BEFORE THE BOARD OF COUNTY COMMISSIONERS

IN AND FOR SKAGIT COUNTY, WASHINGTON

In the Matter of the Appeal of Shoreline Substantial Development Permit PL 15-0302 Granted to Tesoro Anacortes Refining and Marketing Company, LLC (Tesoro) and the Associated SEPA Environmental Impact Statement	Case No. PL15-0302 Appeal No. PL17-0629 TESORO REFINING & MARKETING COMPANY LLC'S ANSWERING BRIEF

I. INTRODUCTION

This is an appeal of a decision to issue a shoreline substantial development permit for a Marine Vapor Emission Control system. The Marine Vapor Emission Control system, as its name suggests, captures and controls air emissions during vessel loading at the existing Anacortes refinery wharf. The Marine Vapor Emission Control system has a modest physical footprint (two shoreline components and one upland component outside the shoreline), a modest construction footprint, and a modest operational footprint. As the Hearing Examiner concluded, its control of emissions will have a positive impact on the environment and will reduce the emissions of volatile organic compounds. *See* HE Report, Finding 62.

Despite the acknowledged laudable environmental impacts of the Marine Vapor Emission Control system, six environmental organizations appealed the permit to allow Tesoro Refining &

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Marketing Company LLC ("Tesoro")[1] to install this emission control system. In this appeal, they challenge the permit on two general grounds: first, they argue that a shoreline substantial development permit should not be issued because a conditional use permit is required; and second, they argue that the environmental impact statement prepared by Skagit County inadequately describes impacts related to vessel traffic and greenhouse gas emissions.

Although Appellants have appealed a permit for the Marine Vapor Emission Control system, they direct their arguments to a separate part of Tesoro's Clean Products Upgrade Project—a new process unit where mixed xylenes, a chemical used to make polyester, plastics, and x-rays, among other common goods, will be produced. But mixed xylenes production will occur entirely outside the jurisdiction of the Shoreline Management Act, and the major permits necessary to manufacture mixed xylenes were issued months ago and went wholly unchallenged. Moreover, the Hearing Examiner correctly concluded—after more than two years of review by the Skagit County Department of Planning and Development Services, the assemblage of over 1,600 pages of environmental impact analysis, and multiple public hearings and opportunities to comment—that neither the Marine Vapor Emission Control system nor the Clean Products Upgrade Project result in any impacts to the shoreline or environment that would prevent the issuance of a shoreline substantial development permit. Appellants' challenge to the Marine Vapor Emission Control should be denied and the Hearing Examiner's decision affirmed.[2]

II. BACKGROUND

A. Project

The proposed project site has been a refinery since 1955. The Tesoro wharf and

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[1] Tesoro Refining & Marketing Company LLC is a subsidiary of Andeavor.

[2] As outlined below, the Board does not need to reach Appellants' challenge to the adequacy of the environmental impact statement, which consumes almost two-thirds of their brief because the Skagit County Code does not allow Appellants to bring this challenge. Regardless, the over 1,600 pages devoted to analysis of environmental impacts of the Clean Products Upgrade Project far exceeds the "reasonably thorough" discussion of impacts required by State Environmental Policy Act ("SEPA").

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causeway were built in 1954 and have been used since their construction to support the refinery through the transfer of crude oil, feedstocks, and refined products in and out of the refinery. The refinery is located within the Anacortes Urban Growth Area "Urban Development District." Relevant to Tesoro's shoreline substantial development permit application, the Skagit County Shoreline Master Program ("SMP") designates the upland portion of the causeway as "Urban" and the portion of the wharf and causeway that are over water as "Aquatic."

The installation of the Marine Vapor Emission Control system is part of a series of projects that are collectively called the Clean Products Upgrade Project. The Clean Products Upgrade Project will allow Tesoro to deliver cleaner local transportation fuels, comply with Tier III sulfur requirements mandated by the United States Environmental Protection Agency, and give Tesoro the flexibility to produce a new product (mixed xylenes) that is used to make clothing, plastics, and other synthetic products. Tesoro has already received, without challenge, several permits necessary for the Clean Products Upgrade Project, including a Prevention of Significant Deterioration Permit that was issued by the Department of Ecology on July 18, 2017, and an Order Approving Construction that was issued by the Northwest Clean Air Agency on July 18, 2017. In approving the PSD permit, Ecology evaluated the air quality impacts of the Clean Products Upgrade Project, including the associated greenhouse gas emissions, and concluded that the Clean Products Upgrade Project meets air quality regulations. *See* PSD 17-01 at 3-4; *see also* Ecology's Technical Support Document dated March 21, 2017 at 1.

