ENVIRONMENTAL HEARINGS
Pollution Control Hearings Board
Shorelines Hearings Board

Telephone: (360) 664-9160
FAX: (360) 586-2253
Email: eluho@eluho.wa.gov
Website: www.eluho.wa.gov

STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE
Mailing Address: PO Box 40903, Olympia, WA 98504-0903 •
Physical Address: 1111 Israel Rd SW, Suite 301, Tumwater, WA 98501 •

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Sent by Email and US Mail

Oliver Stiefel
Christopher Winter
Crag Law Center
917 SW Oak St Ste 417
Portland OR 97205

Julie S. Nicoll
Skagit County Prosecuting Attorney
Civil Division
605 S. Third Street
Mount Vernon WA 98273

Diane Meyers
Madeline Engel
Northwest Resource Law PLLC
101 Yesler Way Ste 205
Seattle, WA 98104

Re: **SHB No. 18-011**
STAND.EARTH, RE SOURCES FOR SUSTAINABLE COMMUNITIES, EVERGREEN ISLANDS, FRIENDS OF THE SAN JUANS, FRIENDS OF THE EARTH, THE SIERRA CLUB, and PUGET SOUNDKEEPER ALLIANCE v. SKAGIT COUNTY and TESORO ANACORTES REFINING AND MARKETING COMPANY LLC

Dear Parties:

Enclosed please find the Order on Motions for Summary Judgment of the Shorelines Hearings Board.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. *See* WAC 461-08-570 and 575, and RCW 34.05.542(2) and (4).

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 461-08-565.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,

Carolina Sun-Widrow, Presiding
Administrative Appeal Judge

CSW/le/S18-011
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the parties of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED 9/28/18, at Tumwater, WA

Morgan Pilla

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STAND.EARTH, RE SOURCES FOR SUSTAINABLE COMMUNITIES, EVERGREEN ISLANDS, FRIENDS OF THE SAN JUANS, FRIENDS OF THE EARTH, THE SIERRA CLUB, and PUGET SOUNDKEEPER ALLIANCE, Petitioners, v. SKAGIT COUNTY, and TESORO ANACORTES REFINING AND MARKETING COMPANY, LLC, Respondents.	SHB No. 18-011 ORDER ON MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Stand.Earth, Re Sources for Sustainable Communities, Evergreen Islands, Friends of the San Juans, Friends of the Earth, The Sierra Club, and Puget Soundkeeper Alliance (Petitioners), filed a petition for review challenging a shoreline substantial development permit (SSDP) issued by the Skagit County hearing examiner to Tesoro Anacortes Refining and Marketing Company, LLC (Tesoro) to install a Marine Vapor Emission Control system at its wharf. Petitioners also challenge the Final Environmental Impact Statement prepared for the project by Skagit County. Petitioners filed a motion for partial summary judgment, and Respondents Tesoro and Skagit County jointly filed a cross motion for partial summary judgment.

Attorneys Christopher Winter and Oliver Stiefel represented the Petitioners.[1] Deputy Prosecuting Attorney Julie S. Nicoll represented Skagit County. Attorneys Diane M. Meyers and Madeline Engel represented Tesoro. The Shorelines Hearings Board (Board) considering the motions was comprised of Board Members David Baker, Robert Gelder, and Neil L. Wise. Administrative Appeals Judge Carolina Sun-Widrow presided for the Board.

The Board considered the following submittals in its decision on the motions:

Petitioners' Motion for Partial Summary Judgment:

1. Petitioners' Motion for Partial Summary Judgment and Memorandum in Support;
2. Declaration of Tom Glade;
3. Declaration of Stephanie Hillman;
4. Declaration of Marcelin E. Keever;
5. Declaration of Sanford Olson;
6. Declaration of Carl Ullman;
7. Declaration of Chris Wilke;
8. Declaration of Barry A. Wenger;
9. Declaration of Christopher Winter in Support of Petitioners' Motion for Partial Summary Judgment and Memorandum in Support, with Exhibits 1-31;

Respondents' Response and Cross Motion:

10. Respondents' Joint Opposition to Petitioners' Motion for Partial Summary Judgment and Joint Cross Motion for Partial Summary Judgment on Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11;

[1] Attorney Kyle A. Loring initially represented Petitioner Friends of the San Juans, but filed a notice of withdrawal and substitution of counsel on May 25, 2018.

