

NOTICE OF DECISION

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

- Applicant:** Tesoro Anacortes Refining and Marketing Company, LLC
c/o Rebecca Spurling, Lead Environmental Engineer
10200 West March Point Road
Anacortes, WA 98221
- Request:** Shoreline Substantial Development Permit, PL 15-0302
- Location:** 10200 West March Point Road within a portion of Sec. 21 and a portion of Sec. 28, T35N, R2E, W.M. Parcel Nos: P32990 and P32989
- Shoreline Designation:** Urban and Aquatic
- Summary of Proposal:** Additions and upgrades to existing refinery facility in order to produce 15,000 barrels per day of mixed xylenes and to supply cleaner transportation fuels. Shoreline related features of the project involve the accommodation of ships, including installation of a Marine Vapor Emission Control System (MVEC), with a Dock Safety Unit (DSU) on the existing wharf, a Vapor Combustion Unit (VCU) on the upland, and a 3-inch natural gas line running between the two.
- SEPA Compliance:** Draft Environmental Impact Statement, dated March 2017
Final Environmental Impact Statement, dated July 2017
- Public Hearing:** November 2, 2017. Testimony by Planning and Development Services (PDS) and Applicant. Public testimony from 55 members of the public.
- Decision/Date:** The application is approved, subject to conditions. 12/7/2017.
- Reconsideration/Appeal:** Reconsideration may be requested by filing with PDS within 5 days of this decision. Appeal is to County Commissioners by filing with PDS with 5 days of this decision, or decision on reconsideration, if applicable.
- Online Text:** The entire decision can be viewed at:
www.skagitcounty.net/hearingexaminer

FINDINGS OF FACT

Project Description

1. Tesoro Anacortes Refining and Marketing Company seeks approval under the Shoreline Management Act of a portion of a project at their Anacortes refinery. The features for which shorelines approval is sought comprise a new Marine Vapor Emissions Control (MVEC) system to capture vapors during product loading to vessels at the refinery's wharf.

2. The refinery is located on the north end of March Point. The address is 10200 West March Point Road which is within a portion of Sec. 21 and a portion of Sec. 28, T35N, R2E, W.M. The parcel numbers are P32990 and P32989.

3. The refinery is situated on uplands next to marine waters. It has been in existence since 1955. Extending from the refinery into the adjacent bay is a long causeway and wharf built in 1954. The wharf accommodates vessels transporting materials to and from the refinery. The wharf has accommodated vessels since before the enactment of the Shorelines Management Act.

4. The MVEC will consist of the Dock Safety Unit (DSU) on the wharf and the Vapor Combustion Unit (VCU) on the upland, connected by an existing 12" line and a new 3" natural gas line.

5. The Shoreline Management Act (SMA) was enacted in 1971. Under the SMA, shorelines include water areas of the state and lands 200 feet landward of the ordinary high water mark. "Development" on shorelines is governed by statutory policies and the provisions of locally-created shoreline master programs (SMP's)

6. The MVEC system will control emissions from the loading of mixed xylenes product and existing transfers of gasoline-range materials and crude oil. Vapors from loading vessels will be collected by vapor hoses and routed to the DSU where enrichment of the vapors with natural gas will occur. Enriched vapors will then be sent through an existing 12' line along the causeway and into the refinery proper to the VCU for combustion. A new 3-inch natural gas line leading from an existing natural gas line at the refinery will connect the DSU and VCU, ultimately improving combustion efficiency. The only features of the project within statutory "shorelines" are the DSU and the connecting lines leading toward the VCU.

7. The DSU and the connecting lines are within a designated flood plain. However, the elevation of the wharf and causeway are such that no flood is likely to reach the elevation of the deck.

8. The production of mixed xylenes (15,000 barrels per day) will be a new activity at the refinery. The mixed xylenes produced will be loaded onto marine vessels using the existing refinery wharf structure and exported to global markets. The production of mixed xylene feedstock will provide a more diverse product mix at the refinery with the aim of increasing the long-term economic viability of the installation.

9. The MVEC system is part of a larger project called the Clean Products Upgrade Project (CPUP). The overall aim is to enable the refinery to reduce the sulfur content of gasoline products and to produce mixed xylene feedstocks.