Nearly all the components of the Clean Products Upgrade Project were intentionally located outside of the shoreline to avoid shoreline impacts. Thus, the shoreline substantial development permit on appeal here relates only to the Marine Vapor Emission Control system. The Marine Vapor Emission Control System includes three components, two within the shoreline (a Dock Safety Unit and a 3-inch natural gas line) and one located upland outside the shoreline (the Vapor Combustion Unit). *See* HE Report, Finding 10.

The Marine Vapor Emission Control system will significantly reduce emissions that

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occur during vessel loading at the wharf. Vapors displaced during vessel loading will be routed from the vessel to the Dock Safety Unit through "vapor hoses." From the Dock Safety Unit, the vapors will then be routed to the Vapor Combustion Unit through an existing transfer line. The vapors will be combusted at the Vapor Combustion Unit. A new 3-inch natural gas line will supply the Dock Safety Unit with enrichment gas, which is used to safely manage the vapor recovery as marine vessels are loaded. Vapors associated with existing vessel loading activities, as well as the loading of mixed xylenes, will be controlled by the Marine Vapor Emission Control system. Consequently, the Marine Vapor Emission Control system will result in a significant decrease in volatile organic compounds from the existing and future marine loading operations.

Installation and operation of the Dock Safety Unit and the 3-inch natural gas line are the only two shoreline developments proposed by the Clean Products Upgrade Project. Although Tesoro will receive reformate to make mixed xylenes and ship mixed xylenes by vessel, those activities do not require the installation of any new infrastructure, including product transfer lines, in the shoreline because they use the existing wharf infrastructure. Tesoro already receives and ships reformate by marine vessel, and mixed xylenes are extracted from and a subset of products like gasoline that Tesoro already ships by vessel. *See* HE Report, Finding 50; CH2M Hill, Vessel Traffic Assessment (March 2016) at 9.2 ("Reformate and gasoline have been transported by vessel in the past to and from the Refinery.") (included in the administrative record under the file "shoreline permit applicant materials").

B. Hearing Examiner's Decision

On December 7, 2017, the Hearing Examiner approved Tesoro's application for a shoreline substantial development permit to install the Marine Vapor Emission Control system. Concluding that the Marine Vapor Emission Control System "will address environmental dangers and operate to reduce environmental risks," the Hearing Examiner noted that "[i]t would be ironic if such an installation were to provide the vehicle for rejection of this shoreline

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application…" HE Report, Finding 62. He correctly concluded that the Marine Vapor Emission Control system is consistent with apposite county and state shoreline policies and regulations, and expressly rejected arguments that a shoreline conditional use permit is required, concluding that pursuant to the SMP shoreline uses by which the Marine Vapor Emission Control system is judged (ports and industry, piers and docks, and utilities), "the proposal in question is subject only to the Substantial Development Permit requirement." HE Report, Conclusions 4-7 (citing SMP Uses Matrix at 7-2).[3]

III. STANDARD OF REVIEW AND BURDEN OF PROOF

A. Appellants must prove Hearing Examiner's decision was clearly erroneous

Under the Skagit County Code, Appellants have the burden of proving that the Hearing Examiner's findings or conclusions were clearly erroneous. *See* SCC 14.06.170(3). To satisfy this "enhanced burden," Appellants must present a "sufficient amount of credible evidence that the Board is left with definite and firm conviction that the Hearing Examiner's conclusion were wrong. *Donovan v. Sperry Ocean Dock*, SHB Nos. 10-024 through 10-042 (July 13, 2011) (citing *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976)). The Board must sustain the Hearing Examiner's findings of fact if they are supported by "substantial evidence." *Maranatha Min., Inc. v. Pierce Cty.*, 59 Wn. App. 795, 801, 801 P.2d 985 (1990). "The test of substantial evidence is whether evidence is sufficient to persuade a fair-minded person of the truth of the declared premise." *Schofield v. Spokane Cty.*, 96 Wn. App. 581, 589, 980 P.2d 277 (1999).