11. Declaration of Greg Challenger in Opposition to Petitioners' Motion for Partial Summary Judgment;

12. Declaration of Mark H. Nielsen in Opposition to Petitioners' Motion for Partial Summary Judgment, with Exhibit 1;

13. Declaration of Peter Petrovsky in Opposition to Petitioners' Motion for Partial Summary Judgment, with Exhibit 2;

14. Declaration of Stephen F. Mader in Opposition to Petitioners' Motion for Partial Summary Judgment, with Exhibit 3;

15. Declaration of Mary Hess in Opposition to Petitioners' Motion for Partial Summary Judgment, with Exhibit 4;

16. Declaration of Betsy Stevenson in Opposition to Petitioners' Motion for Partial Summary Judgment, with Exhibits 5-6;

17. Declaration of Rebecca Spurling in Support of Tesoro Refining & Marketing Company, LLC's Summary Judgment Response and Motion, with Exhibits 7-15;

Petitioners' Reply and Response

18. Petitioners' Reply in Support of Motion for Partial Summary Judgment and Response to Cross Motion for Partial Summary Judgment;

19. Second Declaration of Christopher Winter in Support of Petitioners' Motion for Partial Summary Judgment, with Exhibits 32-40;

20. Declaration of Robert Pavia;

21. Declaration of Ranajit (Ron) Sahu, Ph.D, QEP, CEM;

22. Declaration of Val Veirs, with Exhibits A-G;

23. Third Declaration of Christopher Winter in Support of Petitioners' Motion for Partial Summary Judgment, with Exhibit 41;

Respondents' Combined Reply

24. Respondents' Combined Reply in Support of Their Motion for Summary Judgment;

25. Supplemental Declaration of Mary Hess;

26. Supplemental Declaration of Rebecca Spurling, with Exhibits 16-20;

27. Supplemental Declaration of Diane M. Meyers, with Exhibits 21-22; and

Petitioners' Surreply

28. Petitioners' Surreply to Respondents' Reply in Support of Their Motion for Partial Summary Judgment.

Based on the evidence and pleadings submitted, the Board enters the following decision.

BACKGROUND

Site and Project

In June 2015, Tesoro applied for a SSDP to construct a Marine Vapor Emission Control system (MVEC) on a wharf at its March Point refinery near Anacortes. Winter Decl., Ex. 23. The March Point peninsula, a shoreline of statewide significance, is bordered by Fidalgo Bay to the west and Padilla Bay to the east. Winter Decl., Ex. 15, pp. ES-3-4; Stevenson Decl., Ex. 5, p. 1. Fidalgo Bay is designated as an Aquatic Reserve, and portions of Padilla Bay are located in the Padilla Bay National Estuarine Research Reserve. Stevenson Decl., Ex. 5, pp. 4-5.

Tesoro's wharf was permitted in 1954 to load and unload the refinery's petroleum products. Spurling Decl., ¶ 4, Ex. 7, pp. 1-7. Over the years, the wharf has been expanded and improved to facilitate Tesoro's ongoing loading and unloading operations. Spurling Decl., ¶ 6, Ex. 8, pp. 1-19; Winter Decl., Ex. 27, pp. 1-11. A causeway connects the wharf to the onshore refinery. Winter Decl., Ex. 15, p. ES-11.

The MVEC is part of Tesoro's Clean Products Upgrade Project (CPUP), which seeks to produce cleaner, lower sulfur fuels and to produce and export 15,000 barrels per day (bpd) of mixed xylenes.[2] Spurling Decl., ¶ 15; Winter Decl., Ex. 17, p. 5. The MVEC has shoreline and upland components. The shoreline component will be comprised of the Dock Safety Unit and a three inch natural gas line installed on the wharf. The upland component will be comprised of a Vapor Combustion Unit. The new three inch gas line, which will be connected to an existing natural gas line within the upland refinery, will supply natural gas from the upland to the Dock Safety Unit. Petrovsky Decl., ¶¶ 4, 5, Ex. 2, pp. 1, 3; Spurling Decl., ¶ 7. The natural gas piped from the upland will be mixed with volatile organic compounds (VOCs) captured at the Dock Safety Unit on the wharf from vessel loading activities, and piped back upland through an existing 12" line to be burned at the Vapor Combustion Unit. The MVEC thus reduces harmful VOCs generated from current vessel loading of gasoline, crude oil, and gasoline blendstocks,[3] as well as from loading the proposed mixed xylenes. Spurling Decl., ¶ 8.

