fell short of their burden in demonstrating that the EIS was clearly erroneous because it failed to properly acknowledge the risks or scope of a true worst-case spill scenario, including very simply the method for cleaning up a mixed xylene and oil spill when the procedures for addressing a spill of each of those components conflict. Nor did the responses explain the EIS's failure to use recent science in evaluating vessel noise impacts on the critically endangered Southern Resident Killer Whale. And the response that the County does not have authority to condition the approval of the project on Tesoro's agreement to mitigate project-generated vessel spill risk and impacts rings hollow in the absence of any legal support. The EIS must be revised to disclose to the public and to inform

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the County about a true worst-case spill scenario, the actual risk of a spill from project vessels, and vessel impacts, and the County should request reasonable mitigation measures to address those impacts.

With respect to **Issue 3**, the FEIS must be remanded for a new analysis of GHG emissions. In its brief, PDS conceded to an error in the FEIS and disclosed that this one project will produce enough mixed xylenes to double U.S. exports. This new information is relevant to understanding downstream and upstream GHG emissions, undercuts the assumptions in the EIS, and has never been subject to public review or comment. Moreover, PDS cannot explain why the public was never given an opportunity to review and comment on downstream emissions of 2,438,089 tons of CO_2 per year. While PDS points to the complexity of the issue, this only underscores the need for meaningful public involvement. The FEIS is further invalid because it has no analysis at all of upstream GHG emissions and because it relies on generic "offsets" that are not supported by the record and provide no environmental benefit. Any one of these issues requires a remand of the EIS. Viewed together, they illustrate that the FEIS analysis of GHG emissions is deeply flawed.

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I. STANDARD OF REVIEW

PDS and Tesoro misstate the standard of review in this case by arguing that Appellants must demonstrate that the decision of the Hearing Examiner is "clearly erroneous." Tesoro Brief at 5, 6; PDS Brief at 3, 5, 12, 13.

The code, however, grants to the Board broad authority in a closed record appeal to remand the decision to the Hearing Examiner ("HE") for further consideration. *Id*. at 14.06.170(10)(a). The code does not include any explicit limitations on this broad grant of authority.

In the alternative, upon a showing that the decision of the Hearing Examiner is "clearly erroneous," the Board may adopt its "own findings, decisions, and conclusion based upon the record made before the Hearing Examiner." *Id*. at 14.06.170(10)(b). The "clearly erroneous" standard applies only in this limited circumstance.

For instance, if the Board determines that the record should be clarified or that the Hearing Examiner failed to apply the appropriate legal criteria, the Board may remand for further proceedings without concluding that the decision is "clearly erroneous" and without adopting its own "findings, decisions, and conclusions." *Id*. at 14.06.170(10)(a).

PDS also asserts that the Board must defer to "an agency's interpretation of its own regulations." PDS Brief at 4. PDS even takes that argument one step further and asserts the Board must "defer to the Planning Department's decisions." *Id*. Both propositions are incorrect. The Skagit County Code does not require the Board to defer to PDS. SCC 14.06.170(8)-(10). Moreover, the decision below was made by the Hearing Examiner and not PDS, so it is unclear how, if at all, PDS's proposed rule of deference would apply in this situation.

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PDS relies on *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004). *Port of Seattle*, however, involves a Washington court reviewing a permit issued by the Department of Ecology ("Ecology") under the Administrative Procedure Act. *Id*. at 593. In that instance, a court may defer to a state agency's interpretation of its own regulations (not its ultimate decision). But that principle does not apply here where the Board is reviewing the decision of a Hearing Examiner on a shoreline permit under the Skagit County Code.

II. STANDING

PDS and Tesoro both concede that Appellants have standing to appeal the SSDP.

Tesoro, however, argues that Appellants must show in addition that they are "aggrieved" in order to appeal the FEIS. Tesoro Brief at 6. Tesoro is mistaken.

A party needs to show it is "aggrieved" to seek review only from the Shorelines Hearings Board – not the Skagit County Board of Commissioners. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 126, 272 P.3d 876 (2012). This requirement is found in the provisions of the Shoreline Management Act that govern review by the Shorelines Hearings Board. RCW 90.58.180(1).

The only standing requirement for this proceeding before the Board of County Commissioners is set forth at SCC 14.06.170(2)(a). PDS and Tesoro both acknowledge that Appellants have standing under this code provision because they are parties of record.

III. THE BOARD HAS JURISDICTION OVER APPELLANTS' CHALLENGE TO THE FEIS.

PDS and Tesoro both argue that the Board does not have jurisdiction to address Appellants' challenge to the EIS. PDS Brief 10; Tesoro Brief at 11-12. Those arguments should be rejected because both PDS and Tesoro misread the Skagit County Code.

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As an initial matter, on January 10, 2018, Appellants sought clarification from Civil Deputy Prosecuting Attorney Mr. Will Honea regarding this issue, asking "whether [the Board] has jurisdiction to hear an appeal of the EIS?" Appellants did so to avoid confusion and unnecessary delay for the parties and the Board. Mr. Honea responded on the same day.

> While there is no independent mechanism for interlocutory appeal of administrative SEPA decisions to the Board of Commissioners during the course of a permitting process (an issue that arose in the appeal of Shell's recent proposed March Point project), SEPA issues may be raised concurrently with the appeal of the underlying permit – in this case, the Applicant's Shoreline Substantial Development Permit.
>
> Accordingly, Appellants are entitled to raise issued related to the EIS should they choose to do so.

PDS and Tesoro fail to demonstrate that this initial ruling is incorrect. The Skagit County Code allows for one consolidated appeal of the SEPA decision together with the underlying permit. SCC 16.12.190. The code includes specific provisions regarding "SEPA and Agency Decisions" and adopts by reference sections of the Washington Administrative Code, including "WAC 197-11-680 Appeals." *Id*. That section of the Washington code authorizes counties to provide for administrative appeals of an EIS. Those appeals "shall be limited to review of a final threshold determination and final EIS," which includes this proceeding. WAC 197-11-680(3)(a)(iii). In addition, the "appeal shall consolidate any allowed appeals of procedural and substantive determinations under SEPA with a hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing office or body." *Id*. at (3)(a)(v). Appellants consolidated their appeal of the FEIS with the appeal of the SSDP in this case. The Board therefore has jurisdiction over Appellants' challenge to the FEIS.

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PDS and Tesoro mistakenly rely on SCC 14.06.110(13) to argue that the Board does not have jurisdiction. This section of the county code states that the "**decision of the Hearing Examiner** on SEPA procedural determinations (*e.g.*, the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement) is the final County determination and no appeal to the Board is allowed." *Id*. (emphasis added). Here, as PDS concedes, the Hearing Examiner did not consider any issues relating to the EIS and did not issue a decision on the EIS. Decision at 3 (para. 15)[1]; PDS Brief at 10. Based on its plain language, SCC 14.06.110(13) does not apply.

Read in this way as a unified whole, the Skagit County Code is consistent with state law. "An agency shall provide for only one administrative appeal of a threshold determination or of the adequacy of an EIS; successive administrative appeals on these issues within the same agency are not allowed." WAC 197-11-680(3)(a)(iv). The Skagit County Code provides that an appeal of an EIS is to be heard one time either by the Hearing Examiner or by the Board, but not both.

In contrast, under the reading of the Code offered by PDS and Tesoro, there would be no appeal right at all. Once PDS issued an EIS, no other review within the County would be allowed, forcing citizens to take all concerns regarding the environmental review to outside administrative boards and/or the court system. Their interpretation conflicts with the County's adoption of the Washington code provision allowing for a single unified appeal.