B. SEPA Standard of Review

Whether an EIS is adequate is a question of law, subject to review *de novo*. EIS adequacy refers to the legal sufficiency of the environmental data contained in the impact

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[3] Ecology, which would have to approve a conditional use permit, did not provide any comment that it believed the Marine Vapor Emission Control system or the Clean Products Upgrade Project require conditional use permits.

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statement and is tested under the "rule of reason." *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn. 2d 619, 632–33, 860 P.2d 390, 398–99 (1993), as amended on denial of reconsideration (Jan. 28, 1994), amended, 866 P.2d 1256 (Wn. 1994) (affirming EIS adequacy). An EIS is adequate if it presents decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. *Id.*

IV. STANDING

Tesoro agrees that Appellants have standing to appeal the Hearing Examiner's decision to issue a shoreline substantial development permit because they meet the criteria of SCC 14.06.0170. Under SEPA, however, Appellants have not shown how they are "aggrieved" by the determination to issue a shoreline substantial development permit for the Marine Vapor Emission Control system, as described below. Thus, they lack standing to contest the adequacy of the EIS. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 126, 272 P.3d 876 (2012). Their appeal of EIS adequacy can be dismissed on this ground alone.

V. THE HEARING EXAMINER PROPERLY DECIDED TO ISSUE A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT FOR THE MARINE VAPOR EMISSION CONTROL SYSTEM

Appellants do not meet their heavy burden of proving that the Hearing Examiner's decision to issue a shoreline substantial development permit is "clearly erroneous" as the Skagit County Code requires. SCC 14.06.120(11). The SMP includes as one of its goals "economic development," and promotes and encourages "the optimum use of existing industrial and economic areas for users who are shoreline dependent and shoreline related." SMP 4.02(5). The site, including the existing wharf and causeway, has operated as a refinery for over sixty years. As the Hearing Examiner correctly concluded, the Marine Vapor Emission Control system is a quintessential water dependent use. HE Report Conclusion 2. This conclusion is not challenged by Appellants.

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The SMP regulations of piers, ports and industries, and utilities not only allow the Marine Vapor Emission Control system to be installed on the existing wharf, they require that it be installed on the existing wharf. Each applicable section prioritizes development in appropriate existing use areas. *See* SMP 6.04(6)(d)(2) ("Port and water related industrial and commercial developments…should locate in appropriate, existing use areas…"); SMP 7.10(1)(A)(3) ("Multiple use and expansion of existing piers, wharves, and docks should be encouraged…"); SMP 7.11(1)(A)(2) & (3) (port facilities should be limited to shoreline and water dependent or related industries and development of existing facilities should be encouraged); SMP 7.18(1)(A)(2) (utilities should utilize existing rights-of-way). Given its longstanding use, the appropriate location of the Marine Vapor Emission Control system was on the existing wharf and causeway.[4] In light of the provisions of the SMP, including the SMP priorities on economic development and utilizing existing developed areas, the Hearing Examiner properly concluded that the Marine Vapor Emission Control system is consistent with the Skagit County SMP.

Although less than clear from their brief, Appellants appear to make three separate arguments that the Hearing Examiner should have required a conditional use permit: (1) the Dock Safety Unit is part of a "fixed bulk liquid or petroleum transfer facility" (Br. at 18); (2) the Dock Safety Unit facilitates the production and shipment of mixed xylenes, which is a "new activity" (Br. at 19); and (3) the 3-inch natural gas line is an "aerial or surface cable and pipeline crossing" that requires a conditional use permit (Br. at 23). Each argument reflects an incorrect application of the SMP and inaccurate understanding of the Marine Vapor Emission Control system and must be rejected.

A. The Marine Vapor Emission Control system is not part of a "bulk petroleum transfer facility."

[4] Coast Guard regulations require the installation of the Dock Safety Unit near the marine vessel. *See* 33 C.F.R. 154, Subparts E and P (describing maximum distance between the Dock Safety Unit and its connection to the marine vessel).