10. In addition to the MVEC features, the CPUP includes an expansion of the Naphtha Hydrotreater (NHT) (removes sulfur from existing gasoline), a new Isomerization Unit (increases octane availability in the gasoline pool), a new Aromatics Recovery Unit (ARU) (producing mixed xylenes), a new steam boiler (to produce heat needed for the ARU and steam for the expanded NHT), and three new storage tanks. Other than the MVEC system, all of the project features are completely outside of the 200-foot shoreline strip and have no components connected to facilities within the shoreline.

11. The purpose of the CPUP is twofold: (1) to improve the refinery's capability to produce local transportation fuels meeting U.S. Environmental Protection Agency requirements for reduced sulfur (Tier 3 fuels), and (2) to produce 15,000 barrels per day of mixed xylenes. An Environmental Impact Statement (EIS) was prepared covering the entire CPUP project.

Permit Processing Procedure

12. Skagit County issued a Notice of Development Application for the subject proposal which was published on July 9, 2015 and July 16, 2015. Notification was provide by mail to all property owners within 300 feet of the refinery property. Seven comments were received in response to the Notice of Development Application.

13. On March 17, 2016, the County issued a Determination of Significance for the CPUP proposal, calling for the preparation of an Environmental Impact Statement. Approximately 2,500 comments were received between March 17 and April 15, 2016.

14. The County issued a Draft Environmental Impact Statement (DEIS) on March 23, 2017. Between March 23 and May 8, 2017, the County received 7,744 comments.

15. The County issued a Final Environmental Impact Statement (FE(S) on July 10, 2017. The Skagit County Code (SCC) does not provide for the appeal of an FEIS at the administrative level.

16. Notice of the public hearing on the MVEC application was published on October 12, 2017, posted on the property on October 13, 2017 and mailed to surrounding owners on October 16, 2017.

17. The public hearing was held, per the notice, on Thursday, November 2, 2017, at the Commissioner's Hearing Room, 1800 Continental Place, Mount Vernon, Washington. The County was represented by Betsy Stevenson, Senior Planner, and Julie Nicoll, Deputy Prosecuting Attorney. The applicant was represented by Rebecca Spurling, Environmental Engineer, and Diane Meyers, and Madeline Engel, Attorneys at Northwest Resource Law, LLC.

18. At the hearing public testimony was heard from 55 persons. Written comments were accepted through the close of the hearing.

19. The following exhibits were admitted:

- (1) Exhibits A through I to Skagit County's Staff Report (including the DEIS and FEIS and related public comments)
- (2) Power point presented by Tesoro at the hearing
- (3) Memorandum to Spurling from Barr Engineering regarding Greenhouse Gas Emissions
- (4) Tesoro Consistency Chart (for consistency with Skagit County Shoreline Master Program)
- (5) Emails regarding Greenhouse Gas Emissions, Spellacy and Spurling.
- (6) Order of Approval to Construct, Northwest Clean Air Agency, July 18, 2017
- (7) Prevention of Significant Deterioration (PSD) Permit, Washington Department of Ecology, July 18, 2017.

In addition written public comments submitted prior to and during the hearing and the applicant's Hearing Memorandum are included in the record. The Hearing Memorandum contained four exhibits

Regulatory Context

20. Tesoro's overall CPUP proposal is subject to a vast array of agency requirements. The County's Staff Report incorporates a list from the FEIS of various agencies involved and the regulatory requirements for the CPUP. The list is seven pages long. The shorelines management piece is but one of many governmental approvals needed.

21. While the FEIS covers the total CPUP picture, the County's role in considering a Shoreline Substantial Development permit is focused on the impacts of the project features which constitute "development" on the "shorelines" as defined by the SMA.

22. "Development" is defined in RCW 90.58.030(3)(d) as

A use consisting of the construction or exterior alteration of structures, dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals, bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the water or shorelines of the state.

23. "Shorelines of the state" are defined as all water areas of the state together with the lands underlying them and associated shorelands (the area 200 feet inland from the ordinary high water mark) plus certain specially designated shoreline areas identified as "shorelines of state-wide significance." RCW 90.58.030.

24. In the instant case, “development” on “shorelines” as proposed by Tesoro is limited to the MVEC. This encompasses the project parts that are within the shorelines as well as the impacts on those shorelines of upland development.