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[1] The HE's statement that the Code "does not provide for the appeal of an EIS at the administrative level" does not mean that such an appeal is not available at the Board level.

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IV. ISSUE 1 – THE APPLICANT MUST OBTAIN A SHORELINE CONDITIONAL USE PERMIT

PDS and Tesoro both misread the Shoreline Master Program ("SMP") in arguing that Tesoro may, for the first time, transfer 230 million gallons per year of purified mixed xylenes into marine vessels for export in the shoreline without obtaining a SCUP. The SMP plainly requires a SCUP in this instance.

A. Tesoro's Wharf is a "Bulk Liquid or Petroleum Transfer Facility."

As Appellants discussed in their opening brief, the wharf itself is the "facility" under the plain language of the SMP. Opening Brief at 17-19. Appellants assigned error to the decision below, stating explicitly that "the HE failed to identify the wharf as a bulk transfer facility requiring a SCUP." *Id*. at 23.

PDS and Tesoro err by arguing narrowly that the MVEC equipment is not a bulk liquid or transfer facility for purposes of SMP 7.10.2.A(6)(b). PDS Brief at 8 ("neither the proposed [DSU] nor the [MVEC] are used to move bulk liquids or petroleum products through pipelines"); Tesoro Brief at 9 (a SCUP is not required for the MVEC because "it is not a bulk petroleum transfer facility"). By addressing only the MVEC equipment, and not the wharf itself, PDS and Tesoro fail to address Appellants' argument and ignore the plain language of the SMP.

Section 7.10 of the SMP applies to "Piers and Docks." Section 7.10.1.A(3) is entitled "Existing Facilities."

> Multiple use and expansion of existing piers, wharves, and docks should be encouraged over the addition and/or proliferation of new facilities.

Thus, the SMP clarifies up front that piers and docks themselves are the "facilities" addressed in the SMP regulations that apply to "Piers and Docks." *See also id*. at 7.10.1.A.(8) (providing

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direction to remove or repair "nonfunctioning piers and docks and restore such facilities"); 7.11.2.B(3) (referring to "pier and dock facilities").

In fact, Tesoro itself acknowledges that the wharf – and not the MVEC equipment – is the "facility." Tesoro relies on this very provision of the SMP to argue that the MVEC must be installed on the existing wharf. Tesoro Brief at 7 (citing SMP 7.10.1.A(3)). But then Tesoro argues that the MVEC is the "facility" for purposes of SMP 7.10.2.A(6)(b). Tesoro cannot have it both ways. Tesoro even identified "the wharf currently used as a marine transfer related (MTR) facility" in its application to the Army Corps of Engineers for a permit for this project. CPUP_JARPA_6-22-15.pdf at 5. The wharf is plainly the "facility" subject to regulation under Section 7.10 of the SMP.

The next step of the analysis is whether the facility is used for the transfer of bulk liquids or petroleum. SMP 7.10.2.A(6)(b). Tesoro argues that "a bulk petroleum transfer facility requires a structure that moves liquid petroleum in large volumes." Tesoro Brief at 8. Appellants agree, with the clarification that the facility could move liquids or petroleum. SMP 7.10.2.A(6)(b). Tesoro's wharf plainly fits this definition as Tesoro uses the wharf to move large volumes of petroleum products now and proposes to use the wharf to move an additional 230 million gallons per year of liquid mixed xylenes in the future.

PDS argues that a "bulk liquid transfer facility" is one that "moves large amounts of liquids or petroleum products through pipelines." PDS Brief at 8. PDS's interpretation conflicts with the plain language of the SMP, which does not refer to a pipeline, and is therefore erroneous.

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B. The Proposed Transfer of 230 Million Gallons Per Year of Refined Mixed Xylenes at Tesoro's Wharf is a New Activity at An Existing Development.

The Shoreline Master Program includes a specific provision that applies to developments such as this one that were in existence when the Master Program was adopted. SMP at 2.04.2. While PDS and Tesoro ignore Section 2.04.2, they implicitly concede that this section of the SMP applies to Tesoro's wharf, which was built in 1954.[2] Thus, the question here is whether the transfer of purified mixed xylenes into marine vessels at Tesoro's wharf is a "new activity" that must adhere to the policies, regulations and permit procedures" of the Master Program, which include conditional use permitting procedures. *Id*.

In resolving Appellants' argument, the Board should first note that the Hearing Examiner did not apply Section 2.04.2. Instead, he ruled at paragraph 39 that the "policies for Shoreline (sic) of Statewide Significance cannot be meaningfully implemented in (sic) existing physical context." Decision at 7 (para. 39). Appellants challenged that conclusion of law in their opening brief, and neither PDS nor Tesoro defended the HE's conclusion, instead arguing that this is not a "new activity." PDS Brief at 9; Tesoro Brief at 10. The parties therefore appear to be in agreement that the Hearing Examiner erred in failing to apply Section 2.04.2 the SMP. Thus,

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[2] PDS misrepresents Appellants' argument in arguing that they "conflate the existing authorized use (refinery and wharf built in the 1950s) with an illegal nonconforming use." PDS Brief at 9. Appellants have done no such thing. An entirely separate chapter of the Master Program applies to nonconforming uses. SMP at Chapter 12. Appellants have not pursued claims under Chapter 12.

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there are no conclusions of law under Section 2.04.2 for the Board to review. The Board must either remand the decision or undertake that analysis *de novo*.[3]

Second, the HE found that the "production of mixed xylenes (15,000 barrels per day) will be a new activity at the refinery." Decision at 2 (para. 8). Neither PDS nor Tesoro have challenged this factual finding. It strains logic past the breaking point to suggest that loading those same 15,000 barrels per day onto marine vessels, and collecting and enriching the vapors from those marine vessels, is not a "new activity" at the wharf. Indeed, the entire point of the project is that it will "provide a more diverse product mix at the refinery with the aim of increasing the long-term economic viability of the installation." *Id*. Tesoro is investing $400 million in this project so it can produce and ship a new petrochemical product.

Third, the record is replete with additional facts establishing this as a "new activity." Tesoro must pipe the purified mixed xylenes onto the wharf to the marine vessels. The MVEC itself is a "new system" to capture volatile hydrocarbon emissions from marine vessels. *Id*. at 2 (para. 1). The new 3-inch natural gas line will supply gas to the Dock Safety Unit ("DSU"), which is in the shoreline area on the wharf, to enrich vapors with natural gas. *Id*. at 2 (para. 4, 6). "Approximately 3,800 feet of new 3-inch natural gas line would be installed on the causeway and an additional 500 feet on the wharf for the proposed project." DEIS at 2-25. "Construction activities associated with line installation would involve installing and removing scaffolding, operating the crane to lift loads, welding, sandblasting, coating weld joints, and hydrostatic testing." *Id*. The use of this new gas line to enrich vapors at the DSU is a new activity at Tesoro's wharf. And the enriched vapors would then be routed through an existing 12-inch line

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[3] The Board may wish to take notice of the County's earlier 1990 Shoreline Conditional Use Permit issued for modifications to this same wharf. Skagit County Shoreline Conditional Use Permit # 8-90.

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on the wharf and through a blower to the Vapor Combustion Unit ("VCU"). *Id*. at 5 (para. 27). This is also a new activity for an existing line.

Thus, the "new activity" at the existing facility involves not only the piping and transfer of a new product – purified mixed xylenes – onto the wharf and into marine vessels. It also involves the new activity of capturing, enriching, and transferring hydrocarbon vapors as a waste from the shoreline area to the uplands where they would be burned for disposal.