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Appellants first assert that a conditional use permit is required because the Dock Safety Unit is used to transfer bulk liquids into marine vessels, making it a "bulk petroleum transfer facility." (Br. at 18-19.) But Appellants cannot and do not describe how the Dock Safety Unit and the Marine Vapor Emission system, which the Dock Safety Unit is a part of, constitute a "bulk petroleum transfer facility." They are simply wrong as a matter of fact.

Neither the Dock Safety Unit nor the Marine Vapor Emission Control system are part of or change the mechanics, capacity, or speed of marine vessel loading and offloading at the existing wharf. They play no role in product transfer—they are not connected to the product transfer lines, do not power the product transfer lines, and are not themselves product transfer lines. They play a modest, but environmentally important, role: vapors that are displaced while marine vessels are loaded are routed through vapor hoses to the Dock Safety Unit. The vapors then exit the Dock Safety Unit and are routed through an existing line to the upland Vapor Combustion Unit. The vapors are combusted in the Vapor Combustion Unit. The 3-inch natural gas lines supplies the Dock Safety Unit with natural gas fuel, when needed.

Although the SMP does not define "fixed bulk liquid or petroleum transfer facility," the plain meaning of this phrase does not describe any part of the Marine Vapor Emission Control system, including the Dock Safety Unit. "Transfer" means "to convey or move from one place to another," "bulk" means "goods or cargo not in packages or boxes, usually transported in large volumes, as grain, coal, petroleum," and "petroleum" is a liquid mixture of hydrocarbons. Random House Webster's Unabridged Dictionary (2d ed. 1998). Taken together, a bulk petroleum transfer facility requires a structure that moves liquid petroleum in large volumes.

Washington statutes contains similar definitions. Under Washington laws including statutes related to oil spill prevention, "bulk" means "material that is stored or transported in a loose, unpackaged liquid, powder or granular form," and facility means any structure that "transfers" oil in "bulk" "to or from a vessel or pipeline, that is used for producing, storing, handling, transferring, processing or transporting oil in bulk." *E.g.*, RCW 88.40.011; RCW

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88.46.010. Combined, the definition of "bulk transfer facility" requires (1) the ability to produce, store, handle, transfer, process or transport (2) material in loose, unpackaged liquid, powder or granular form (3) to or from vessels.

The Dock Safety Unit meets neither the common understanding nor the legal definition of a "bulk petroleum transfer facility." It captures vapors as they are displaced from the marine vessel loading. It does not convey or move bulk liquid materials. It does not produce, store, handle, transfer, process, or transport loose, unpackaged liquid, powder or granular form of material to or from vessels. Accordingly, a conditional use permit for "bulk petroleum transfer facility" is not required for the Marine Vapor Emission Control system because it is not a bulk petroleum transfer facility.

B. There is no "new form of activity" that requires a conditional use permit.

Appellants assert that the production and shipment of mixed xylenes is "new form of activity" that requires a shoreline permit. (Br. at 20). Because the production of mixed xylenes occurs upland and outside the shoreline jurisdiction, and the shipment of mixed xylenes does not involve any new work in the shoreline and is not a "new form of activity," Appellants' argument must be dismissed.

The production of mixed xylenes occurs entirely outside the shoreline jurisdiction at an upland location. It will occur in a new unit (the Aromatics Recovery Unit) to be constructed at the refinery. The construction of the Aromatics Recovery Unit and the production of mixed xylenes are subject to separate permits, which have already been issued by Ecology and NWCAA. These permits were not challenged.

The shipment of mixed xylenes from the existing wharf is not a new form of activity at the wharf. The existing wharf was permitted by the U.S. Army Corps of Engineers in 1954 to support the refinery with barge loading and "pipeway" and has been in use to transfer production to and from the refinery since 1954. Although the wharf predates the adoption of the SMP in 1976, it is a "water and shoreline dependent" facility allowed in the shoreline under SMP 3.03

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I(2) (defining water and shoreline dependent industrial development); SMP 7.10 (water dependent piers and docks for industrial purposes are permitted in the shoreline); SMP 7.11 (shoreline and water dependent port facilities are allowed in the aquatic and urban areas of the shoreline); and SMP 7.18 (shoreline dependent petroleum pipelines are allowed in the aquatic and urban areas of the shoreline).[5] *See also* HE Report Conclusion 3. The Hearing Examiner correctly found that use of the existing wharf and wharf infrastructure to receive and ship product is consistent with the shoreline use categories in the SMP. *See id*. at Conclusion 4.