Project Shoreline Features

25. The MVEC is comprised of the DSU on the wharf, the VCU on the upland and connecting conveyance lines.

26. The DSU will consist of two units on a common skid with a common oxygen analyzer system and a gas enrichment system. Placing it on the wharf will require use of either a barge tied off at the wharf or a spud barge adjacent to the wharf. Spud barges have vertical steel shafts (“spuds”) that can be extended to or driven into the seabed to provide stability. If a spud barge is used, the skid-mounted DCU units will be lifted onto the wharf by a crane mounted on the barge. If needed, the spuds would be deployed from the barge in an area with no eelgrass. Use of the spud barge, if it occurs, will be the only in-water work conducted.

27. The DCU will be attached to the wharf and connected to existing piping and utility connections. In addition, a 3-inch natural gas line will be installed in the existing pipe rack to supply gas to the DSU for enrichment of vapors as needed for safe vapor recovery. This line will extend approximately 3,800 feet along the causeway and 500 feet on the wharf. The new line will also provide natural gas to the VCU to optimize combustion efficiency. Associated construction activities will include placement of scaffolding, crane operation, welding, sandblasting and hydrostatic testing. As feasible, pipe joints will be welded and coated on shore or on the causeway road.

28. During work over water secondary containment structures and other best management practices will be used to prevent materials from entering the water or intertidal zone. Installation and operation of the DSU and the gas line are not expected to result in water quality degradation.

29. Construction work at the wharf and causeway would take place in an approved fish window to minimize any disruption of spawning fish.

30. From the DSU, vapors will be routed through an existing available 12-inch line on the causeway through a blower to the VCU for combustion. The VCU will be on an undeveloped upland area adjacent to and south of the wastewater treatment plant aeration basin. Part of this area will be cleared and graded. The VCU foundation pad will be cement pavement or aggregate. The VCU will include vapor blowers, pumps, knockout drum, filters, combustion units, and associated piping and equipment. As the project is described, the impacts of upland development on the shorelines will likely be *de minimis*.

Shoreline Impacts

31. The Skagit County Shoreline Master Program (SMP) regulates development within various area designations which are outlined on a designation map. The shorelines involved here

are designated “Urban” (above the Ordinary High Water Mark) and “Aquatic” (below the Ordinary High Water Mark). The waters are also within a special overlay designation for particularly sensitive areas called Shorelines of Statewide Significance.

32. Within each area designation, uses are regulated under broad generic categories. The categories that apply here are Ports and Industry, Piers and Docks, and Utilities. In general the policies and regulations that apply to Aquatic shorelines are the same as for the adjacent Urban upland shorelines.

33. In its Staff Report, the County reviewed the development, construction and operation of the MVEC for consistency with the County’s SMP. They determined that the existing wharf and refinery are shoreline dependent. They found that the proposal, as conditioned, is consistent with the general policies and regulations for “uses” in the area designations involved. These policies and regulations are set forth verbatim in the Staff Report.

34. In the SMP’s Uses Matrix (SMP p. 7-2), shoreline “uses” are identified under broad headings which, as relevant here, include Ports and Industry, Piers and Docks and Utilities. Such “uses” in Urban and adjacent Aquatic shoreline areas are listed as permitted outright, subject to policies and regulations. However, it is noted that special circumstances may be found in specific use regulations.

35. A repeatedly argued point in public comment was that the proposal at hand should require a Shoreline Conditional Use Permit. The use regulations for Ports and Industry and Piers and Docks merely state that these uses are permitted subject to general regulations. However, for Utilities in Aquatic shoreline areas the following is stated at SMP 7.18.2.A(6)(a):

Submarine or buried water and sewer pipelines, petroleum pipelines, and sewage outfall systems are permitted as a conditional use and subject to the upland Shoreline Area regulations.

This apparently identifies one of the special circumstances warned about in the Uses Matrix.

36. Assuming that the 3-inch natural gas line involved with the MFVEC is a form of petroleum pipeline, the Staff’s apparent interpretation of the above language was that conditional use approval is needed only when the pipeline is “submarine or buried.” The pipelines involved in the MVEC are above water along the wharf and causeway

37. The Examiner concurs with the Staff interpretation. He further concurs with the Staff’s evaluation of the subject proposal’s consistency with the SMP and adopts the same. The Staff Report is by this reference incorporated herein as though fully set forth.