Fourth, Tesoro's applications for other permits confirms that this is a new activity. Tesoro's application for an air quality permit for the project includes an entire section entitled "Proposed New Process Units and Physical Modifications." CPUP_PSDapp_June 2016 (6-23-16)_with_coverletter.pdf at 13; *see also* Draft EIS at 2-11 (Figure 2-6). New components are highlighted in red and labeled "NEW", which include the new MVEC and DSU to be installed on the wharf in the shoreline area to control emissions from loading mixed xylenes into marine vessels. *Id*. at 14. Tesoro's air quality permit includes Table IV-1 listing out the equipment associated with the project, and all but one piece of equipment is identified as "new." Hearing Exhibits1-7 Tesoro2017 at 108.pdf. The MVEC is required under the new air quality permit to control emissions from the new activity of loading mixed xylenes into marine vessels at the wharf.

Tesoro's application to the Army Corps of Engineers provides further details. The "new ARU will * * * use both distillation and liquid sulfolane extraction to produce a mixed xylene product that meets the high purity commercial specifications for petrochemical feedstock." CPUP_JARPA_6-22-15.pdf at 7. Tesoro argues that xylenes have been present as a small but unquantified component of reformate handled at the facility. Tesoro Brief at 10. But that misses the point. It is the "mixed xylenes product that meets the high purity commercial specifications

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for petrochemical feedstock" that have never before been handled at Tesoro's wharf or loaded onto marine vessels in the Aquatic zone. The EIS addresses this very point.

> Mixed xylenes are already present at the refinery because they are naturally found in crude oil and are present in the fuels currently produced. The **new mixed xylenes** that would be produced by the proposed project would be extracted from reformate.

Draft EIS at 2-5 (emphasis added).[4]

In short, the record establishes that: 1) purified mixed xylenes would be handled on the wharf for the first time; 2) Tesoro's new air permit requires new pollution controls on the wharf, including the MVEC and the 3-inch natural gas line; 3) Tesoro would enrich volatile hydrocarbon vapors from marine vessels with natural gas and pipe those vapors to shore; and 4) all of this new activity requires an investment from Tesoro of $400 million and numerous new permits from a variety of government agencies to manufacture and export a new petrochemical product. Tesoro and PDS assert this is not a "new activity" simply because xylenes have been present in some unspecified amount in the reformate and crude oil previously handled at the wharf. But that argument does not account for all of the new industrial activity that would take place with this project to export a new petrochemical product.

The objective of the Shoreline Master Program in Skagit County is to satisfy the "clear and urgent demand for a planned, rational and concerted effort * * *to prevent the inherent harm in uncoordinated and piecemeal development of shorelines." SMP at 1.02.1. Section 2.04.2 strikes a balance by exempting pre-existing development from the permitting procedures but requiring that "new activities" obtain shoreline permits and comply with the policies that apply to Shorelines of Statewide Significance. The approach proposed by PDS and Tesoro in this

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[4] Thus, paragraph 50 of the decision does not address whether the project as a whole involves "new activity" at the existing facility.

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instance, to argue that this $400 million project does not involve a "new activity" at Tesoro's wharf, undermines the policies of the Master Program.[5] Tesoro must obtain a SCUP to handle for the first time 230 million gallons of mixed xylenes per year on State-owned land in the Aquatic zone of a Shoreline of Statewide Significance.

C. A SCUP is Required for the 3-inch Natural Gas Pipeline.

In their opening brief, Appellants set forth an independent basis for why a SCUP is required for this project. Opening Brief at 25. SMP 7.18.2.A(6)(c) states that:

> Aerial or surface cable and pipeline crossings are permitted as a conditional use and subject to the landward Shoreline Area regulations.

Once again, PDS and Tesoro cannot point to anywhere in the decision below where the HE applied this subsection of the Master Program.

The HE did, however, state that "the 3-inch natural gas line involved with the MVEC is a form of petroleum pipeline." Decision at 6 (para. 36). PDS and Tesoro, in contrast, argue that the 3-inch line is a "fuel line" and not a "pipeline." PDS Brief at 8; Tesoro Brief at 10-11. PDS and Tesoro have not appealed the HE's decision, and the Board does not have jurisdiction to entertain their argument.[6]

PDS claims its staff interpreted the language of the SMP and concluded that this was a fuel line. *Id*. PDS, however, does not cite to anything in the record evidencing this staff interpretation, and the formal Staff Report says nothing at all about this issue. PL15-0302

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[5] It also undermines the policies of the Shoreline Management Act, which establishes that local authorities and Ecology share jurisdiction over conditions uses in the shoreline area. RCW 90.58.140(10); WAC 173-27-200. PDS's argument that the Board should reject Appellants' appeal to avoid sharing jurisdiction with Ecology is improper. PDS Brief at 6.

[6] PDS and Tesoro do not contest that the pipeline would be an aerial or surface crossing.

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Tesoro SSD staff report 10-2017 CORRECTED clean 10-27-17.pdf. Without any record of the staff interpretation, the Board should disregard this argument.[7]

This is particularly true here, because PDS does not explain how it distinguishes between a fuel line and a pipeline. Thus, there is no way for either Appellants or the Board to evaluate that interpretation or to understand how it applies in other circumstances. In a closed-record proceeding, PDS cannot provide that interpretation now.

To be clear, Tesoro is not planning to use the 3-inch natural gas pipeline for fuel. The natural gas delivered in that line would not be burned to supply power. The gas would be used to enrich vapors at the DSU. Decision at 5 (para. 27). After those enriched vapors are transferred via a separate 12-inch line to the VCU, they would be burned as a waste product. These facts are more than adequate to support the Hearing Examiner's finding that the 3-inch line is a pipeline.

Tesoro relies on RCW 81.88.010 in arguing that the 3-inch natural gas line is not a "pipeline" because Washington law apparently excludes from this definition lines "located exclusively on the consumer or consumers' property." Tesoro Br. at 11. But Tesoro's wharf sits on State-owned property and is operated by Tesoro pursuant to an aquatic commercial land lease with the Washington Department of Natural Resources. DEIS at 2-6. The 3-inch natural gas pipeline would not be located "exclusively" on Tesoro's property because it would cross from Tesoro's upland property onto State-owned property in the shoreline area. *Id*. at 2-2 (Figure 2-

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[7] PDS also fails to defend the "apparent interpretation" of SMP 7.18.2.A(6)(a) relied upon by the Hearing Examiner that Appellants claim as error. Decision at 6 (para. 36); Opening Brief at 24-25. Any supposed staff interpretation that is not in the Staff Report or a part of this record should be disregarded by the Board.

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1). [8] Thus, even if the Board had jurisdiction to review the Hearing Examiner's finding, which it does not, these facts further demonstrate that the 3-inch line is a pipeline. [9]

D. The Board Should Deny the SSDP.

In sum, Appellants respectfully submit that the Board should deny the SSDP and issue conclusions that: 1) the wharf is a bulk liquid transfer facility; 2) piping and loading purified mixed xylenes onto marine vessels, capturing volatile hydrocarbon vapors with the MVEC, enriching those vapors with natural gas, and transferring those enriched vapors as a waste through an existing 12-inch line to uplands are new activities at the wharf; 3) the new 3-inch natural gas line is an aerial pipeline; and 4) Tesoro must apply for and obtain a SCUP pursuant to SMP Sections 2.04.2, 7.10.2.A(6)(b), 7.11.2.A(6), and 7.18.2.A(6)(a).

In the alternative, Appellants request that the Board remand this matter to the Hearings Examiner for further proceedings.

V. ISSUE 2 – THE EIS IS INADEQUATE AND THE HEARING EXAMINER ERRED IN CONCLUDING THAT THE UNMITIGATED IMPACTS OF THE PROJECT'S VESSEL TRAFFIC AND SPILL RISKS ARE INSIGNIFICANT OR SHOULD NOT BE ADDRESSED.