Moreover, shipment of mixed xylenes is not a "new activity." Tesoro has been receiving and shipping various octane grades of gasoline and reformate since the dock was built in the 1950s. As the Hearing Examiner correctly concluded, "[r]eformate and mixed xylenes are subsets of products, such as gasoline, that are already shipped by marine vessel to and from the refinery." HE Report, Finding 50. This finding was not challenged by Appellants, who acknowledge that mixed xylenes are contained in products shipped to and from the facility already. (Br. at 10). Mixed xylenes are a substance currently in reformate (and gasoline) that are separated (extracted) from reformate for use in the petrochemical industry (primarily to make polyester).[6] Tesoro is not installing any new transfer equipment or conducting new transfer activities at the existing wharf. The receipt and shipment of reformate and mixed xylenes is a not a new shoreline activity that requires a conditional use permit.

C. The Marine Vapor Emission Control system does not include a "pipeline."

Appellants argue that the Marine Vapor Emission Control system requires a conditional use permit because the 3-inch natural gas line is an "aerial pipeline." This is incorrect. The 3-inch natural gas line is not an "aerial pipeline" because it is not a pipeline at all.

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[5] The upland portion of the Anacortes Refinery is a water and shoreline related industry. SMP 3.03 at I.2.2.e.

[6] The Hearing Examiner further found that mixed xylenes present no different spill risk than existing products shipped to and from the refinery (Finding 51), and consequences of a spill, if one occurred, would not be worse than the consequence of a spill of products already shipped to and from the refinery (Finding 54). These findings are unchallenged.

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As described in the Hearing Examiner's Report, the 3-inch natural gas line supplies gas to the Dock Safety Unit gas line for the enrichment of vapors, as needed, to ensure safe vapor recovery. *See* HE Report, Finding 27; *see also* Staff Report at 6. Although the SMP does not define "pipeline," Washington law does. Under Washington pipeline safety laws and regulations, a natural gas line located wholly within a facility is not a "pipeline." *See, e.g.*, RCW 81.88.010 (defining natural gas pipeline to exclude lines "located exclusively on the consumer or consumers' property"); WAC 480-93-005(13) (same). This definition is consistent with technical publications that set different manufacturing standards and operational limits for "pipelines." Under these technical standards, a "pipeline" is a line of sufficiently large diameter to transfer large volumes at higher pressures over longer distances. *See* Standards of American Society of Mechanical Engineers, ASME B31.4 and ASME B31.8. The 3-inch natural gas line is much smaller and does not meet the technical standards that apply to "pipelines" as described by ASME. The 3-inch natural gas line will operate at a much lower flow rater and much lower pressure; it does not transport products to or from vessels—it does not connect to vessels at all—and it is contained wholly within Tesoro's facility.[7] The 3-inch natural gas line is not a "pipeline," and the Hearing Examiner's decision was correct.

VI. THE BOARD SHOULD REJECT APPELLANTS' EIS ADEQUACY CHALLENGE.

A. The Board does not need to consider EIS adequacy arguments.

Appellants devote most of their opening brief to a challenge the adequacy of the EIS. However, the adequacy of the EIS is not properly before the Board during this appeal. The

[7] Under the SMP, the 3-inch natural gas line is, at most, a "fuel" line. The SMP utility regulations draw a distinction between "fuel" lines and "pipelines." Section 7.18(1)(A)(2) requires that "utilities," "specifically power, communications, and **fuel lines and pipelines**" "utilize existing rights-of-way." Similarly, Section 7.18(2)(B)(1) also requires that "utilities," "specifically power, communications, **pipelines, and fuel lines**" "utilize existing rights-of-way." The SMP regulations consequently treat "pipelines" differently than "fuel" lines. Section 7.18(2)(A)(6) requires a conditional use permit for certain kinds of pipelines: submarine or buried petroleum pipelines, and aerial and surface cable and pipelines. There is not similar requirement for "fuel" lines, which do not require a conditional use permit.

