Hearing: February 27, 2018 at 9:00 a.m.

BEFORE THE BOARD OF COUNTY COMMISSIONERS
IN AND FOR SKAGIT COUNTY

In the Matter of the Appeal of Shoreline Substantial Development Permit No. PL15-0302 to Tesoro Anacortes Refining and Marketing Company LLC	Appeal of Hearing Examiner Decision No. PL17-0629 **SKAGIT COUNTY PLANNING & DEVELOPMENT SERVICES' RESPONSE BRIEF**

The Hearing Examiner's decision to issue a Shoreline Substantial Development Permit to Tesoro Anacortes Refining and Marketing Company LLC ("Tesoro") should be upheld on appeal since it is supported by substantial evidence in the administrative record. Appellants have failed to meet their burden of proving the Hearing Examiner made any factual or legal errors. With respect to the Appellants' claims on the Environmental Impact Statement ("EIS"), this portion of the appeal should be denied since the Board lacks jurisdiction pursuant to Skagit County Code ("SCC") 14.06.110(13).

However, if the Board decides to assert jurisdiction of the EIS adequacy claim, the appeal should be denied since Skagit County Planning & Development Services (hereinafter "Planning Department") prepared a reasonable, thorough EIS under the State Environmental Policy Act ("SEPA"), using best available information to analyze potential

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

environmental impacts associated with Tesoro's project. Accordingly, the EIS should be upheld as adequate as a matter of law.

I. Factual Background

By way of background, the Planning Department, acting as the lead agency under SEPA, initially reviewed Tesoro's proposed project application materials and determined that the proposal may have a significant adverse impact on the environment.[1] Accordingly, the Planning Department required the preparation of an EIS under RCW 43.21C.031 and SCC 16.12.[2] On March 17, 2016, the Planning Department issued a Determination of Significance and a request for comments on the scope of an EIS for the proposed project.[3] The scoping period occurred between March 17, 2016 and April 15, 2016.[4]

In accordance with WAC 197-11 SEPA Rules, the Planning Department issued the Draft EIS ("DEIS") on March 23, 2017.[5] The comment period occurred between March 23, 2017 and May 8, 2017.[6] A public hearing was held on April 17, 2017.[7] On July 10, 2017, the Planning Department issued the Final EIS ("FEIS").[8]

With respect to the Shoreline Substantial Development Permit, the Planning Department published a Notice of Development Application in a newspaper of general circulation on July 9, 2015 and July 16, 2015 pursuant to SCC 14.26.9.04.[9] The 30 day

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[1] Staff Report (10/27/17) at p. 27.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at p. 28.
[7] *Id.*
[8] *Id.* Appellants' Brief at p. 13, line 22 states in error: "PDS published the FEIS and Response to Comments on July 20, 2017."
[9] Staff Report (10/27/17) at p. 5.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

comment period ended on August 14, 2015 and the public hearing was held on November 2, 2017.[10] On December 7, 2017, the Hearing Examiner issued a decision approving the Shoreline Substantial Development Permit. Appellants filed an appeal on December 14, 2017.

II. Standard of Review

Appellants have the burden of proving the Hearing Examiner's decision is clearly erroneous pursuant to SCC 14.06.170(3). A finding is clearly erroneous when there is a definite and firm conviction that a mistake has been committed.[11] While Appellants may disagree with the Hearing Examiner's findings,[12] they have failed to meet their burden of proving the Hearing Examiner made any factual or legal errors.

Pursuant to SCC 14.06.110, this appeal shall be processed as a "closed record" appeal "based on the existing record."[13] No new evidence or testimony shall be given or received.[14] Appellants' brief cites to various documents that were not part of the administrative record since they were produced after the FEIS was published on July 10, 2017 and/or after the November 2, 2017 Public Hearing on the Shoreline Substantial Development Permit.[15] Under the "rule of reason," it would be preposterous to expect an

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[10] *Id.*at p. 1.

[11] *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (*citing Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)).

[12] "[T]he County…has not given serious and meaningful consideration to whether this project makes sense." Appellants' Opening Brief at p. 69, lines 3-4. This is not a relevant legal standard for the Board to consider.

[13] SCC 14.06.020.

[14] SCC 14.06.170(9).

[15] *See* Appellants' Opening Brief at p. 32, footnote 16 (November 7, 2017 Ecology letter); p. 35, footnote 17 (January 19, 2018 article on spills); p. 42, lines 6-15 (July 2017 article on whales), p. 62, lines 16-21 (December 2017 Hearing Transcript regarding Clean Air Rule in *Assn'n of Washington Business, et. al. v. Ecology*, Case No. 16-23-0323-34); p. 63, line 18 – p. 64, line 10 (September 2017 Order in *Columbia Riverkeeper et al. v. Cowlitz County* ("Kalama") case); and p. 68, lines 10-16 ("recent studies..[of]..life cycle emissions of Bakken crude[.]").

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

EIS to disclose and analyze facts that were not known at the time the EIS was issued. EIS adequacy must be determined on the basis of information and comments that predate FEIS issuance; post-FEIS information is not a basis for finding the FEIS inadequate.[16] As a result, all documents not included in the administrative record that were produced by Appellants post-FEIS or post-Shoreline Substantial Development Permit Hearing, should not be considered by the Board in this closed record appeal.