The Response Briefs both overlook Appellants' arguments that the EIS could not have evaluated a worst-case spill without studying the impacts of, and how to respond to, a combined spill of propulsion fuel (including bunker fuel) and xylene, reformate, or gasoline blendstock cargo. Likewise, PDS and Tesoro fail to respond to the issue that worst-case spill scenarios must incorporate the delays likely to be caused by standard salvage operations. And they assert that

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[8] Tesoro's attempt to rely on technical publications must be rejected as improper, because those publications are not part of the record in the closed record proceedings.

[9] Here again, Tesoro makes inconsistent use of the term "facility." The statute, however, refers to the "consumers' property" not the "facility." RCW 81.88.010.

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the study of spill scenarios and vessel impacts on regional transportation systems and critically endangered orcas was extensive notwithstanding that the studies rejected the locations likely to cause greatest impacts to ferry systems and relied on an outdated understanding of the impacts of project vessel noise on the orcas. The sections below confirm the inadequacy of the EIS for studying worst-case spill scenarios, spill risks, and vessel impacts to the endangered orcas. Appellants urge the County to exercise its authority to apply common-sense mitigation measures to limit the project's risk of a spill and vessel impacts.

A. The Inadequacy of the EIS's Analysis of Shipping Traffic and Spill Risks Is Related to the Marine Vapor Emission Control System.

Tesoro suggests that the Board should ignore the flaws in the EIS on the grounds that the MVEC system is unrelated to the facility's proposal to export 15,000 bpd of mixed xylenes. Tesoro Brief at 12-13. This request overlooks the role that the new MVEC would play in facilitating the export of xylenes from the facility by allowing its transfer from upland manufacturing facilities to ships at the wharf. The DEIS expressly identifies the installation of the MVEC as a necessary "project component" for the production of the xylenes that would be shipped through regional waters, stating the need to "[i]nstall a Marine Vapor Emission Control (MVEC) System to capture vapors during product loading from docked marine vessels." DEIS at 2-3. Although the MVEC would be used to control emissions from existing transfers of gasoline-range materials and crude oil, it would also "control emissions from the proposed loadings of mixed xylenes product." *Id*. at 2-15. Thus, the MVEC constitutes an integral component of the new xylene export loading and unloading activities, and the vessel traffic and oil spill risks that it facilities for that export must be considered in the EIS as an indirect impact of the CPUP. WAC 197-11-060(4)(d).

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B. The Project Would Result in Increased Vessel Traffic and Shipping of a New Material, Mixed Xylenes.

Tesoro argues unconvincingly that the project does not change or impact current conditions and that Appellants did not challenge Hearing Examiner findings to that effect. As an initial matter, Appellants assigned error to the Hearing Examiner findings regarding the increased vessel traffic, risk of spill, and damaging consequences of a spill, stating in the Basis for Appeal, at paragraphs 5-7:[10]

- The Hearing Examiner's finding of fact that there would be no significant additive adverse environmental impacts beyond existing, permitted facilities and uses, is clearly erroneous and unsupported by the record;
- The Hearing Examiner's findings of fact regarding a worst-case spill are clearly erroneous and unsupported by the record.
- The Hearing Examiner's findings of fact regarding vessel traffic are clearly erroneous and unsupported by the record.

And as explained at page 10 of the Opening Brief, the manufacture and export of mixed xylenes and the increased import of reformate and backhaul of gasoline blendstock and their associated 120 new transits per year (approximately 40 vessels that transit inbound with reformate and outbound with gasoline blendstock and 20 vessels that export xylenes), would qualify as new activities at Tesoro's facility. As noted above, the MVEC facilitates this increased activity by controlling pollution during loading of the cargo from the wharf to the ships.

Although PDS alleges that Appellants misrepresent the scope and magnitude of the project, they do not cite any shipping figures to support that position. PDS Response at 13.[11]

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[10] In addition, Appellants address these findings at pages 49-53 of the Opening Brief.

[11] And to the extent that Appellants referred to the DEIS-acknowledged increase in tankship traffic in Rosario Strait and Guemes Channel as significant, Appellants were describing the 12.3% and 19.6% increases in that traffic, respectively.

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Instead, PDS's reference to 60 annual vessels is consistent with the numbers that Appellants cite at pages 30-33 of the Opening Brief as the basis for the argument that these figures and their associated increase in spill risk constitute a significant increased risk to regional waters.

C. PDS and Tesoro Continue to Disregard the EIS Inadequacies.

The EIS's length and verbosity do not substitute for its obligation to adequately consider the project's spill risk, true worst-case scenarios, and vessel traffic impacts. While Appellants agree that the EIS need not reference every conceivable effect or alternative, the EIS here does not consider a worst-case scenario that involves a spill of both the ships' xylene or reformate cargo and their propulsion fuel. Likewise, the EIS declines to study spill locations that would cause significant disruptions to the regional transportation system and neglects to adequately evaluate significant impacts to one of the eight (8) most endangered species in the United States. And the DEIS conclusion that the project would result in a low likelihood of a spill in Guemes Channel and Rosario Strait ignores that it did not model the risk of a spill from project vessels. As explained in the Opening Brief, the Vessel Traffic Risk Assessment that the FEIS relies upon concludes that the cumulative risk of an oil spill in the Guemes Waterway Zone would double with the addition of vessels that include this project's vessels. Opening Brief at 30-31. As explained below, the EIS's partisan analysis cannot reasonably be deemed to have adequately considered the impacts to our local waterways or the species that ply them.

1. The EIS does not consider a worst-case spill scenario.

Although the PDS and Tesoro argue that the EIS reviews a worst-case scenario, they fail to address Appellants' argument that the EIS does not look at: a) the likelihood and effects of a combined propulsion fuel and xylene or reformate spill; b) lengthy delays in cleanup due to salvage operations; or c) spill locations likely to impair regional transportation routes. The

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following sections identify the differences between the milder worst-case scenario contemplated by the EIS and a true worst-case scenario.

a. A worst-case scenario would evaluate the conflicting response strategies for a spill of both propulsion fuel and xylene or reformate cargo spill.

Although PDS asserts that "the FEIS addressed potential fuel spills as well as a release of xylene," it cites to text from the FEIS that contradicts that claim. PDS Response at 14-15 n.60. The FEIS does note the possibility of a combined spill, stating that "'[i]n the event of a worst-case, or maximum most probable spill discharge, fuel from the vessel could be leaked along with the xylenes or reformate product.'" *Id*. (quoting FEIS at 3-43). But in the sentence that follows directly, the FEIS expressly acknowledges that it did not evaluate the impacts of such a spill, stating that "[a]nalysis of fuel spills was not included in this study because vessel fuel spills are not a unique feature of this proposed project." *Id.* Instead, the EIS relies upon other studies of fuel spill risks in the Salish Sea, asserting that "there would be no changes in analysis or risk assessment results due to the proposed project." *Id.* at 15 n.60 (cont'd). Yet nowhere in its discussion of propulsion fuel and cargo volumes does the EIS identify the very unique features of the proposed project – shipping of a new material, mixed xylenes, and the conflicting methods for responding to xylene spills as compared to traditional oil spills. As explained at pages 33-35 of Appellants' Opening Brief, the absence of any evaluation of how to respond to such a spill renders the EIS inadequate.