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Skagit County Code expressly forbids an appeal of EIS adequacy to the Board. SCC 14.06.110(13) states that "no appeal to the Board" of EIS adequacy "is allowed." Moreover, Skagit County does not provide for an administrative appeal of EIS adequacy. *See* SCC 16.12.210 (establishing SEPA administrative appeal procedures); SCC 14.06.050. Under SEPA, in order to administratively appeal EIS adequacy, including this closed record appeal to the Board, the agency must have adopted an EIS appeal procedure. *See* RCW 43.21C.075(3) (predicating allowance of administrative appeal of EIS on whether "agency has a procedure for appeals of an agency environmental determination made" under SEPA); Richard L. Settle, The Washington State Environmental Policy Act § 19.01[1] (2017) ("SEPA does not require that agencies make any provision for administrative review of SEPA determination."). Because Skagit County is not required to allow an administrative appeal of EIS adequacy, has not done so, and, in fact, forbids an appeal to the Board, the Board does not need to consider or decide Appellants arguments directed at EIS adequacy.[8]

B. Appellants' EIS adequacy arguments are not directed at the Marine Vapor Emission Control system.

Should the Board determine it should consider Appellants' EIS adequacy arguments, it can affirm the Hearing Examiner's decision on the separate ground that none of their EIS adequacy arguments relate to impacts directly, indirectly, or cumulatively caused by the Marine Vapor Emission Control system. Instead, their arguments criticize the environmental analysis of other portions of the project that are not before the Board and that have already been considered and decided by other agencies. *See Glasser v. City of Seattle*, 139 Wn. App. 728, 736–37, 162 P.3d 1134, 1138 (2007) (observing that SEPA's review process allows agencies "to focus on issues that are ready for decision and exclude from consideration issues already decided or not

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[8] Skagit County's decision not to allow an appeal of EIS adequacy comports with the policy of SEPA to limit the number of appeals of environmental determinations. *See* Settle, *supra*, at § 19.01 ("In order to make the SEPA review process more efficient, the Legislature, . . . has amended SEPA several times, imposing increasingly strict limitations on administrative appeals of SEPA compliance.").

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yet ready").

Appellants challenge two areas of EIS adequacy that do not relate to the Marine Vapor Emission Control system: vessel traffic and greenhouse gas emissions. As described above, the Marine Vapor Emission Control system simply captures vapors that are displaced during vessel loading. It does not impact vessel traffic in any way or increase the risk of a vessel spill or accident. It does not dictate the vessel route of any vessel or cause noise that will impact the Southern Resident Killer Whale. The Marine Vapor Emission Control system has only a modest direct impact on greenhouse gas emissions that is clearly outlined in the EIS and not challenged by Appellants. Ecology has already concluded that Tesoro's use of natural gas in the Marine Vapor Emission Control system is the "best available control" for the modest greenhouse gas emissions caused by the Marine Vapor Emission Control system. The Hearing Examiner similarly found that "[t]he MVEC system is being installed with appropriate combustion technology to minimize GHG emissions." HE Report, Finding 57. Appellants' EIS adequacy arguments are misdirected.

C. EIS thoroughly and adequately describes impacts.

The substantial record that describes the environmental impacts of the Clean Products Upgrade Project more than satisfies SEPA requirements and provided more than enough information for the Hearing Examiner to make his decision. SEPA calls only for a level of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives. *See* Settle, *supra*, at 14(a)(i), at 158; WAC 197-11-402(2), 440(5)(b)(i), 440(5)(c)(iv), 440(6)(b)(i). An 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." *Klickitat Cty. Citizens*, 122 Wn. 2d at 641 (citing Settle). Accordingly, "[i]mpacts or alternatives which have insufficient causal relationship, likelihood, or reliability to influence decisionmakers are "remote" or "speculative" and may be excluded from an EIS. *Id.*

Skagit County identified no unavoidable significant adverse impacts and proposed no

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mitigation measures beyond the planned prevention and minimization measures that are part of the Project proposal. *See* DEIS, Table ES-2 (Summary of Impacts and Proposed Mitigation); FEIS at 3-1 ("[T]here are no changes to the conclusions presented in the Draft EIS, and no new significant impacts have been identified."). These conclusions were both correct and thoroughly and adequately supported by the analysis contained in the FEIS and DEIS.