[2] Mixed xylenes are petroleum products extracted from petroleum feedstock called reformate, a high octane liquid. Spurling Decl., Ex. 14, p. 11. Reformate is derived from refining crude oils and is commonly used in blending gasoline to get various octane ratings. *Id.* Tesoro currently produces reformate from crude oil at the refinery and it also receives reformate from other refineries via ships. Winter Decl., Ex. 15, p. ES-3. All reformate produced at Tesoro's refinery is presently directed to gasoline blending; the Clean Products Upgrade Project will direct a portion of the reformate stream to producing mixed xylenes. Spurling Decl., ¶ 30. Mixed xylenes are used in manufacturing many products, including medical films and x-rays, spray paints, rubber and plastics. Winter Decl., Ex. 15, p. ES-3.

[3] Gasoline blendstocks consists of several gasoline range compounds such as reformate and aromatic chemicals benzene and toluene that are used for blending or compounding into finished motor gasoline. Spurling Decl., ¶ 5, Ex. 14, p. 25; Challenger Decl., ¶ 7.

Under the Skagit County Shoreline Management Master Program (SMP),[4] SCC 14.26.010, the upland site of the MVEC is designated Urban Shoreline Area, and the shoreline site is designated Aquatic Shoreline Area. Stevenson Decl., Ex. 5, p. 1.

Besides the MVEC, the other components of the CPUP include installation of an aromatics recovery unit to produce mixed xylenes, a steam boiler for additional energy needed to run new process units, and three storage tanks to store reformate and mixed xylenes. Winter Decl., Ex. 17, pp. 3, 5.

SSDP/SEPA Procedure

Skagit County published the Notice of Development Application for the CPUP in July 2015. Some of the Petitioners submitted comments on the application. Stevenson Decl., Ex. 5, p. 4. Skagit County, as lead agency under the State Environmental Policy Act (SEPA), ch. 43.21C RCW, determined that the CPUP has the potential for significant adverse environmental impacts and issued a Determination of Significance in March 2016, requiring an environmental impact statement (EIS) for the project. Winter Decl., Ex. 15, pp. 8-9. Skagit County issued a draft EIS on March 23, 2017, and received over 7,000 comments, including those from the Petitioners. On July 10, 2017, Skagit County issued a Final EIS (FEIS) and Response to Comments.[5]

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[4] Skagit County and the hearing examiner reviewed Tesoro's SSDP application under the 1976 SMP, which is still in effect and awaiting completion of the SMP update process. *See Shoreline Master Program Update*, https://www.skagitcounty.net/Departments/PlanningAndPermit/shorelinesmain.htm (last visited Sept. 19, 2018). The SMP is in chapter 14.26 of the Skagit County Code.

[5] The draft EIS evaluated the CPUP's impacts on the following: geologic resources; air quality, greenhouse gases, and climate change; freshwater resources; terrestrial vegetation and wildlife; marine and nearshore resources; energy and natural resources; environmental health, land and shoreline use; social and economic environment; cultural resources; and marine transportation. The draft EIS also evaluated potential cumulative impacts from marine vessel transportation and the risks associated with spills. The FEIS evaluated additional information on some of the resources listed above and also identified mitigation measures to address the project's potential environmental

The CPUP required many other permits besides the SSDP. Among them are a Prevention of Significant Deterioration Permit (PSD) and Notice of Construction Approval Permit that regulate new sources or modification to existing sources of air pollution under the Clean Air Act. Winter Decl., Ex. 10, p. 8. On July 18, 2017, the Department of Ecology (Ecology) issued the PSD, and the Northwest Clean Air Agency issued an Order of Approval to Construct. Among other things, these permits limited the amount of greenhouse gas and other air pollutant emissions from the MVEC specifically and the CPUP as a whole. Spurling Decl., Exs. 9-10.

On November 2, 2017, Skagit County Planning and Development Services issued a staff report recommending approval of the SSDP with conditions. Winter Decl., Ex. 7, p. 45-46. The Skagit County hearing examiner held a public hearing on the SSDP application on November 2, 2017. Winter Decl., Ex. 6, p. 1. Petitioners submitted written comments to Skagit County on the SSDP Application. Second Winter Decl., Ex. 34. On December 7, 2017, the hearing examiner issued a decision approving Tesoro's request for an SSDP with conditions. Winter Decl., Ex. 6. All of the Petitioners except Puget Soundkeeper Alliance sought a closed record appeal of the hearing examiner's decision with the Board of Skagit County Commissioners. Winter Decl., Ex. 2. On March 9, 2018, the Board of Skagit County Commissioners denied the appeal and affirmed the hearing examiner's decision. *Id.*

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impacts. *See* Winter Decl., Exs. 10-11; FEIS, July 10, 2017, cover letter; App. A Index-Organizations, pp. 1-4, App. A 2-24, available at https://tesoroanacorteseis.blob.core.windows.net/media/Default/Library/2017_07_10_Tesoro_Anacortes_CPUP_Final_EIS.pdf (last visited on Sept. 19, 2018).