III. Argument

A. Shoreline Substantial Development Permit Should be Upheld as a Matter of Law

By way of background, the Shoreline Management Act ("SMA"), RCW 90.58, requires local governments to develop a master program for the use of shorelines within its jurisdiction. The SMA mandates that shoreline development in Washington be consistent with the policies of the SMA and the local government's master program.[17] RCW 90.58.140 requires local governments to establish a program to administer and enforce a permit system for substantial development within shorelines.[18] As a result, on appeal, deference must be given to an agency's interpretation of its own regulations.[19] Since the Planning Department wrote and administers its own Shoreline Management Master Program (hereinafter "SMP") and recommended issuance of the Shoreline Substantial Development Permit, the Board must defer to the Planning Department's decisions.[20] Since

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[16] *See Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 542-44, 137 P.3d 31 (2006).
[17] RCW 90.58.140(1); RCW 90.58.030(3)(b).
[18] RCW 90.58.140(2)(b). RCW 90.58.050.
[19] *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (*citing Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000)).
[20] *Id.*

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

the Hearing Examiner approved the Shoreline Substantial Development permit in this matter, on appeal, the Appellants have the burden of proving the Hearing Examiner's decision was clearly erroneous.

Under the SMP, one of the goals promotes economic development, stating: "to promote and encourage optimum use of existing industrial and economic area for users who are shoreline dependent and shoreline related[.]"[21] This policy is reflected through the SMP, promoting the use of existing facilities.[22] Furthermore, RCW 90.58.020 states that '[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." Accordingly, the SMA requires coordinated planning to prevent uncoordinated and piecemeal development of the state's shorelines.[23] With respect to the proposed project, the Planning Department determined that locating a 3 inch natural gas line on an existing wharf is consistent with the SMP policies.[24] Appellants have failed to articulate a factual or legal basis that the Planning Department and Hearing Examiner made any errors in their findings that the project is consistent with the goals and policies of the Shoreline Master Program.

Appellants attempt to argue that a Conditional Use Permit should have been issued in addition to a Shoreline Substantial Development permit. In part, it appears that

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[21] SMP at p. 4-1 to 4-2.

[22] See Chapter 7.10 (existing facilities – multiple use and expansion of existing piers, wharves, and docks should be encouraged over the addition and/or proliferation of new facilities; Chapter 7.11 (existing facilities – development or redevelopment and multiple use of existing port areas, facilities, and services should be encouraged over the addition and/or location of new or single purpose port facilities; and Chapter 7.18 (existing use areas – utilities, specifically power, communications, and fuel lines and pipelines, should utilize existing right-of-way and corridors and should avoid duplication and construction of new or parallel corridors).

[23] RCW 90.58.020.

[24] Staff Report at pp. 21-26 (corrected version dated October 27, 2017).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Appellants seek Ecology's involvement and oversight of the Planning Department's permitting process since they believe Ecology would require additional mitigation. However, the SMA does not give Ecology authority to directly review the Planning Department's decision to issue a Shoreline Substantial Development permit. Under the SMA, Ecology's primary role is to review and approve Shoreline Master Programs.[25] Once a Shoreline Master Program has been approved, the SMA specifically grants local governments the **exclusive power** to administer the Substantial Development permit system.[26] The SMA does not give Ecology the right to directly review a local government's decision regarding a Substantial Development permit.[27] Accordingly, the Board should give appropriate deference to the Planning Department's decision to issue a Shoreline Substantial Development permit and disregard Appellants' arguments that a Conditional Use Permit is required.

As described in the Planning Department's Staff Report, Tesoro's existing wharf facility and operations are water and shoreline dependent industries and activities, in accordance with the definitions in Chapter 3 of the SMP.[28] The other portions of the Tesoro refinery within shoreline jurisdiction are shoreline-related uses.[29] The upland portion of the site within shoreline jurisdiction containing the refinery is designated an Urban Shoreline Area and the area of the wharf is designated an Aquatic Shoreline Area.[30] Pursuant to Chapter 3 of the SMP, the Planning Department determined that the new Dock

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[25] RCW 90.58.050.
[26] (Emphasis added); RCW 90.58.140(3).
[27] *Twin Bridges Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 837, 175 P.3d 1050 (2008) (citing *Samuel's Furniture v. State, Dept. of Ecology*, 147 Wn.2d 440, 455, 54 P.3d 1194 (2002)).
[28] Staff Report at pp. 10-12.
[29] *Id.*
[30] *Id.* at p. 1.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Safety Unit and 3-inch natural gas line for the Marine Vapor Emission Control System is a "substantial development."[31] "Substantial development" is defined as:

> Any development of which the total cost or fair market value exceeds one thousand dollars,[32] or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter: See Chapter 2, Section 2.05 for list of exemptions.[33]

The Hearing Examiner's Decision adopted the Planning Department's recommendation to issue only a Substantial Development permit consistent with the SMP:[34]

> 2. The Tesoro refinery at Anacortes is a shoreline related use. SMP 3.03(I)(2). The project features involving operations at the wharf are shoreline dependent. SMP 3.03(I((1) [sic]. The MVEC is a substantial development on shorelines that requires a Shoreline Substantial Development Permit. RCW 90.58.140
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> ...
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> 4. [S]pecial circumstances calling for conditional use approval were not shown.
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> 5. The findings support a conclusion that the proposed development (MVEC) is consistent with the policies and regulation of the Skagit County Shoreline Master Program.
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> 6. The findings support a conclusion that the proposed development (MVEC) is consistent with the policies of the Shoreline Management Act (RCW 90.58.020). In the context of existing development, this includes consistency with the policies for Shorelines of Statewide Significance.
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> 7. Nothing in the record shows any inconsistency of the proposal or the process of its consideration with the permit and enforcement regulations adopted by the Washington Department of Ecology (Chapter 173-27 WAC).

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[31] *Id.*

[32] This figure has been adjusted over the years – at time of this application, it was $6,416. Effective September 2, 2017, the dollar threshold has been adjusted to $7,047.

[33] SMP Chapter 3.