The omission of any evaluation of a combined propulsion fuel and xylene or reformate spill likely led to several other mistaken assumptions in the EIS. For example, as noted at page 36 of the Opening Brief, the omission of propulsion fuel from the EIS analysis likely affected its conclusion that adverse weather conditions would ameliorate the impacts of a spill more quickly

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than calm weather. The omission may have also contributed to erroneous conclusions regarding impacts to recreational areas, like statements that, "a worst-case marine spill scenario or maximum most probable spill scenario would result in a ***less than significant*** impact on recreational use and access because access and use restrictions would be short term and the products fully evaporate from the environment.'" PDS Response at 19 (quoting DEIS at 10-38, 10-39). Nothing in the EIS suggests that propulsion fuel would behave differently in the Salish Sea than in other places around the world, where it would be unlikely to completely evaporate within 3 days.

b. A worst-case spill scenario would endure extended delays due to salvage operations.

PDS characterizes the omission of salvage operations from the EIS as an inconsequential procedural error and dismisses it summarily. PDS Response at 16. However, as explained at pages 35-36 of the Opening Brief, the cleanup delays associated with salvage activities can be substantial and must be evaluated to understand the full extent of a worst-case spill's potential impacts. Indeed, the absence of such an impact analysis overlooks EIS references to salvage activities, such as laws guiding salvage operations (DEIS at 13-2, Table 13-1) and Tesoro's spill response contracts with Marine Spill Response Corporation and Global Diving and Salvage (DEIS at 13-64).

Moreover, the failure to respond to comments about salvage operations, particularly due to the importance of that issue, falls short of SEPA requirements to respond to comments. Contrary to the bald, uncited assertion that PDS "responded to each comment," and therefore must have responded to comments about salvage, the FEIS does not respond to salvage comments. FEIS at Appendix A 13-224-13-225 (public comment noting that "[s]alvage operations could last days, weeks or months"); PDS Response at 16. And although PDS

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correctly notes that SEPA authorizes an agency to "respond to comments as it deems appropriate," PDS omits the associated SEPA requirement for a response to citizen comments. SEPA regulations state that "[a]n agency shall consider and may respond to comments as the agency deems appropriate; the requirements for responding in a FEIS shall be met (WAC 197-11-560)." WAC 197-11-550(8) (emphasis added). And in directing agencies to respond to comments in the FEIS, SEPA states that:

> [t]he lead agency shall consider comments on the proposal and shall respond by one or more of the means listed below, including its response in the final statement. Possible responses are to:
>
> (a) Modify alternatives including the proposed action.
>
> (b) Develop and evaluate alternatives not previously given detailed consideration by the agency.
>
> (c) Supplement, improve, or modify the analysis.
>
> (d) Make factual corrections.
>
> (e) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's response and, if appropriate, indicate those circumstances that would trigger agency reappraisal or further response.

WAC 197-11-560(1). In addition, in carrying out this duty, "the lead agency may respond to each comment individually, respond to a group of comments, cross-reference comments and corresponding changes in the EIS, or use other reasonable means to indicate an appropriate response to comments." WAC 197-11-560(3).

The EIS failed to meet this requirement and that failure was not harmless given that salvage operations of any real length could significantly exacerbate the 3-day window that the EIS repeatedly claims as the maximum length of spill impacts.

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c. A worst-case spill scenario would involve a spill in the path of regional transportation system elements like the Washington State Ferries route.

Neither of the Responses explains why the EIS omitted a spill location in the path of the routes of either the Washington State Ferries system for the San Juan Islands or the Guemes Island ferry. Instead, PDS states paradoxically that "Appellants fail to recognize Section 13.3.2.3 of the DEIS, which states: "'the temporary impacts of a worst-case spill on vessel traffic would be ***potentially significant,'"*** but that "the FEIS ultimately concluded that 'the potential impacts of a worst-case spill on ferry traffic would be less than significant,'" based on an assumption that a spill would last just 3 days. PDS Response at 18-19 (quoting DEIS at 13-1; FEIS at 3-42).

Tesoro offers the standard defense that Appellants merely seek more or different modeling locations and that Appellants did not describe the inadequacy of the modeled locations. Tesoro Response, at 16. Yet that argument ignores the Opening Brief, which explained that the EIS peculiarly selected locations that avoided both ferry system routes even though Figure 13-7 (Oil Spill Modeling Release Locations) of the DEIS included potential study locations – gray circles – directly in the path of each the ferries. Opening Brief at 37-38; DEIS at 13-39.

Moreover, notwithstanding public comments referencing the Guemes Island ferry, the EIS omitted that ferry route altogether, and therefore failed to evaluate potential project impacts to that ferry route. FEIS at 3-41 (Table 7: Ferry Routes Crossing the Marine Vessel Transportation Route) (identifying the San Juan Island ferries, Victoria Clipper, and Black Ball ferry); FEIS at Appendix A 13-119 (comment from Anne Elkins re: boat traffic in local waters that includes the Guemes Island Ferry). Without studying a spill in the path of the ferries and the

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resulting impacts to island communities dependent on those ferries for essential transportation and for basic necessities like food, the EIS is inadequate.

2. The PDS response on critically endangered Southern Resident Killer Whales reflects the inadequate consideration of vessel impacts in the EIS.

PDS offers an outdated understanding of vessel noise impacts on the ability of Southern Resident Killer Whales ("SRKW") to perform essential functions like foraging. That Response essentially argues that SRKW are accustomed to underwater noise. For example, it cites a 2006 court decision for its finding that "'marine mammals were accustomed to shipping and port activity." PDS Response at 18 (citing *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 541-42, 137 P.3d 31 (2006)). Yet that decision occurred more than a decade ago and upheld a Shorelines Hearings Board decision issued before the SRKW were listed under the federal Endangered Species Act. Similarly, PDS cites a general noise impact portion of the DEIS for the statement that project-generated vessel noise would merely blend in with noise from other Salish Sea shipping activities. PDS Response at 17 (citing DEIS, at 7-53). But the EIS does not identify the noise that would be expected from the individual ships exporting xylene or importing reformate to the facility or the impacts of that noise.

As explained in the Opening Brief at pages 41-43, project-generated vessels could cause significant noise impacts to SRKW, and the EIS's failure to evaluate those impacts renders it inadequate. Scientific knowledge about these impacts caused DEIS commenters to recommend that Skagit County condition the project's xylene and reformate ships to "conform to vessel noise standards cited in this publication, namely 'Quiet gross polluters (to below a 175.4 dB threshold).'" FEIS at Appendix A 7-28 (comment from J. Alderton, citing several vessel noise studies dated between 2014 and 2017). Those comments also noted that "[m]arine mammals,

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including the Endangered Southern Resident Killer Whales, will be adversely impacted by the increased vessel traffic," and referenced a study titled "A key to quieter seas, half of ship noise comes from 15% of the fleet" to support that statement. *Id.* In response to this concern and recommendation to use quieter vessels, the FEIS summarily concluded that quieting project vessels would make a negligible reduction in acoustic impact on the environment and that PDS was unable to use noise standards applied by the International Whaling Commission's Scientific Committee for reducing ship noise. FEIS at Appendix A 7-40, A 7-28 (stating that the noise standard, <175.4 dB, "is not useful for assessing potential impacts on endangered Southern Resident killer whales," notwithstanding the use of that standard by scientists studying vessel noise impacts to the SRKW).

Rather than issue summary conclusions, the EIS must adequately evaluate the noise impacts from project vessels and, in the event that best available science like that provided in comments to the DEIS confirms that project shipping is likely to contribute to cumulative impacts to the critically endangered SRKW, Skagit County should require a quiet vessel certification for project-generated vessels. DEIS, at 7-66. This approach would be consistent with the Final Recovery Plan for the SRKW, in which the National Marine Fisheries Service recognized that "[r]ecovery of the Southern Resident killer whales is a long-term effort and will require cooperation and coordination of Federal, state, tribal and local government agencies, and the community." 73 Fed. Reg. 4177 (Jan. 24, 2008).

