RESOLUTION #

A Resolution Pertaining to the Closed Record Appeal (PL17-0629) Of Hearing Examiner Approval of Shoreline Substantial Development Permit (PL15-0302).

WHEREAS, Stand.Earth, RESources for Sustainable Communities, Friends of the San Juans, Evergreen Islands, Friends of the Earth and Sierra Club (collectively, "**Appellants**") bring this closed record appeal to the Board of Skagit County Commissioners ("**Board**") of a decision by the Hearing Examiner approving Tesoro Anacortes Refining and Marketing Company LLC's ("**Tesoro**") request for a Shoreline Substantial Development Permit (PL15-0302)(the "**SSDP**"). Skagit County Planning and Development Services ("**Planning**") appeared before the Board, filing briefing in support of Tesoro.

WHEREAS, this matter arises from Tesoro's proposed installation of Marine Vapor Emissions Control ("**MVEC**") equipment as a condition to Tesoro's proposed Clean Products Upgrade Project ("**CPUP**") on the north end of March Point. The MVEC consists of a Dock Safety Unit ("**DSU**") on an existing wharf, and an associated Vapor Combustion Unit ("**VCU**") on adjacent upland. The MVEC will collect vapors emitted during transloading of hydrocarbon products, preventing their escape into the atmosphere. Other than the DSU and associated 3" natural gas pipe, new construction supporting Tesoro's CPUP project will occur entirely outside "Shorelines of the state" as defined by the Shoreline Management Act, RCW 90.58.030 (hereinafter, the "**shoreline area**").

WHEREAS, Appellants assert that because the CPUP includes new product activity such as mixed xylene and the MVEC would not be installed but for that new activity, the DSU and 3" gas pipe represent new activity in the shoreline area for the purposes of Skagit County's Shoreline Master Plan ("**SMP**"), requiring a Shoreline Conditional Use Permit ("**SCUP**") rather than a SSDP, which, the Appellants argue, will require greater scrutiny and more rigorous permit conditions to mitigate the overall CPUP project's environmental impacts.

WHEREAS, in furtherance of their argument that a SCUP will mandate additional environmental conditions, Appellants assert that the Final Environmental Impact Statement ("**FEIS**") prepared by Tesoro pursuant to RCW 43.21C, the State Environmental Policy Act ("**SEPA**"), is inadequate as to its analysis of vessel traffic, risk of inadvertent spills in the marine environment, impact on Southern Resident Orca whales, and greenhouse gas emissions.

WHEREAS, Tesoro and Planning argue that the Board lacks jurisdiction to consider the adequacy of the FEIS in general, citing Skagit County Code 14.06.110(13). This fundamentally miscomprehends Skagit County's permit and SEPA appeal processes, and requires clarification. Understood properly, Skagit County Code carefully balances state law limiting multiple administrative SEPA appeals with the right of our citizens to seek redress from their elected officials.

WHEREAS, Skagit County Code seeks to implement SEPA's requirement that permit decisions and environmental review be linked and reviewed concurrently to the fullest extent

possible, a policy that reasonably promotes permit processing efficiency as well as the practical ability to condition permits based on their likely environmental impacts. *See*, RCW 43.21C.075(1)("Because a major purpose of [SEPA] is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action."); *see also* RCW 43.21C.075(2)(a)("Unless otherwise provided by this section..[a]ppeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.")

WHEREAS, Skagit County Code also implements SEPA's requirement that local government limit review of SEPA determinations to one appeal. RCW 43.21C.075(3)(a)("If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure...[s]hall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement)." See, *Ellensburg Cement v. Kittitas Cty*, 179 Wn.2d 737 (2014).

WHEREAS, as contemplated by SEPA, Skagit County Code provides for one pre-decisional SEPA appeal of a threshold determination or EIS adequacy to the Hearing Examiner, *see* SCC 16.10.210(1), but does not afford a subsequent pre-decisional SEPA appeal to the Board independent of the underlying permit. This was recently addressed by the Board in the matter of *Equilon Enterprises*, Board Appeal No. PL 15-0071, in which Equilon (Shell) challenged the Hearing Examiner's decision overturning Planning's SEPA determination of environmental non-significance, thus requiring Shell to submit its proposed plan for a Bakken crude-by-rail facility in the shoreline area to full SEPA environmental impact review. The Hearing Examiner's decision was upheld by Skagit County Superior Court in the matter of *Equilon v. Skagit County*, Skagit County Cause No. 15-2-00368-5 against Shell's challenge that the Hearing Examiner lacked authority to impose an EIS requirement. But the issue of a challenge to a SEPA determination or EIS adequacy that is divorced from an underlying permit (as was the case in *Equilon*) is not the situation presented by this appeal. Here, SEPA is linked with the underlying permit.