1. Even though the EIS overstates the spill impacts, it nonetheless concluded that there were no significant impacts.

The Hearing Examiner correctly concluded that the Clean Products Upgrade Project does not increase the impacts of vessel traffic and that project-related vessel traffic would constitute, at best, a negligible addition to a long-term decline in vessel traffic. HE Report, Finding 43.[9] He also correctly concluded that the size of the vessel loads will not increase, that vessel spills are not more likely than spills of materials that are already coming to and going from the refinery, and that spills of either reformate or mixed xylenes would not be more damaging than a spill of material that is already coming to or going from the refinery. HE Report, Findings 48, 50, 51, 54. In other words, the project does not change or impact conditions that exist presently. This conclusion was correct and not clearly erroneous. Significantly, Appellants do not challenge any of these findings.

Project activities will not increase the capacity of the Tesoro Refinery to load vessels beyond current levels, and Project-related vessels will not increase the Tesoro Refinery's overall vessel traffic beyond its current capabilities. The Tesoro dock has been used for over sixty years to support the refinery, and fluctuations in both volumes and type of material occur over time based upon market requirements. Tesoro's operations are constrained within the physical limitations of the transfer lines already in service on the wharf, which in turn restricts Tesoro's

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[9] Appellants erroneously cite FEIS at 3-48 for the proposition that the proposed project contributes to significant increased risk of a major accident and spill. The FEIS says exactly the opposite: "The proposed project's increase in vessels does not represent a significant increase in spill risk above the spill risks currently present." FEIS 3-48.

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ability to increase vessel traffic. HE Report, Finding 45. The Project will be managed within the physical limitations of Tesoro's dock's current capacity, including use of the existing transfer lines to load and unload materials. While the types and proportion of products that the vessels carry may change, the volume of vessel traffic will not.

Appellants string together several claims about impacts that they claim the EIS does not address. They assert that the EIS should have considered vessel traffic throughout the Salish Sea that is not associated with this project, the impacts of spills on the Southern Resident Killer Whale and ferries, the spill risk at particular locations in the Salish Sea, or weather-induced delays that might occur in responding to a spill. As a threshold matter, the law does not require the EIS to address every conceivable impact of a project. Nonetheless, the lengthy EIS prepared by Skagit County more than thoroughly describes vessel traffic impacts of the project.

The EIS conducted a substantial analysis of the Clean Products Upgrade Project's impact on vessel traffic. It described the robust regulatory regime responsible for vessel safety, discussed potential accidental marine spills associated with the proposed project, both from vessels in transit and during a product transfer at the wharf, discussed behavior of xylenes and reformate in the marine environment, modeled various spill scenarios, summarized the potential impacts of spills on various resources, and described the likelihood of such an event happening and the spill response plans and resources in place that would act to prevent or minimize exposure of a spill.

With respect to spill locations, the EIS analyzed several different spill scenarios that were carefully selected to represent conditions that might occur throughout the Salish Sea, and were chosen from the Northwest Area Contingency Plan Spill Scenario Locations.[10] *See* App. 13-A to

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[10] The Northwest Area Contingency Plan is a collaboration between U.S. EPA, U.S. Coast Guard, Ecology, Oregon Department of Environmental Quality, and Idaho Bureau of Homeland Security, who form the Northwest Area Committee. This committee coordinates response actions with tribal and local governments and with the private sector.

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DEIS (Fate and Behavior Analysis in the Marine Environment: Reformate and Mixed Xylenes). These locations are theoretical points established to help spill responders prepare and prioritize strategies to protect various coastal and stream locations before a spill occurs. The modeled scenarios include the transfer facility at the refinery dock, an open-water spill scenario (West of Neah Bay), a spill scenario near an existing port facility (Northeast of Port Angeles), and a scenario representing an island community along the transit path (Rosario Strait).[11] Although Appellants complain that more or different points should have been selected, they do not describe how the modeled locations are inadequate to describe the impacts of a spill in a variety of situations or under a variety of conditions.