Shorelines of Statewide Significance

38. The project occurs in an area statutorily designated as Shorelines of Statewide Significance. The SMA’s policy section, RCW 90.58.020 sets forth a list of preferences with respect to such shorelines which, in general, militate against changes to the natural environment.

The statewide interest is to be protected over local interest. Natural conditions, long term benefits, shoreline ecology, public access, and recreational opportunities are to be preserved.

39. The trouble with applying these policies to the locality involved here is that the horse is already out of the barn. This has been an industrial site for many years. The record demonstrates that the MVEC will not impose significant additive adverse environmental impacts. The policies for Shoreline of Statewide Significance cannot be meaningfully implemented in existing physical context.

40. The presence of specially protected marine areas nearby in both Padilla Bay and Fidalgo Bay are of particular concern. However, there is no compelling evidence that the values protected in these areas are put at additional risk by the modest changes being made by Tesoro's MVEC project.

Vessel Traffic

41. "Shorelines" as noted include all water areas of the state. Whereas the "development" in question does not directly include shipping and water transportation, it is appropriate to evaluate the effects on water areas that will likely result from or be aided by the subject "development."

42. The proposal calls for 40 annual deliveries of reformate and 20 annual shipments of mixed xylenes at the refinery's wharf. The FEIS states, "Tesoro anticipates approximately five additional vessels a month would be needed to support the production and shipment of mixed xylenes." This calculation of additional vessels was based on simply adding the reformate/xylene shipments to existing vessel levels.

43. However a study, conducted by CH2M Hill, showed that marine traffic at the refinery will, in fact, remain below historical levels. This analysis went back to 2002 and showed higher traffic levels in the earlier years. The Examiner finds the study credible.

44. The conclusion follows that the refinery was able to accommodate the higher levels of shipping that were experienced in the relatively recent past.

45. The project will not increase the capacity of the Tesoro\refinery dock to accommodate vessels. The refinery's operations are constrained within the physical limitations of the transfer pipelines in service.

46. Moreover, the size of loads involved will not increase. Therefore, the Examiner finds that the proposal will not result in new impacts from increased marine traffic to and from the Tesoro refinery.

47. The record is replete with information on the system for managing marine traffic in the waters around from the refinery and through the surrounding inland waters out to the ocean. This system appears to incorporate up-to-date technology and to function effectively.

48. The Examiner is not persuaded that the proposal will result in new risks in terms of the likelihood of spills, collisions or weather-related accidents.

Mixed Xylenes

49. The CPEP will include the production of a new product at the refinery: mixed xylenes. Mixed xylenes are a component of many consumer products including medical films, spray paints, solvents, synthetic fibers plastics, paint thinners and paper.

50. Reformate and mixed xylenes are subsets of products, such as gasoline, that are already shipped by marine vessel to and from the refinery.

51. As noted, the evidence does not suggest that mixed xylenes and reformate spills are more likely than spills of other materials from ships coming to and going from the Tesoro facility.

52. Xylenes and reformate can be toxic if inhaled or swallowed, but if spilled they evaporate relatively rapidly from the water surface and break down into harmless components.

53. A worst case spill (two orders of magnitude larger than the largest recorded spill in the Salish Sea) could adversely impact air quality and exposed organisms over a short term if no response actions were taken. However, robust spill response programs in place both at the refinery and along the marine vessel transportation route are expected to be adequate to respond to and minimize the effects of even a worst-case spill.

54. In general the consequences of spills of mixed xylenes should not be more damaging than spills of materials that have historically been transported to and from the refinery.

55. It is, of course, inevitable that some of the products ultimately created using the mixed xylenes made at and exported from the Tesoro Anacortes refinery will end up in waste streams that contribute to pollution of both land and sea. But the creation of these products themselves is not illegal and the placement of mixed xylenes in the commercial market does not itself constitute pollution.

Greenhouse Gases

56. Because vessel traffic will not be increasing, logically the impact from such traffic in terms of greenhouse gas generation should not increase over past levels.

57. However, at the refinery, Tesoro's proposed project may result in an increase in direct greenhouse gas (GHG) emissions. The primary source for GHG emissions will be stationary combustion sources on the upland, mainly the new natural gas fired boiler. This is a

part of the overall project unrelated to the shoreline area. The MVEC system is being installed with appropriate combustion technology to minimize GHG emissions.