3. The EIS should incorporate into its cumulative spill risk analysis Tesoro's outbound crude oil shipments.

PDS responds to the argument that a spill risk analysis should include Tesoro's outbound crude oil shipments by claiming that such shipments are "*hypothetical"* and that the project is not designed to increase crude oil exports. PDS Response at 15 (emphasis in original).

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However, these claims misinterpret Appellants' argument, which is that the EIS's spill risk and spill scenario analyses must rely on accurate assumptions about the cargo carried by vessels that could be involved in a collision with project vessels. As explained in the Opening Brief, Tesoro is already shipping crude oil outbound. These shipments are not "hypothetical." And they are not addressed in the EIS or the Vessel Traffic Risk Analysis. Opening Brief at 11-12 (describing Tesoro crude oil exports), 31 (noting that spill risk studies for Salish Sea assumed that outbound vessels would not carry crude oil), 31 n.15. Thus, in evaluating potential spill risks and spill scenarios, the EIS must be remanded to ensure that the cumulative effects analysis accounts for the risks posed by export shipments of crude oil through these same waterways by the same operator within the same time frames.

D. Skagit County Has Authority to Condition the Project to Address Its Impacts.

PDS offers two justifications for declining to seek mitigation of project impacts: (1) SEPA does not require mitigation of impacts; and (2) it does not have authority to condition the project. PDS Response at 19-21. However, as explained in the Opening Brief at pages 44-45, Skagit County's SEPA-implementing rules direct it to use all practicable means to achieve outcomes like "[a]ttain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." SCC 16.12.200(4)(a)(iii). In addition, mitigation would be consistent with the reasoning in *West Main Associates v. City of Bellevue* that "SEPA standards or policies…provide general guidance for determining whether the environmental impacts of an otherwise acceptable project require the denial of, or the imposition of conditions on the project." 49 Wn. App. 513, 525, 742 P.2d 1266 (1987).

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Applying reasonable mitigation measures to protect SRKW from vessel noise and to minimize the risk of a spill would also be consistent with SMP goals and policies. The SMP establishes goals to guide the management of County shorelines that include: (1) a shoreline use goal to "allow for compatible uses of the shorelines in relationship to the limitations of their physical and environmental characteristics. Such uses should enhance rather than detract from or adversely impact, the existing shoreline environment; and (2) a conservation goal to "preserve, protect, and restore the natural resources of Skagit County's shorelines in the public interest and for future generations. These natural resources include but are not necessarily limited to fish, wildlife, vegetation, and natural features found in shoreline regions. Only renewable resources should be extracted and in a manner that will not adversely affect the shoreline environment." SMP 4.01, 4.02.

More specifically, SMP policies for piers and docks and ports and industry state:

(1) SMP 7.10.1.A(6) -- Water Quality, Fish, Shellfish, and Wildlife - Piers and docks and their associated activities should conserve and enhance water quality, fish, shellfish, and wildlife resources and habitats; and

(2) SMP 7.11.1.F(1) -- Impacts -- Ports and water related industry proposals should mitigate adverse impacts to the shoreline and aquatic environment and to adjacent and nearby land and water users.

Last, PDS ignores Skagit County's authority and responsibility under Washington's Shoreline Management Act ("SMA") in alleging that Skagit County does not have authority to mitigate project-generated impacts on state waters. PDS Response, at 21-22. Although federal and state offices provide some oversight of activities in those areas, Skagit County has not identified a law that preempts it from protecting its waters, habitats, or species from activities

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generated within its borders. On the contrary, the SMA under which Tesoro seeks its permit obligates Skagit County to protect against unnecessary impacts to state waters and endows it with the authority necessary to do so. The SMA establishes a policy that "contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, which protecting generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020. In implementing the policies, "the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the sate shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally." RCW 90.58.020. Consequently, "[p]ermitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." *Id.* When permitting shoreline development, local jurisdictions have "the primary responsibility for…administering the regulatory program consistent with the policy and provisions of this chapter." RCW 90.58.050 (noting that SMA establishes a cooperative program of shoreline management between local government and the state). Thus, the SMA directs Skagit County to take the lead role in reviewing permits and ensuring that they limit impacts as much as possible.

Further, the SMA's geographic scope expressly includes the waters that would be traveled by project-generated vessels. The SMA applies to shorelines, defined as "all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of statewide significance…." RCW 90.58.030(2)(d). Shorelines of statewide significance, like Padilla Bay, receive even greater protection against adverse impacts than shorelines generally. RCW 90.58.020, .030. Thus, the

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SMA empowers Skagit County to protect its residents, its waters, and its habitats, as well as those found on neighboring state waters.

PDS's contrary argument that the County lacks authority to impose mitigation measures on this project is wrong as a matter of law and may lead to unintended consequences later down the road. The Board should not willingly surrender its authority under the law.

VI. ISSUE 3 – THE DISCUSSION OF GHG EMISSIONS IN THE FEIS IS CLEARLY ERRONEOUS.

After reviewing the response briefs from PDS and Tesoro, it is now clear that the FEIS is flawed and must be remanded. PDS conceded to an error in the FEIS and disclosed for the first time that the design capacity of this one project is equivalent to total U.S. exports of mixed xylenes from all other sources in the nation. This significant error casts this project in a new light and has serious consequences for understanding both upstream and downstream emissions of GHGs associated with a project of this size. This new information also underscores PDS's failure to allow for any public review and comment on downstream emissions and the missing analysis of upstream emissions. The EIS does not provide the County with enough information to make a reasonable decision on this project, and the FEIS conclusion that GHG emissions are not significant is clearly erroneous.

A. The FEIS Must Be Remanded to Address a Significant Error in the Size of the Mixed Xylenes Market and Downstream GHG Emissions of 2,438,089 Tons Per Year.

Appellants discussed in their Opening Brief how the FEIS strangely asserted that the U.S. exports "18.5 billion barrels per day" of mixed xylenes. Opening Brief at 66 (quoting FEIS at 3-13). However, the FEIS also states that the "global mixed xylene market is between 1 and 1.5 million barrels per day." *Id*. Appellants pointed out that public comment could have identified this plain error if it had been included in a draft EIS.

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Now, PDS has admitted to a significant error in the FEIS. PDS Brief at 26 n.108. In its response brief, PDS refers to a "minor error" to the "18.5 billion barrels per day" figure. *Id*. "Upon further research, the source states 800,000 million tons of xylene exports per year, which equals 5.6 million barrels per year or 15,000 barrels per day." *Id*. PDS claims that this supposedly "minor error does not change the findings of the EIS and is therefore harmless." *Id*. This error, however, is far from minor.

"Inaccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Hughes River Wastershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)).[12] For instance, in *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), a federal court recently ruled against the government under NEPA because the environmental review did not include accurate information on the economic costs of GHG emissions. The error in this case is significant for at least the following four reasons.

First, PDS does not identify its source, and that information is not in the record. PDS also does not explain why this error would not change the findings in the EIS. Claims of "harmless error" under SEPA are reviewed under the "rule of reason." *Thornton Creek Legal Fund v. Seattle*, 113 Wn. App. 34, 54, 52 P3d 522 (2002). Without a record and without reasons,

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[12] *See also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1157 (W.D. Wash. 2002) ("An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decisonmakers and the public an accurate assessment upon which to evaluate the proposed project"); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986) (remanding NEPA document for coal transloading facility because it relied on misleading economic data).

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this Board cannot review PDS's claim of harmless error. For that reason alone, the FEIS should be remanded.