Petitioners filed a petition for review of the SSDP and FEIS with the Board on April 4, 2018. Petitioners are nonprofit, environmental organizations whose missions include protecting and restoring the Salish Sea. To establish standing to bring this appeal, Petitioners submitted the declarations of its members and/or employees. The declarants state that they live near the project, depend on ferry transportation, or recreate on the shorelines and marine waters near the project. Their recreation includes birdwatching, viewing the endangered southern resident killer whale, sailing, kayaking, and beachcombing. The southern resident killer whale population is declining due to prey scarcity, disturbance from vessel traffic that interferes with their feeding and communication, and toxic contaminants in the water. The declarants state that their recreation and other interests could be threatened by project impacts such as increased vessel traffic and risk of spills, explosion, and other accidents from building and operating the MVEC. They also state that a favorable decision from the Board invalidating the SSDP and FEIS, and requiring a conditional use permit for the project will address the threatened injury to their interests by requiring more rigorous environmental review and disclosure of the project's impacts. *See* Glade Decl., Hillman Decl., Keever Decl., Olson Decl., Ullman Decl., Wilke Decl., and Wenger Decl; Winter Decl., Ex. 1, pp. 1-2.

The parties submitted the following legal issues governing the case:

1. Pursuant to the Shoreline Management Act, RCW 90.58, implementing regulations, and the Skagit County Shoreline Master Program ("SMP"), is Tesoro Anacortes Refining and Marketing Company, LLC ("Tesoro") required to apply for and obtain a Shoreline Conditional Use Permit for activities occurring in a Shoreline of Statewide Significan[ce] as part of its Clean Products Upgrade Project ("CPUP"), including installation on its industrial wharf of new marine vapor emissions control ("MVEC")

equipment and a new 3" natural gas line that would facilitate the production and transfer to marine vessels of 230 million gallons per year of mixed xylenes, if:

a. The CPUP involves "new forms of activity" at Tesoro's wharf, built in 1954, which must "adhere to the policies, regulations, and permit procedures of the" SMP pursuant to Section 2.04.2;
b. Tesoro's wharf is a "fixed bulk liquid or petroleum facility * * * permitted as a conditional use" pursuant to Section 7.10.2.A(6)(b) of the SMP; and/or
c. The new 3-inch natural gas line installed on the wharf would be an "aerial * * * pipeline crossing[] * * * permitted as a conditional use * * *" pursuant to Section 7.18.2.A(6)(c) of the SMP?

2. Did Skagit County erroneously conclude that direct emissions from production of mixed xylenes of approximately 360,000 metric tons per year of greenhouse gases would have no significant adverse impact on the environment, as defined by the State Environmental Policy Act, by relying on hypothetical future offsets to be obtained under the Clean Air Rule?

3. Did Skagit County erroneously conclude that indirect emissions of greenhouse gases would have no significant impact on the environment if:

a. the Final Environmental Impact Statement ("FEIS") fails to disclose, analyze, or consider upstream greenhouse gas emissions resulting from the extraction of crude oil, the production of 270 million gallons per year of reformate from that crude oil, transportation of reformate to Tesoro's Anacortes refinery, and extraction and transportation of 12 million standard cubic feet of natural gas per year, which would be used to generate power for the production of mixed xylenes; and
b. the FEIS disclosed for the first time potentially significant downstream greenhouse emissions, but the public was given no opportunity to review or comment on these emissions in the DEIS and the Final EIS discounts those emissions based on offsets?

4. Did Skagit County erroneously conclude that the direct, indirect, and cumulative impacts to critically endangered Southern Resident Killer Whales from underwater noise generated by project vessels, including tankers bound for Asia and Articulated Tug Barges, would not be significant and therefore did not require mitigation?

5. Did Skagit County fail to adequately evaluate in the FEIS the direct, indirect, and cumulative impacts of vessel traffic, accidents, and spill risks on Salish Sea communities and economies, Southern Resident Killer Whales, and ecologically critical marine and shoreline areas, if:

a. the FEIS does not disclose the routes through the Salish Sea for vessels transporting hundreds of millions of gallons of reformate to the Tesoro refinery from other ports or terminals in the greater Salish Sea and gasoline blendstock from the Tesoro refinery back to these same facilities;
b. the FEIS does not consider adequately the increased risks of accidents and spills in the context of high-risk navigational locations like the Guemes Channel and Rosario Strait;
c. the FEIS does not consider adequately the potential impacts of accidents or spills to Skagit County's Guemes Island ferry or Washington State Ferries;
d. the FEIS does not disclose, analyze, or consider a true worst-case spill scenario;
e. the FEIS does not account for ongoing transports of crude oil from Tesoro's Anacortes refinery in assessing the cumulative risk of accidents and/or spills in the Salish Sea;
f. the FEIS does not disclose, analyze, or consider project-related vessel use of anchorage area, including the risk of venting toxic air pollutants and/or a spill during anchoring; and/or
g. the FEIS does not adequately consider the benefit of reasonable mitigating actions?