[34] Hearing Examiner's Decision at p. 10 (Conclusions of Law 2-8).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

8. Therefore, the approval criteria for granting a Substantial Development Permit (SDP) are met. SMP 9.02(1).

Accordingly, the Board should give deference and substantial weight to the Hearing Examiner's decision, which shall not be overturned absent a showing of clear error.

Appellants allege that the proposed Dock Safety Unit is used to transfer bulk liquids making it a "bulk liquid transfer facility" under the SMP, which requires a Conditional Use Permit.[35] The term "bulk liquid or petroleum transfer facility" is not defined in the SMP. However, a reasonable person would understand this term to include a facility that moves large amounts of liquids or petroleum products through pipelines. However, neither the proposed Dock Safety Unit nor the Marine Vapor Emission Control System are used to move bulk liquids or petroleum under a plain language reading of the SMP. Appellants fail to make a compelling case that the Planning Department and the Hearing Examiner erred in their decisions.

Appellants also argue that the Marine Vapor Emission Control System is a "pipeline" under the SMA, which would also require a Conditional Use Permit. As noted in the Planning Department's Staff Report, the Utilities section of the SMP specifically differentiates between fuel lines and pipelines. Once again, since the terms "pipeline" and "fuel line" are not defined in the SMP, the Planning Department interpreted the plain language of the SMP and concluded that the natural gas line for the Marine Vapor Emissions Control System is a "fuel line," not a pipeline. The Planning Department's analysis of the SMP should be afforded deference. The Hearing Examiner concurred with

[35] Appellants' Opening Brief at p. 17. It should also be noted that Ecology has provided numerous comments on this project, but has failed to assert the position that a Conditional Use Permit is required.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

the Planning Department's finding that "[s]pecial circumstances calling for conditional use approval were not shown."[36] The Hearing Examiner's decision is supported by a reasonable interpretation of the SMP and should be afforded substantial weight. Since Appellants have failed to establish any clear error, the Hearing Examiner's decision should be upheld on appeal.

Finally, Appellants' allegations that that a "new form of activity" is occurring that requires a Conditional Use Permit has no basis in fact or law. The Hearing Examiner recognized this issue in Finding of Fact 50: "[r]eformate and mixed xylenes are subsets of products, such as gasoline, that are already shipped by marine vessel to and from the refinery." Appellants have provided no credible evidence to dispute this finding. Furthermore, Appellants conflate the existing authorized use (refinery and wharf built in the 1950s) with an illegal nonconforming use. Since the facility pre-dates the SMP and is water dependent, it is an authorized pre-existing use. However, the question of whether the existing facility is an illegal nonconforming use is irrelevant to the proposed project.

In conclusion, the Planning Department's interpretation of its own code and recommendation to issue the Shoreline Substantial Development permit should be afforded substantial weight. Since Appellants have failed to meet their burden of proving there was clear error with respect to the issuance of the Shoreline Substantial Development permit, the Hearing Examiner's decision should be upheld as a matter of law.

[36] Hearing Examiner's Decision at p. 10 (Conclusion of Law 4).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

B. Board Has No Jurisdiction Over Environmental Impact Statement Adequacy Claims

The Board lacks jurisdiction to hear Appellants' alleged claims on EIS adequacy. SCC 14.06.110(13) states in part:

> [C]onsistent with SCC 16.12.210, Appeals, 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**.[37]

SCC 16.12.210 states that appeals should be consistent with RCW 43.21C, and specifically addresses the process for threshold determination appeals.[38] SCC 16.12.210 is silent with respect to EIS adequacy appeals. WAC 197-11-680(3)(a) states in part, "[a]gencies **may** provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures."[39] However, SEPA and its implementing regulations do not require local appeals.[40] Since SCC 14.06.110(13) unequivocally states that "no appeal to the Board is allowed" with respect to the adequacy of an EIS, the Board has no jurisdiction to hear Issues 2 and 3 of Appellants' brief. The Hearing Examiner's Decision also properly reflects this limitation in Paragraph 15 of the Findings of Fact: "The Skagit County Code (SCC) does not provide for the appeal of an FEIS at the administrative level."[41] Accordingly, the Board should decline jurisdiction on Issues 2 and 3 of Appellants' brief.

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[37] Emphasis added.

[38] Threshold determinations fall into the following categories: Determination of Non-Significance ("DNS"), Mitigated Determination of Non-Significance ("MDNS"), and Determination of Significance ("DS"). A DS was issued on the proposed Tesoro project on March 17, 2016. *See* Staff Report (10/27/17) at p. 27.

[39] Emphasis added.

[40] If local jurisdictions adopt appeal procedures for threshold determinations, then SEPA, RCW 43.21C.075 and WAC 197-11-680, requires adherence to specific rules. For example, "no more than one agency appeal proceeding on each procedural determination" and consolidation of appeals of "procedural issues and of substantive determinations." RCW 43.21C.075.

[41] Hearing Examiner's Notice of Decision at p. 3.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

C. Final Environmental Impact Statement is Adequate as a Matter of Law

If the Board decides to assert jurisdiction of the EIS adequacy claim, the Appeal should be denied since the Planning Department prepared a thorough EIS under SEPA, using best available information to analyze potential environmental impacts associated with Tesoro's project. Pursuant to SCC 16.12.210(4), "[t]he procedural determination by the County's Responsible Official shall carry substantial weight in any appeal proceeding." RCW 43.21C.090, also states "[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a 'detailed statement,' the decision of the governmental agency shall be accorded substantial weight." Accordingly, the Planning Department's analysis and decisions made with respect to the EIS are entitled to "substantial weight."