Second, Tesoro proposes to produce 15,000 barrels per day of mixed xylenes in this one project. FEIS at 2-3. Now, however, PDS disclosed for the first time that total current U.S. exports of mixed xylenes are 15,000 barrels per day. PDS Brief at 26 n.108. This new information undercuts the FEIS assumption on xylene conversion and displacement – *i.e.*, that each gallon of mixed xylenes shipped from Washington will offset a gallon of mixed xylenes shipped from Texas. FEIS at 3-15; Opening Brief at 57-58, 65-68. If that were true, this one project would totally wipeout mixed xylene exports from Texas. In fact, however, as Appellants pointed out, global demand is growing, and therefore it is much more likely that Tesoro's GHG emissions would be in addition to existing GHG emissions from U.S. exports of mixed xylenes. Opening Brief at 67. In *Wildearth Guardians v. BLM*, 870 F.3d 1222 (10th Cir. 2017), a federal appeals court rejected an EIS where it relied on unsupported assumptions on the coal market as a basis for its analysis of GHG emissions. Similarly, the flawed market data in this case skewed the consideration of downstream GHG emissions and the conclusion that these emissions are not significant. *Cf. Sierra Club v. FERC,* 867 F.3d 1357 (D.C. Cir. 2017) (remanding EIS where it failed to quantify rationally the downstream emissions of GHGs).

Third, PDS did not correct the figures for the global mixed xylene market, so we can now assume that those are correct. The FEIS asserts that the global market is between 1,000,000 and 1,500,000 barrels per day. FEIS at 3-13. This one project would increase production capacity by 15,000 barrels per day. *Id*. at 2-3. Thus, this one project could increase global production by 1-1.5%. We know the international market is expanding, we know that this project dramatically increases U.S. export capacity, and we know that this project would meaningfully increase total

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global production capacity. Taken together, all of those facts undermine assumptions in the FEIS.

Fourth, this new information raises the question of how this one project would impact total U.S. production capacity for mixed xylenes. That information is not in the record, but it is safe to assume that this one project would significantly increase national production capacity, which has many consequences for understanding both the upstream and downstream GHG emissions associated with the project. This is especially true because Washington is investing hundreds of millions of dollars to promote clean energy and reduce reliance on fossil fuels. And there are new cleaner alternatives for producing plastics and other products derived from mixed xylenes. The FEIS should analyze the impacts of the increased demand for crude oil and the increased supply of mixed xylenes that would result from this project.

The Board should reject PDS's claim of harmless error and remand the FEIS for PDS to provide accurate data to the public to evaluate the impacts of this project on GHG emissions.

B. The FEIS Must be Remanded to Allow for Meaningful Public Comment.

This new information on the size of this project in relation to the overall U.S. export market underscores the other procedural error that occurred below. PDS disclosed downstream GHG emissions for the first time in the FEIS. Opening Brief at 65. This violates WAC 197-11-400(4) ("EIS process enables government agencies and interested citizens to review and comment on proposed government actions * * * and their environmental effect"). Because this information was not available in the DEIS, the citizens in this case did not have an opportunity to comment on how PDS analyzed the impacts of 2,438,089 tons of GHG emissions from transportation of mixed xylenes to Asia and use in manufacturing. Opening Brief at 65.

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In its response, PDS does not assert that the citizens did, in fact, have an opportunity to comment on this critical information. PDS Brief at 23. PDS, for instance, does not assert that the FEIS includes a response to Appellants' concerns or that PDS addressed those concerns in some other way in finalizing the environmental review. Instead, PDS takes issue with Appellants' solution to the problem and their suggestion that this new analysis should have been released to the public in a supplemental DEIS. *Id.* at 23 n.95. Tesoro simply ignores the issue.

Guidance from Ecology, however, clarifies that a supplemental DEIS is exactly what should have happened in this circumstance. As the SEPA Handbook clarifies:

> However, a supplemental draft EIS may be issued before a final EIS if there are significant changes in the draft EIS. In this case, the draft EIS is circulated for review, then a supplemental draft EIS is circulated for review, and a final EIS is issued, which responds to comments on both the draft and supplemental EISs.
>
> There are several situations when a supplement EIS is appropriate.
>
> ***
>
> - New information becomes available indicating new or increased significant environmental impacts are likely.
>
> - The lead agency decides that significant issues/impacts were missed in the draft EIS and/or additional alternatives or mitigation should be evaluated and SEPA goals would be better served with another draft EIS and comment period.

Settle, R., *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § Appendix D, 3.6 (2009).

Here, PDS missed a significant issue in the DEIS – the downstream emissions of GHGs. The FEIS identified for the first time, and then assumed away, 2,438,089 tons of CO_2 per year. FEIS at 3-14. In contrast, the DEIS identified only direct emissions of 389,406 tons of CO_2 per year. DEIS at 4-18. While those direct emissions are significant in and of themselves, the

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emissions identified in the FEIS were approximately 640% more than the emissions identified in the DEIS.[13] Yet the citizens were not given an opportunity to comment on these newly identified emissions. As Appellants discussed in their opening brief, these emissions are plainly significant. Opening Brief at 58.

PDS also asserts that the analysis "is extraordinarily complex" and that there "is no state guidance on how to address such impacts under SEPA." PDS Brief at 23. But those factors just underscore the importance of meaningful public involvement.

"The state environmental policy act's public comment and notice procedures are at the heart of the environmental review process. The act requires that all responsible opposing viewpoints be given an opportunity to be included in the decisionmaking process." *Nisqually Delta Assoc. v. Du Pont*, 103 Wn.2d 720, 737-38, 696 P.2d 1222 (1985). "[C]ourts demand strict compliance with the disclosure and procedural provisions" to "preserve the efficacy of the State Environmental Policy Act of 1971." *Id*. at 738.

By packing the FEIS with new information on downstream GHG emissions, PDS prevented the citizens and other agencies from offering their viewpoints on a critical and evolving issue with significant policy implications for Washington. SEPA demands more.

C. The FEIS Must be Remanded to Consider Upstream Emissions of GHGs.

As Appellants point out in their opening brief, the FEIS does not address at all the upstream emissions of extracting and transporting Bakken crude oil, refining crude oil into reformate, producing large quantities of sulfolane and aqueous ammonia, and transporting those

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[13] PDS again misstates Appellants' argument. PDS quotes from the FEIS section on direct emissions and then states that "Appellants allege that the Planning Department should have provided the new information in the FEIS on GHG emissions in a supplemental EIS." PDS Brief at 23 n.95. This is wrong. It was the new analysis of downstream emissions – not direct emissions – that should have been released in a supplemental draft. Opening Brief at 65-66.

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chemicals to the facility. Opening Brief at 68-69. Additional upstream emissions would result from extracting natural gas that would be used in the MVEC system and the new boiler associated with the project. None of these emissions are considered in the FEIS. The new information on the sheer size of this project in relation to existing U.S. exports of mixed xylenes places additional emphasis on the importance of this analysis.

PDS and Tesoro both ignore this issue in their briefs. They do not contest that this analysis is required by SEPA. And they do not argue that this analysis can be found in the EIS. By remaining silent, they implicitly concede the issue.

D. The FEIS Must be Remanded for a Revised Analysis of Direct Emissions of 389,496 Tons Per Year of GHGs.

Appellants discussed in their Opening Brief why the theory of fuel conversion in the DEIS is invalid and why the FEIS therefore relied on other generic and unspecified offsets to address direct emissions from the facility. Opening Brief at 53-55; 62-64. As Ecology recommended and the FEIS conceded, the theory of fuel conversion is invalid because there would be no actual environmental benefit in terms of overall GHG emissions in Washington State. FEIS at 3-16. The same amount of gas would be burned in Washington because any reduction in supply from Tesoro would simply be made up by another supplier. *Id*.