Appellants do not meet their heavy burden of demonstrating that the EIS is inadequate. Each of the purported deficiencies do not overcome the fundamental conclusion necessitated by the lengthy analysis in the EIS: because neither vessel traffic—quantities, traffic patterns, types of vessels—nor characteristics of products shipped change in any appreciable way from what is presently shipped to and from refinery, the risks associated with vessel traffic do not change in any way from present conditions. The EIS correctly concluded that there are no significant adverse impacts associated with vessel traffic, and Appellants have not demonstrated otherwise.

2. The Clean Products Upgrade Project will reduce GHG emissions.

The Clean Products Upgrade Project will change greenhouse gas emissions in two principle ways. First, when it is operating, it will result in certain greenhouse gas emissions increases from facility sources, primarily from the new upland steam boiler, as well as from electricity usage and transportation. Second, when it is operating, the Project will also result in a reduction of greenhouse gas emissions because Tesoro will take an existing feedstock (reformate) that is presently used to make gasoline and instead use it to make a different product

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[11] The Fate and Transfer Report, which is nearly 400 pages long, concluded that in the event of release to the marine environment, reformate and mixed xylenes would rapidly evaporate, leave no residual material, and would be unlikely to cause impact to shore.

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(mixed xylenes). As documented in the EIS, the greenhouse gas emissions associated with manufacturing mixed xylenes and converting them to polymers and plastics are less than the greenhouse gas emissions that are associated with combustion of gasoline.

Appellants inexplicably claim that making mixed xylenes instead of gasoline "has no environmental benefit at all." (Br. at 64). This simply wrong—a comparison of the greenhouse gas emissions associated with the production of mixed xylenes to production and combustion of gasoline leads to the expected conclusion: combustion of gasoline results in significantly higher greenhouse gas emissions than the manufacture of mixed xylenes. Appellants arrive at their erroneous conclusion through a misleading and incomplete citation to the EIS analysis. First, they claim that the production of plastics (from mixed xylenes) causes nearly 2.5 million tons of greenhouse gas emissions per year. Though they quote correctly a portion of the analysis in Table 3 at 3-14, they omit the conclusion and thereby inaccurately and misleadingly represent this nearly 2.5 million tons of greenhouse gas as an increase over existing conditions. It is not. A review of Table 3 shows that the nearly 2.5 million tons of greenhouse gas from making mixed xylenes must be compared to nearly 3 million tons of greenhouse gas emissions from making gasoline for combustion. Appellants fail to cite the EIS's conclusion: making plastics instead of gasoline for combustion results in **525,755 fewer tons per year of greenhouse gases**. Moreover, this reduction of 525,755 tons per year of greenhouse gas emissions understates the net benefit of making mixed xylenes; while it factors in the transportation impacts of mixed xylenes (to Asia), it does not factor in the transportation impacts of moving gasoline from the refinery to gas stations and fuel terminals. If Tesoro produced gasoline instead of mixed xylenes—which is the "no action" scenario—there will be at least 525,755 more tons per year of greenhouse gases.[12] Using an existing feedstock (reformate) to make mixed xylenes instead of

[12] By Appellants' math, that is the equivalent of the emissions of 101,634 passenger vehicles.

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gasoline is exactly the sort of project that the Clean Air Rule was designed to encourage.[13] Though Appellants assert that "other suppliers" will make up for any reduction in gasoline production, the simple truth is when operational, there will be a net reduction in the total Project greenhouse gas emissions.

VII. CONCLUSION

For the reasons described above and in the Skagit County Planning Department's response, which Tesoro hereby joins and incorporates, the decision of the Hearing Examiner to issue a shoreline substantial development permit should be affirmed by the Board.

DATED this 9th day of February, 2018.

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[13] The uncertain status of the Clean Air Rule does not alter in any way the emissions calculations associated with the Clean Products Upgrade Project. With or without the Clean Air Rule, it remains true that making mixed xylenes results in fewer greenhouse gases than combusting gasoline.

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I filed the foregoing with Skagit County Board of County Commissioners via e-mail and pursuant to agreement of the parties, served foregoing document by e-mail on:

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