With respect to the Shoreline Substantial Development permit, the Hearing Examiner's Decision included the following Conclusions of Law with respect to the EIS:[42]

> 10. The FEIS was prepared pursuant to the State Environmental Policy Act (SEPA). It is a source of information about the CPUP project and what it will do. While its publication is no automatic guarantor of its thoroughness or correctness, the Examiner is not convinced that it misrepresents or omits matters germane to the subject shoreline development (MVEC).
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> 11. The County may attach additional conditions to permits based on the policies and goals of SEPA if conditions are necessary to mitigate specific probable adverse environmental impacts identified in environmental documents prepared under SEPA. SCC 16.12.200(2)(a). The Examiner concludes that no such conditions are called for here.
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> 12. The Examiner is not persuaded that the shoreline project under consideration, as conditioned, will have proximate negative environmental impacts that warrant denial of the application[.]

[42] Hearing Examiner's Decision (Conclusions of Law 10 and 11 at p. 11).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

The Hearing Examiner's Decision should also be upheld since the Appellants have not met their burden of proving it was clearly erroneous.

The Planning Department conducted an exhaustive investigation of the probable significant impacts of Tesoro's proposal under SEPA and the EIS should be upheld as a matter of law. The adequacy of an EIS is a question of law, focusing on the legal sufficiency of the data in the EIS.[43] Sufficiency of the data is measured by the "rule of reason" which requires a "reasonably thorough discussion of the significant aspects of the probable environmental consequences."[44] The rule of reason is "in large part a broad, flexible cost-effectiveness standard" in which the adequacy of an EIS is best determined "on a case-by-case basis" guided by all of the policy and factual considerations reasonably related to SEPA's directives."[45] SEPA does not require analysis of every possible impact:

> [A]n EIS is **not a compendium of every conceivable effect** or alternative to a proposed project, but is simply an aid to the decision making process. That is, the EIS need include only information sufficiently beneficial to the decision making process to justify the cost of its inclusion. Impacts or alternatives which have insufficient causal relationship, likelihood, or reliability to influence decisionmakers are "remote" or "speculative" and may be excluded from an EIS.[46]

An EIS is legally adequate if the project's environmental effects are reasonably disclosed, discussed, and substantiated.[47] Since the DEIS and FEIS both contain an extensive analysis of the potential environmental impacts associated with Tesoro's proposed project, the

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[43] *Preserve Our Islands,* 133 Wn. App. at 538-39 (*citing Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 632–33, 860 P.2d 390, 866 P.2d 1256 (1993)).
[44] *Id.*
[45] *Klickitat County Citizens*, 122 Wn.2d at 633.
[46] Emphasis added. *Preserve Our Islands*, 133 Wn. App. at 539 (*citing Klickitat County Citizens*, 122 Wn.2d at 632–33.
[47] *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 209, 634 P.2d 853 (1981). The "rule of reason" also forgives trivial or harmless error. *See* Richard L. Settle, *The Washington State Environmental Policy Act* § 14.01[1] at 14-18 (1996).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Planning Department's analysis is sufficient as a matter of law under the "rule of reason." Furthermore, Appellants have failed to meet their burden of proving the analysis or the Hearing Examiner's Decision was clearly erroneous.

1. EIS Included Thorough Analysis Regarding Vessel Traffic Impacts and Spill Risks.

Substantial evidence in the administrative record supports the Planning Department's environmental analysis with respect to vessel traffic, spill, and anchorages. The Hearing Examiner also entered findings of fact with respect to vessel traffic and spill risk associated with the proposed project, which the Appellants have not proven were made in error.[48] Since the Appellants' brief contains numerous mischaracterizations of the Planning Department's environmental analysis,[49] the Board should carefully review the text of the DEIS and FEIS. Appellants also misrepresent the scope and magnitude of this proposed project. With respect to vessel traffic, the proposal calls for "40 annual deliveries of reformate and 20 annual shipments of mixed xylenes at the refinery's wharf."[50] That amounts to 5 additional vessels per month or 60 total vessels per year. The Hearing Examiner properly held that "the proposal will not result in new impacts from increased marine traffic to and from the Tesoro refinery."[51] The FEIS also addressed potential impacts to the marine environment due to increased vessel traffic, which is briefly discussed below.

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[48] Hearing Examiner's Decision at pp. 7-8 (Findings of Fact 42-48).

[49] For example, Appellants state "[t]he DEIS acknowledges that the project would result in a significant increase in tankship traffic in Rosario Strait and Guemes Channel." Appellants' Opening Brief at p. 41, lines 4-5 (citing DEIS at 13-15). However, the DEIS did not make any findings that this was a "significant" increase, it merely stated that potential impacts from vessel traffic would be highest in Rosario Strait and Guemes Channel. DEIS at 13-15.

[50] Hearing Examiner's Decision at p. 7 (Finding of Fact 42).

[51] *Id.* (Finding of Fact 46).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Since the DEIS and FEIS contained a detailed, lengthy analysis of the potential spill risks associated with Tesoro's proposed project,[52] Appellants' allegations of inadequacy have no basis in fact or law. By way of background, the FEIS included extensive spill modeling, assuming that no spill response was undertaken to demonstrate a worst-case scenario.[53] The three spill scenarios described in DEIS Section 13.5.3 each describe an instantaneous spill.[54] In an instantaneous spill event, the entire volume of the xylene or reformate would be released immediately to the environment.[55] These release rates were considered to be worst-case compared to a gradual release of the same volume, whereby the contents of the xylene are more gradually released to the environment.[56] An instantaneous spill event has already accounted for potential exposure to higher, or worst-case, concentrations of the spilled material.[57] A gradual release scenario would also afford responders a greater chance to stop or better contain the spill than from an instantaneous release, thereby potentially reducing the total amount released.[58] The DEIS stated "[th]e modeling results indicated that 99.5 percent of material in the worst-case spill scenario had evaporated or dissipated within 3 days of the spill (no persistent residue would remain)."[59] Furthermore, the FEIS addressed potential fuel spills as well as a release of xylene, despite Appellants' arguments to the contrary.[60]