To sustain the finding of no significant impacts in the FEIS, PDS changed the explanation from the DEIS and instead relied on Tesoro obtaining generic "offsets" under the Clean Air Rule ("CAR"). FEIS at 3-16. Appellants described how the reliance on generic offsets is unlawful under SEPA because PDS failed to discuss with the required level of detail how Tesoro could mitigate environmental impacts in this way. Opening Brief at 62.

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In its response brief, Tesoro ignores the issue of direct emissions and offsets. Tesoro Brief at 16-18. Instead, Tesoro focuses only on downstream emissions of 2,438,089 tons per year of GHGs. *Id*. Because those generic offsets serve as the only basis in the FEIS for the conclusion that these direct emissions are not significant, the FEIS must be remanded.

Tesoro opaquely takes on the issue of "fuel conversion." "Though Appellants assert that 'other suppliers' will make up for any reduction in gasoline production, the simple truth is when operational, there will be a net reduction in the total Project greenhouse gas emissions." Tesoro Brief at 18. In fact, it is PDS – and not Appellants – that discredits the theory of fuel conversion. FEIS at 3-16 ("there would be similar GHG emissions from combustion of transport fuel supplied by other sources to meet State-wide demand"). In the FEIS, PDS considered emissions State-wide and not just for the project. To the extent Tesoro disagrees with a State-wide analysis, Tesoro has not appealed the FEIS, and this Board does not have jurisdiction to consider Tesoro's disagreement with the methodology chosen by PDS.

PDS also fails in its response brief to address direct emissions and reliance on generic offsets.

> The fuel conversion offset is not a "mitigation measure" but rather a scientific fact. The FEIS acknowledges that the fuel conversion would not result in a decrease in emissions in Washington State.

PDS Brief at 24. PDS does not explain how fuel conversion can be a "scientific fact" where PDS concedes in both the FEIS and in its brief that fuel conversion would not result in a decrease in emissions in Washington State. The "scientific fact" is that fuel conversion has no environmental benefit.

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More importantly, however, PDS fails to defend the rationale and the ultimate conclusion in the FEIS that direct emissions of GHGs are not significant. PDS also fails to address or defend the FEIS's reliance on generic offsets supposedly to be obtained under the CAR, which has been overturned after a challenge by Tesoro's industry group that the rule is invalid as applied specifically to Tesoro's industry. Opening Brief at 62-63.[14]

In sum, the record is clear that fuel conversion has no environmental benefits for State-wide GHG emissions. PDS cannot rely on generic offsets under the CAR to address direct emissions of 389,496 tons per year of GHGs from the facility, especially when Tesoro's industry group has filed suit to overturn that rule. The FEIS must be remanded because its conclusion that those emissions are not significant is clearly erroneous.

E. The FEIS Must be Remanded to Include a Discussion of Mitigation Measures for GHG Emissions.

` In response to Appellants' argument on greenhouse gas emissions, PDS incorrectly asserts that "Appellants continue to be misguided with respect to the issue of mitigation." PDS Brief at 22. PDS asserts that the "EIS does not include any specific mitigation measures with respect to GHG emissions" and this is "because there was not a significant impact finding that required mitigation under SEPA." *Id*. PDS's response makes clear that the FEIS must be remanded to include mitigation measures for GHG emissions.

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[14] Tesoro is speaking out of both sides of its mouth where it asserts that this project "is exactly the sort of project that the Clean Air Rule was designed to encourage." Tesoro Brief at 18.

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PDS has conflated the two distinct roles of mitigation under SEPA – one is procedural and one is substantive. The EIS must first identify mitigation measures, address whether they are technically feasible and economically practicable, and discuss how those measures affect the likely environmental impacts of a proposed project. WAC 197-11-440(5)(b)(iii), (5)(c)(i), (6)(a), (6)(c)(iii), (6)(c)(iv). If the EIS determines that significant impacts may result, then the government may exercise its substantive authority under SEPA to impose mitigation measures when making the ultimate decision on the project. RCW 43.21C.060 ("Any governmental action may be conditioned or denied pursuant to this chapter * * *").

> The procedural obligation to include mitigation measures is sometimes confused with a substantive obligation to mitigate adverse environmental impacts. The two are distinct. The EIS concerns only the procedural obligation.

R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14.01(2)(c) (2009). PDS's response quoted above misses the mark because it conflates the two concepts – mitigation in the EIS with substantive mitigation imposed under SEPA in the final decision on the governmental action. PDS Brief at 22.

In Appellants' opening brief, they challenged the FEIS's discussion of GHG mitigation measures. Opening Brief at 64. The FEIS's conclusion that there would no significant impacts is based on these flawed mitigation measures. *Id*. As a result, this flawed FEIS prematurely cut off consideration of substantive mitigation under RCW 43.21C.060. *Id*. These same concerns led the Shorelines Hearings Board to invalidate the EIS in *Columbia Riverkeeper et al. v. Cowlitz County*, SHB No. 17-010c (Order on Motions for Partial Summary Judgment) (Sept. 15, 2017).

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PDS and Tesoro both ignore this noteworthy decision and the reasoning of the Shorelines Hearings Board.[15]

PDS's statement that the "EIS does not include any specific mitigation measures with respect to GHG emissions" is fatal to the EIS. PDS was required to include a discussion of mitigation measures in the EIS. WAC 197-11-440(5)(b)(iii), (5)(c)(i), (6)(a), (6)(c)(iii), (6)(c)(iv). The EIS must then "[s]ummarize significant adverse impacts that cannot or will not be mitigated." *Id*. at 197-11-440(6)(c)(v). Unable to defend the generic offsets in the FEIS as proper mitigation measures, PDS now asserts there are no mitigation measures at all for GHG emissions. That position is equally untenable under SEPA. By conflating its procedural and substantive mitigation obligations under SEPA, PDS skipped over its duty to discuss possible mitigation measures in the EIS. Without a valid EIS, PDS cannot properly exercise its substantive authority to condition or deny the project.

The EIS must therefore be remanded to include a discussion of mitigation measures to address the environmental impacts of GHG emissions associated with this project. Those mitigation measures should include a local mitigation fund that can reduce emissions, benefit the local environment and community, and create green jobs in Skagit County. Without information on appropriate mitigation measures, the FEIS conclusion that GHG emissions are insignificant is clearly erroneous.

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[15] The Board should reject PDS's argument that this decision from the Shoreline Hearings Board is not in the record. This decision is legal precedent. Moreover, Appellants brought this decision to the attention of PDS in their comments below. Ramel 110117.pdf at 33.

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CONCLUSION

Appellants request that the Board of County Commissioners:

I. Deny the Shoreline Substantial Development Permit;

II. Adopt conclusions of law that a Shoreline Conditional Use Permit is required for the new activity of producing, transferring and transporting mixed xylenes at Tesoro's wharf, which is a fixed bulk transfer facility in the Aquatic Zone; and

III. Remand the Final Environmental Impact Statement to Skagit County Planning and Development Services to be supplemented with additional information on environmental impacts resulting from vessel traffic, spill risk, and emissions of greenhouse gases.

Respectfully submitted this 20th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that all parties to this matter have agreed to electronic service. I further certify that I filed and served the foregoing Appellants' Rebuttal Brief on February 20, 2018, by emailing those documents to representatives of the Skagit County Board of Commissioners and parties of record as follows:

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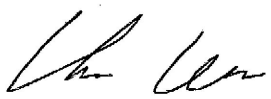

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