WHEREAS, Skagit County Code ("**SCC**") 14.06.110(13), relied on by Tesoro and Planning in arguing that the Board lacks jurisdiction to consider SEPA determinations, specifically pertains to Level I decisions, which are permit matters in which Planning makes the underlying decision, followed by an appeal to the Hearing Examiner, followed by a closed record appeal to the Board. Thus, in Level I matters, the decision on both the permit and SEPA is made by Planning staff, and aggrieved citizens have opportunity to challenge Planning's SEPA determinations at the level of the Hearing Examiner. Consistent with RCW 43.21C.075(3)(a), EIS adequacy may not be raised in a subsequent Level I appeal to the Board, one SEPA appeal already having been furnished before the Hearing Examiner. Leaving SEPA decisions to County staff (i.e., Planning staff and the Hearing Examiner) in Level I matters is a rational approach in our effort to balance competing requirements given that Level I matters are less environmentally significant, involving such matters as administrative special use permits, building permits, and administrative interpretations. But that is not the situation before the Board presented by this matter.

WHEREAS, shoreline substantial development permits (as well as shoreline conditional use permits and variances) are in form and function Level II decisions, in which the Hearing Examiner

makes the underlying permit decision after considering recommendations from Planning, followed by a closed record appeal to the Board. This is echoed by the County's Shoreline Master Plan. *See*, SMP 8.02(2)(h)(Planning duties involve "[s]ubmitting substantial development, conditional use and variance permit applications to and making written recommendations and findings on such permits..."); SMP 8.02(1)(b)(Board of Commissioners' duty is to "[d]ecide appeals of the Hearing Examiner's decision and of the Administrator's actions and interpretations.")

WHEREAS, Level II decisions are governed by SCC 14.06.120, which, unlike SCC 14.06.110 pertaining to Level I decisions, does *not* limit the Board's consideration of SEPA determinations. This is because a Level II appeal to the Board is the sole mechanism for review of SEPA determinations, or for that matter, any review by an elected official of what are generally far more significant decisions impacting our community, shorelines and natural environment.

WHEREAS, the jurisdictional argument advanced by Tesoro and Planning, if accepted, would mean that all issues arising under SEPA (and, functionally, the Shoreline Management Act) would be decided solely by Skagit County staff in all instances, with no Skagit County elected official ever having jurisdiction to hear constituents' environmental concerns. To articulate a concrete example, if the entirety of the CPUP had been planned by Tesoro within the shoreline area, the Board, if we were to accept Planning's jurisdictional argument, would have no ability to consider whether the SEPA determination was adequate in assessing whether the conditions attached to the underlying permit adequately mitigate the likely adverse environmental impacts.

WHEREAS, the Board has a strong commitment to open, transparent and accountable government, an important aspect of which is preserving our citizens' right to seek redress from their elected officials when aggrieved by significant staff decisions that impact Skagit County's natural environment, including the shoreline area.

WHEREAS, the jurisdictional argument advanced by Tesoro and Planning is not consistent with Skagit County Code, or the Board's intent. The Board has jurisdiction to consider SEPA determinations in accordance with SCC 14.06.120 and SMP 8.02(1)(b).

WHEREAS, the Board is nevertheless limited to considering environmental impacts under SEPA that have a nexus to the activities sought to be permitted, and thus the Board may not permissibly review the FEIS as to environmental issues beyond the scope of the underlying permit – even where the FEIS was originally prepared for a broader purpose, as is the case here.

WHEREAS, here, the activity envisioned by the SSDP is not a new industrial activity, but rather involves the installation of a vapor recovery unit and a small natural gas pipe necessary to serve the vapor recovery unit. Seen in isolation from the larger project – as the Board must, under applicable law – the evidence reflects that the MVEC will produce a positive environmental impact, by containing environmentally harmful hydrocarbon vapors. While the Board understands and appreciates the Appellants' and citizen testimony regarding climate change and transition of our energy economy to more sustainable alternatives, we are obligated to impartially afford all parties who come before us due process under the law. Here, that means limiting our environmental review to the scope of the activity sought to be permitted.

WHEREAS, responding to the Shoreline Management Act's basic intent that new construction in the shoreline area is subject to a higher level of scrutiny given shoreline environmental sensitivity, Tesoro intentionally avoided planning its CPUP project in the shoreline area to the fullest extent possible, seeking a SSDP solely for the DSU and associated 3" natural gas pipe, equipment that is inherently water-dependent. It would contradict sound public policy to disincentivize future applicants from avoiding the shoreline area by communicating our intent through this appeal to nevertheless subject them to the same heightened environmental review that shoreline permitting invokes.

WHEREAS, in considering this closed record appeal, pursuant to Skagit County Code 14.06.170(10), the Board is limited to taking one of the following actions:

(1) Deny the appeal and affirm the decision of the Hearing Examiner;

(2) Find the Hearing Examiner's decision clearly erroneous, adopting its own findings, conclusions and decision based on the record before it; or

(3) Remand the matter for further fact-finding and consideration by the Hearing Examiner.

WHEREAS, the Board is unable to conclude that the Hearing Examiner's decision in this matter was clearly erroneous.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Appeal is denied, and the decision of the Hearing Examiner is affirmed.

WITNESS OUR HANDS AND THE OFFICIAL SEAL OF OUR OFFICE this 9th day of March 2018.

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON

SKAGIT COUNTY COMMISSIONERS SEAL STATE OF WASHINGTON COURT

Kenneth A. Dahlstedt, Chair

Lisa Janicki, Commissioner

Ron Wesen, Commissioner

ATTEST:

Amber Bigge

~~Linda Hammons,~~ Clerk of the Board

APPROVED AS TO FORM:

Will Honea, Civil Deputy
Skagit County Prosecutor's Office