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[52] *See generally* Chapters 3 and 13 of DEIS and FEIS (p. 2-43).
[53] DEIS at p. 13-35.
[54] DEIS at p. 3-44.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 10-38.
[60] *See* FEIS at p. 3-43: "In 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. Analysis of fuel spills was not included in this study because vessel fuel spills are not a unique feature of this proposed project. Vessel fuel spills have

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Appellants also argued that additional study should be conducted on spill risk given the *hypothetical* possibility that outbound vessels could be loaded with crude oil as cargo. However, as noted in the FEIS, "[t]he proposed project would not change the crude oil processing capacity of the refinery, the capability of the refinery to receive crude oil, or the method and number of crude oil deliveries."[61] Condition 7 of the Hearing Examiner's decision also confirms that the "export of crude from the Tesoro refinery is not authorized under this SDP[.]" With respect to adverse weather conditions and associated spill risk, this issue was analyzed when the model was developed. Several test simulations of spill releases under high wind speed conditions were examined during the development of the Draft EIS prior to performing the modeling exercise.[62] It was determined from examination of these test runs, that adverse conditions greatly reduced the impact from the spills due to the close proximity of shorelines at the dock and throughout the ship channel in the Salish Sea.[63] Therefore, the modeling results presented in the DEIS have greater potential impacts than would be expected under more adverse weather condition scenarios, which results in a conservative approach to assessing potential impacts.[64]

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already been modeled in detail in previous risk assessments performed in the Salish Sea for Ecology (French-McCay et al. 2005) and the range of scenarios modeled would account for any new marine vessel traffic associated with the proposed project. Therefore, there would be no changes in analysis or risk assessment results due to the proposed project. The fuel volumes modeled in the previous studies were based on oil tanker cargo presently traversing the Salish Sea and the proposed project would not significantly increase the fuel volumes that were modeled. Note that the fuel volumes required for the transport of xylenes and reformate would be 30 to 50 times less than those in tankers. Since analysis of fuel spills was not included in this study because vessel fuel spills are not a unique feature of this proposed project, there are no changes to the conclusions in the Draft EIS regarding spill risk or spill response."

[61] FEIS at p. 1-5. Accordingly, potential environmental impacts associated with increasing the amount of crude oil received or exported were not analyzed in this EIS and are not authorized under permits issued for the proposed project. FEIS Appendix A at p. 1-13 (Response to Comment Ch. 01-062).

[62] FEIS at p. 3-44.

[63] *Id.*

[64] *Id.*

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Appellants allege that the Planning Department failed to respond to comments about potential delays caused by salvage operations.[65] The Planning Department refutes this claim, as it responded to each comment, a summary of which was incorporated into the FEIS. Pursuant to WAC 197-11-550(8), the Planning Department is authorized to respond to comments as it deems appropriate. Even if the FEIS failed to respond to specific comments on delays due to salvage operations, it responded to other general comments on spill response activities. Any alleged procedural errors during the EIS process are reviewed under the "rule of reason."[66] Where such errors are not consequential, they must be dismissed as harmless.[67] Under the rule of reason test, any alleged failure to respond to specific comments on the potential delays due to salvage operations is harmless and does not render the FEIS inadequate.

In summary, the DEIS ultimately concluded that "there would be a low likelihood of a spill (of any scenario) in Guemes Channel and Rosario Strait. The spill likelihood in the Strait of Juan de Fuca would remain a negligible likelihood."[68] The Hearing Examiner's Decision was consistent with the Planning Department's findings, which stated "[t]he Examiner is not persuaded that the proposal will result in new risks in terms of the likelihood of spills, collisions or weather-related accidents."[69] While Appellants argue that additional study could have been conducted, they have failed to meet their burden of proving there was clear error in the environmental analysis or the Hearing Examiner's

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[65] Appellants' Brief at p. 44, lines 4-10.
[66] *Klickitat County Citizens*, 122 Wn.2d at 638.
[67] *Id.* at 637-38. *See also Mentor v. Kitsap Cy.*, 22 Wn. App. 285, 290–91, 588 P.2d 1226 (1978).
[68] DEIS at pp. 13-61 and 13-62.
[69] Hearing Examiner's Decision at p. 8 (Finding of Fact 48).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

findings. Accordingly, the Planning Department's extensive environmental analysis should be upheld as a matter of law.

2. EIS Included Thorough Analysis Regarding Potential Impacts to Whales, Ferries, and Recreation Areas.

Appellants allege that the EIS failed to adequately evaluate spill impacts to the Southern Resident Killer Whale ("SRKW"). However, potential impacts to whales were discussed at length in Chapter 7 of the DEIS and Section 3.5.1 of the FEIS. With respect to noise impacts, the DEIS stated: "the intensity of underwater noise generated from marine vessels associated with the proposed project would be consistent with noise currently generated from shipping activities in the Salish Sea."[70] The DEIS further stated, "[b]eyond these ranges, noise would attenuate to background levels, and noise associated with the proposed project would have negligible impact on marine wildlife."[71] The DEIS ultimately concluded that "impacts on marine wildlife from noise during operation of the proposed project would be *less than significant*."[72] Based on comments received on the DEIS, additional discussion of potential impacts to SRKWs was included in Section 3.5.1 in the FEIS.[73]

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[70] DEIS at p. 7-53. *See also* FEIS at p. 3-22: "Noise from operation of marine vessels associated with the proposed project has the potential to disturb behavior of pinnipeds and whales within 5 miles of the marine vessels. However, due to the short duration of disturbance and the information provided above from the NMFS, marine vessel operation is unlikely to impact behavior of marine wildlife to an extent that would reduce the viability of a population of a marine wildlife species. As indicated in the Draft EIS, the increase of five marine vessels per month (60 vessels per year or 5 vessels per month) is equivalent to a 0.1 to 2.2 percent increase in large marine vessel traffic along these transportation routes, which would not be considered a significant increase in marine vessel traffic over current levels. Therefore, the determination of less than significant impacts from the proposed project on Southern Resident killer whale is supported by the analysis completed in the Draft EIS."