58. The Northwest Air Pollution Agency (NWAPA) has issued an Operating Permit imposing conditions related to reducing project impacts on air quality. Likewise the State Department of Ecology issued a permit relating to the Prevention of Significant Deterioration of Air Quality. Neither of these permits has been appealed.

59. Best Available Control Technology must be installed to control greenhouse gases under requirements for Prevention of Significant Deterioration. If significant deterioration of air quality is prevented, emissions that result from activities in shoreline jurisdiction should be effectively minimized. The Examiner is not persuaded that the shoreline-related components of this project will result in significant greenhouse gas increases.

Killer Whales

60. Notice can be taken of the plight of resident Orcas in waters of the Salish Sea surrounding the refinery. Their presence in the area is well-known and keeping track of them and watching them are both a focus of scientific inquiry and a source of tourist dollars. Many of those who testified posited potential harm to these Orcas as a reason for opposing the project.

61. The causes of the decline of these Orcas are likely multiple. While it is probably true that noise from boats is a contributing factor, the relationship between operation of the particular boats using the Tesoro refinery facilities and the plight of the Orcas is in the realm of speculation.

Overall

62. The MVEC components will address environmental dangers and operate to reduce environmental risks. It would be ironic if such an installation were to provide the vehicle for rejection of this shoreline application on environmental grounds.

63. In connection with the shoreline permit, consideration is required of whether other local, State or Federal mitigation measures applied to the proposal are sufficient to mitigate the identified impacts. (See SCC 26.12.200(2)(d).) The issued permits relating to air quality appear sufficient in regard to impacts of the MVEC. As conditioned, the local environmental impacts of the MVEC on the state's shorelines were not shown to be significantly adverse

64. Furthermore, the transportation of a new product from the refinery was not shown likely to pose significant additive risks or significant additive environmental impacts.

65. The upland features of the MVEC project were not shown likely to adversely affect the shorelines.

66. Environmental impacts flowing from activities further afield such as the manufacture and disposal of plastics are too remote for regulation in this proceeding.

67. Potential environmental impacts associated with transport of crude oil to the Tesoro refinery by rail or associated with the export of crude oil are not a part of the subject project and were not analyzed in the EIS.

68. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding. SMP 9.06.

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). The MVEC is a substantial development on shorelines that requires a Shoreline Substantial Development Permit. RCW 90.58.140

3. It was argued that a decision on this application should await the updating of the local Shoreline Master Program. The Hearing Examiner disagrees. The application must be judged by the law in effect when the application was filed.

4. Numerous persons expressed the view that the development proposed should require a Shoreline Conditional Use Permit as well as a Substantial Development Permit. The categories under which the project is judged for master program consistency are broad (Ports and Industry, Piers and Docks, Utilities). Within these broad categories, the proposal in question is subject only to the Substantial Development Permit requirement. See SMP Uses Matrix, p. 7-2. Special circumstances calling for conditional use approval were not shown.

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.

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.

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).

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

9. The Skagit County Code does not provide for the administrative appeal of an FEIS. The instant process is not an appeal hearing.

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).

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.

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

13. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. The proposed MVEC system must be built in accordance with the information submitted in connection with the SDP permit application.

2. Design and control features described in the FEIS as it relates to the MVEC system must be complied with and included in the building permit application, as applicable.

3. All other required permits and authorizations shall be obtained and the conditions of the permits and authorizations shall be followed.

4. The Applicant shall submit a copy of this decision with its building permit application for the MVEC system.

5. The MVEC shall be commenced within two years of the last agency approval required for it and shall be completed within five years thereof. An extension of time for commencement or completion may be granted for good cause.

6. If any modification of the subject proposal is proposed, the Applicant shall notify Skagit County Planning and Development Services (PDS) prior to the start of construction.

7. The transport of crude oil by rail to the Tesoro refinery is not authorized under this SDP. The export of crude oil from the Tesoro refinery is not authorized under this SDP.

8. Failure to comply with any condition herein may result in permit revocation.

ORDER

The requested Shoreline Substantial Development Permit (PL15-0302) is approved, subject to the conditions set forth above.

SO ORDERED, this 7th of December, 2017.



Wick Dufford, Hearing Examiner

Transmitted to Interested Parties, December 7, 2017

See Notice of Decision, page 1, for appeal information.