[71] *Id.*

[72] *Id*

[73] FEIS at p. 3-20 to 3-22.

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Washington Courts have upheld a similar type of analysis of potential impacts to marine mammals in *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 541-42, 137 P.3d 31 (2006) (finding EIS analysis adequate, recognizing that "marine mammals were accustomed to shipping and port activity"). Finally, the Hearing Examiner's decision is consistent with the Planning Department's analysis, recognizing that "[t]he relationship between the operation of the particular boats using the Tesoro refinery facilities and the plight of the Orcas is in the realm of speculation."[74] Due to the extensive analysis and findings in the EIS, Appellants' allegations with respect to the potential impacts to SRKWs from the proposed project should be disregarded as having no basis in fact or law. Appellants have failed to meet their burden of proving any errors in the EIS or Hearing Examiner's findings.

Furthermore, Appellants contest the adequacy of the environmental analysis with respect to potential spill impacts on regional ferry systems. 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***."[75] As discussed in DEIS Section 13.5.6 (Spill Likelihood), such events would be extremely unlikely to occur. The FEIS also stated "[i]f a spill were to occur along or near one of Washington State's ferry routes, ferry operations could be delayed or temporarily halted. Other spill scenarios would result in smaller blockages."[76] Accordingly, the FEIS ultimately concluded that "the potential

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[74] Hearing Examiner's Decision at p. 9 (Finding of Fact 61).
[75] DEIS at p. 13-15.
[76] FEIS at p. 3-41.

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

impacts of a worst-case spill on ferry traffic would be less than significant."[77] Appellants have failed to prove any factual or legal errors with respect to this analysis.

Finally, the DEIS thoroughly analyzed potential impacts associated with a worst-case spill scenario on or near recreation areas. Based on the spill modeling results, a worst-case spill scenario or maximum most probable spill scenario could result in short-term restrictions on recreational use and access for up to 3 days to protect human health or ecological receptors in active areas of a spill and spill response.[78] Assuming response actions are not able to prevent products from reaching recreational areas, 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."[79] The FEIS also discusses emergency response planning and programs[80] and potential impacts to recreation areas.[81] As a result, Appellants' claims of insufficient analysis with regard to recreation areas are unfounded and should be dismissed.

3. Appellants' Analysis of Mitigation Measures is Inaccurate as a Matter of Law.

Appellants allege, "[g]iven the unexplored and unaddressed impacts, the Hearing Examiner erred when he declined to require additional mitigation measures under SEPA."[82] As a matter of law, the Planning Department has no obligation to impose mitigation unrelated to specific adverse impacts identified in the EIS. The substantive authority set

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[77] *Id.* at p. 3-42.
[78] DEIS at p. 10-38.
[79] *Id.* at p. 10-38 and 10-39.
[80] FEIS at p. 3-30.
[81] FEIS Section 3.8.2 at pp. 3-37 to 3-39.
[82] Appellants' Opening Brief at p. 44.

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

forth in RCW 43.21C.060 is permissive rather than mandatory. RCW 43.21C.060 states "[a]ny governmental action *may* be conditioned or denied[.]"[83] Accordingly, neither the Planning Department nor the Hearing Examiner is under any legal obligation to impose additional mitigation. It is a generally accepted principle that SEPA encourages and authorizes, but does not compel agencies to mitigate adverse environmental impacts.[84] In *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 197 P.3d 1153 (2008), an FEIS was alleged to be deficient because it did not analyze specific setback distances as a mitigation measure. The Washington Supreme Court held that an FEIS "does not require inclusion of specific remedies of each environmental impact."[85] *See also Glasser v. City of Seattle*, 139 Wn. App. 728, 741, 162 P.3d 1134 (2007) (holding the agency need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts). Even if the Board agreed with Appellants, neither the Planning Department nor the Hearing Examiner is legally obligated to impose additional mitigation. Appellants also fail to present any legal authority that would suggest mitigation should be required as a matter of law.

Furthermore, "[a]ny conditions imposed under [SEPA]...must be based on environmental impacts identified in the EIS."[86] SEPA does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible.[87]

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[83] Emphasis added.
[84] Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, 18-44 (1995).
[85] *Residents Opposed to Kittitas Turbines,* 165 Wn.2d at 311-12.
[86] *Manke Lumber Co., Inc. v. Mason Cty. & State of Wash., Dep't of Ecology*, SHB No. 95-66, 1996 WL 382095 at *6.
[87] *Maranatha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804-05, 801 P.2d 985 (1990).

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

As noted in the FEIS, the proposed project was designed to minimize potential impacts and includes best management practices (such as pollution prevention plans to protect surface water during construction) to avoid or minimize impacts.[88] For two resources, air quality and climate change and cultural resources, additional mitigation measures and voluntary commitments by Tesoro were included in the FEIS.[89] The Hearing Examiner did not find any errors with respect to the Planning Department's environmental analysis and mitigation measures.[90] Appellants' allegations that the FEIS contained insufficient mitigation measures has no basis in fact or law.

Appellants allege the Planning Department and the Hearing Examiner should have required mitigation measures that are outside their legal authority to impose. Pursuant to RCW 43.21C.060, "mitigation measures shall be reasonable and capable of being accomplished." Under WAC 197-11-060(4)(e):

> [T]he range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792) may be wider than the impacts for which mitigation measures are required of applicants (WAC 197-11-660). This will depend upon the specific impacts, the extent to which the adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation.

For example, Appellants seek such mitigation measures as tug escorts, quiet vessels, and additional restrictions on anchorages, which are are all within the regulatory authority of the U.S. Coast Guard and Ecology's Office of Marine Safety.[91] Skagit County has no

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[88] FEIS at p. 4-1.
[89] *Id.*
[90] Hearing Examiner's Decision at p. 11 (Conclusions of Law 10-12).
[91] Additional information regarding the agencies responsible for regulating bunkering and anchoring activity and marine transportation is provided in Table 2 in Section 3.1 of the FEIS. The potential impacts of anchoring associated with the proposed project, including marine vessels during operations, are discussed in Sections 7.4.1.1 and 7.4.2.1 of the DEIS, respectively. Marine vessel anchorage data is discussed in Section 13.3.1.3. Additional information regarding marine vessel anchorages is provided in Section 3.9.1.4 of the FEIS.

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

authority over these types of marine transportation activities. Appellants also argue the permit should be conditioned to include mitigation that demonstrates Tesoro's ability to compensate for economic impacts in the event of a spill.[92] As noted in the FEIS, costs associated with cleaning up spills and paying damages to those that have been harmed by a spill are covered under federal regulations, such as the Clean Water Act, Oil Pollution Act, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and similar state-level regulations.[93] Parties responsible for a spill would be subject to these federal and state regulations. Skagit County has no authority to impose additional requirements with respect to financial assurance. Therefore, Appellants' position lacks any legal merit.

4. EIS Included Thorough Analysis of Potential Impacts Associated with Greenhouse Gas ("GHG") Emissions.

Finally, Appellants argue the EIS is inadequate "because it relies on invalid mitigation measures to 'offset' direct and downstream emissions."[94] As noted above, Appellants continue to be misguided with respect to the issue of mitigation. To be clear, the EIS does not include any specific mitigation measures with respect to GHG emissions. This is largely in part because there was not a significant impact finding that required mitigation under SEPA. The Planning Department considered relevant emissions controls and regulatory programs when it analyzed potential direct, indirect, and cumulative impacts associated with Tesoro's proposed project. Since the DEIS contained a more limited discussion of GHG emissions, the pubic requested additional analyses on these issues in

[92] Appellants' Opening Brief at p. 48.
[93] FEIS at p. 3-31.
[94] Appellants' Opening Brief at p. 53.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

their comments. Accordingly, the FEIS included a more extensive discussion of the potential impacts associated with GHG emissions.[95] Since Appellants continue to take the EIS findings out of context, below is a relevant excerpt from the FEIS (p. 3-16):

> From a SEPA perspective, there are increases in direct and indirect GHG emissions due to the proposed project that were reported in Draft EIS Section 4.4.2.2, Impacts on GHG Emissions. Direct increases in GHG emissions from the proposed project would result from the operation of the new boiler, MVEC, and increased process heater usage. Indirect reductions of GHG emissions would result from a portion of fuel production being used to produce xylene for export instead of being combusted in the local fuels market. In contrast to how GHG emissions and reductions are accounted for under CAR (whereby Tesoro may be able to obtain ERUs from reported reductions in GHG emissions by exporting a higher percentage of their petroleum products), this change in production may not result in an overall net reduction of GHG emissions statewide. It is anticipated that the demand for transport fuel supply in the state of Washington would remain relatively similar. Consequently, there would still be similar GHG emissions from combustion of transport fuel supplied by other sources to meet demand state-wide. However, those sources are unrelated to the proposed project and these market fluctuations will be addressed by Ecology under the CAR. While Tesoro's proposed project may result in an increase in direct GHG emissions from the operation of proposed new combustion sources, under the CAR, Tesoro may be able to offset any potential impacts by obtaining ERUs for the reduction of GHG emissions associated with the facility's reduction in product supply. Therefore, the conclusions with respect to GHG emissions in the Draft EIS remain unchanged.

As evident in the excerpt above, the analysis of GHG emissions impacts is extraordinarily complex, with no state guidance on how to address such impacts under SEPA.[96]

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[95] Appellants allege that the Planning Department should have provided the new information in the FEIS on GHG emissions in a supplemental EIS. Appellants' Opening Brief at p. 66. However, SEPA rules do not support this position. Under WAC 197-11-405(4), a supplemental EIS is required only when there are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impact or there is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts. No supplemental EIS is required since the proposal did not change and the additional information in the FEIS did not change the ultimate findings. Furthermore, as noted above, the Planning Department's decision on this matter should be afforded "substantial weight." *See also Preserve Our Islands*, 133 Wn. App. at 542-43 (holding that a supplemental EIS was not required since it would do nothing more to enhance the information available to the decision-maker).

[96] There is similarly no current federal guidance on GHG emissions analysis under NEPA.

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605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Methodologies for assessing effects of GHG emissions are still being developed. No state or federal agency has published a rule outlining which indirect GHG emissions should be quantified in an environmental review.[97] In addition, impacts associated with GHG emissions should be addressed at a global scale, since effects are global in nature. Accordingly, the Planning Department did not limit its analysis to local impacts.

As depicted on Figure 3 in the FEIS, shipping xylenes from Washington State to Asia is a shorter transport distance than from the Gulf Coast to Asia, resulting in lower GHG emissions because less vessel fuel is burned during transport.[98] In addition, the emissions from transforming mixed xylenes into plastics products are lower than if mixed xylenes were burned as a component of liquid transport fuel.[99] The emissions associated with converting 15,000 bpd of mixed xylenes to plastics are approximately 1.3 to 2.1 million metric tons per year, whereas the emissions from burning those mixed xylenes as a component of gasoline would be approximately 3 million metric tons per year.[100]

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. As stated in the FEIS, the project would not significantly affect world demand for xylenes.[101]

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[97] *See Cf. WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (affirming a GHG analysis in an EIS "[b]ecause current science does not allow for the specificity demanded by the Appellants"). Federal case law is persuasive authority since Washington Courts use NEPA provisions and case law interpreting NEPA to interpret SEPA and its implementing regulations. *See Pub. Util. Dist. No. 1 v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067 (2007).

[98] FEIS at p. 3-13.

[99] *Id.*

[100] *Id.*

[101] FEIS at p. 3-5.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

Appellants allege there was insufficient analysis in the EIS on changes to market demands as a result of this project. However, conducting an accurate analysis of fluctuating market demands and other unknown factors is nearly impossible. SEPA Rules (WAC 197-11-330(3)(d)) recognize this challenge: "[f]or some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified." SEPA requires the consideration of environmental impacts that are likely, not merely speculative (WAC 197-11-060(4)(a)). The Planning Department need not "foresee the unforeseeable."[102] The lack of information and uncertainty about the routes of vessels and destinations of the mixed xylenes would require significant assumptions resulting in a speculative analysis that would not result in useful information for decision-makers.[103] The Hearing Examiner recognized these challenges in his findings:

- "Environmental impacts flowing from activities further afield such as the manufacture and disposal of plastics are too remote for regulation in this proceeding."[104]
- "The Examiner is not persuaded that the shoreline-related components of this project will result in significant greenhouse gas increases."[105]

The Hearing Examiner also recognized that the Northwest Clean Air Agency and Department of Ecology have both issued air permits, which have not been appealed.[106] These agencies have authority to regulate air emissions associated with Tesoro's proposed

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[102] *Sierra Club v. US. Dept. of Energy*, 867 F.3d 189, 198 (2017).
[103] It is similarly speculative to presume, as Appellants did, that Tesoro may plan any changes to its refining capacity that would warrant additional extraction and additional analysis as part of the EIS.
[104] Hearing Examiner's Decision at p. 10 (Finding of Fact 66).
[105] *Id.* at p. 9 (Finding of Fact 59).
[106] *Id.* (Finding of Fact 58).

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

project, and neither agency has required mitigation with respect to GHG emissions. Yet, Appellants allege in their brief that Ecology "criticized" the Planning Department's analysis of GHG emissions during the EIS comment process.[107] However, it should be noted that Ecology's May 8, 2017 comment letter with respect to the DEIS, contained a limited discussion with respect to the air emissions:

> Although Tesoro has discussed CAR obligations within the DEIS, the data will require our own analysis, which may lead to alternative compliance decisions. It is also anticipated that, separate from Tesoro's CAR obligations overall, statewide fuel GHG emissions may remain the same since other importers or producers may address local market demand.

As evident from this comment, Ecology provided little direction on how to evaluate GHG emissions impacts and did not openly "criticize" the Planning Department's analysis.

Furthermore, Appellants mischaracterize the FEIS, stating that the project would "cause" 2,438,089 tons of CO_2 emissions per year. This statement is taken completely out of context and ignores the additional analysis in the FEIS. After thoroughly analyzing the potential direct, indirect, and cumulative impacts of the proposed project, the FEIS ultimately concludes "these GHG impacts are considered less than significant."[108] This extensive analysis should be upheld on appeal since it is based on substantial evidence in the record. Appellants may disagree with the Planning Department's analysis since this is a complex and dynamic area of science and law, but under the "rule of reason," the EIS is adequate as a matter of law and the Hearing Examiner did not make any errors.

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[107] Appellants' Opening Brief at p. 66, lines 22-23.

[108] *Id.* at p. 3-7. It should be noted that Appellants identified a minor error in a figure stated in the FEIS. *See* Appellants' Opening Brief at p. 66, lines 8-11. It recently came to the Planning Department's attention that the "18.5 billion barrels per day" figure was stated in error. 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. This minor error does not change the findings of the EIS and is therefore harmless.

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

IV. Conclusion/Relief Requested

In summary, the Hearing Examiner's decision and the EIS are supported by substantial evidence in the administrative record and should be upheld on appeal. Appellants have not met their burden of proof to establish that any factual or legal errors were made. To hold otherwise would be contrary to Washington law and Skagit County Code. Therefore, the appeal should be denied and Appellants' claims should be dismissed with prejudice.

DATED this 9th day of February, 2018.

RICHARD A. WEYRICH
SKAGIT COUNTY PROSECUTING ATTORNEY

By _____
Julie Nicoll, WSBA #40953
Attorney for Respondent Skagit County Planning & Development Services

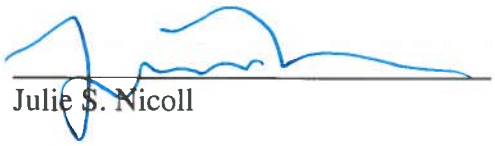
SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I e-mailed a true copy of this document to:

Appellants	Kyle Loring: kyle@sanjuans.org Chris Winter: chris@crag.org Oliver Stiefel: oliver@crag.org
Tesoro Refining & Marketing Company (Applicant)	Diane Meyers: dmeyers@nwresourcelaw.com Madeline Engel: mengel@nwresourcelaw.com Eliza Hinkes: ehinkes@nwresourcelaw.com

DATED this 9th day of February, 2018, at Mount Vernon, Washington.



Julie S. Nicoll

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3rd St. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 416-1600
Fax: (360) 416-1649