6. Do Petitioners have standing under the State Environmental Policy Act, RCW 43.21C.075(4)?

7. Do Petitioners have standing under the Skagit County Shoreline Management Master Program?

8. Are Petitioners barred from contesting adequacy of the Environmental Impact Statement based on the common law, statutory, and regulatory doctrines of administrative finality and waiver?

9. Did Skagit County Planning and Development Services correctly conclude that the Marine Vapor Emission Control system portion of the Clean Products Upgrade Project required a Shoreline Substantial Development Permit?
   a. Is a 3-inch natural gas line a "pipeline" under the Skagit County Shoreline Management Master program?
   b. Is the loading and shipment of mixed xylenes a "new activity" for a refinery built in 1854, as that term is used in the Skagit County Shoreline Management Master Program?

10. Did the Skagit County Hearing Examiner correctly approve a Shoreline Substantial Development Permit for the Marine Vapor Emission Control system portion of the Clean Products Upgrade Project?

11. Did the Final Environmental Impact Statement adequately analyze the potential direct, indirect, and cumulative impacts of vessel traffic and greenhouse gas emissions attributed to the Marine Vapor Emission Control system portion of the Clean Products Upgrade Project?

The parties' pending motions seek summary judgment dismissal of all issues except Issues 5b, 5c, 5f, and 5g.

ANALYSIS

1. Summary Judgment

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare assertions concerning alleged

genuine material issues do not constitute facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When determining whether an issue of material fact exists, all facts and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The Board will enter summary judgment for a nonmoving party under appropriate circumstances. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 470 (1992).

2. Board Jurisdiction

The Board has jurisdiction to review a local government's approval or denial of a SSDP under RCW 90.58.180. The scope and standard of review for this appeal are de novo. WAC 461-08-500(1). Petitioners have the burden of proving that approval of the SSDP is inconsistent with the requirements of the Shoreline Management Act (SMA), ch. 90.58 RCW, and/or the local SMP. RCW 90.58.140(7). The applicable SMP here is the 1976 SMP, which was in effect at the time Skagit County reviewed Tesoro's SSDP application.

3. Standing (Issues 6, 7)

Both parties move for summary judgment on Issues 6 and 7, which asks whether Petitioners have standing to bring this petition under SEPA and the SMP.

The SMA allows "any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state" to seek review from the Board. RCW 90.58.180(1). Similarly, any person aggrieved by a SEPA determination may seek Board review. RCW 43.21C.075(4). The term "person aggrieved" has been interpreted to include anyone with standing to sue under existing law. *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997).

Organizations have standing to sue on behalf of its members by showing that at least one member would otherwise have standing to sue, the purpose of the organization is germane to the issue, and neither the claim nor the relief requires the participation of individual members. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 894, 337 P.3d 1076, 1079 (2014); *Friends of the San Juans v. San Juan County*, SHB No. 13-001, p. 5 (Order Granting Summ. J. to Appellants on Standing and Denying Summ. J. to Resp't on the Merits, May 15, 2013). Petitioners, as the parties asserting standing, bear the burden of proof. *The Puyallup Tribe of Indians v. Dep't of Ecology*, PCHB No. 16-120c, p. 15 (Order on Motions, Jan. 16, 2018).

Petitioners have demonstrated organizational standing in this case. As discussed below, at least one member of each of the Petitioners would have standing to sue. The interests sought to be protected (fish and wildlife near the refinery, nearshore and offshore recreation) are germane to Petitioners' organizational mission to protect the Salish Sea and its marine ecosystems. Finally, the requested relief of invalidating the SSDP and FEIS, and other just and equitable relief, do not require participation of Petitioners' individual members.

The Board applies a three-part test to determine whether a party has demonstrated standing: 1) the party must suffer an injury in fact that is concrete and particularized; 2) the injury falls within the zone of interests protected by the statute at issue;[6] and 3) the Board must have within its legal power the authority to impose a remedy that will redress the injury. *The Puyallup Tribe of Indians v. City of Tacoma*, SHB No. 16-002, p. COL 3 (July 18, 2016);

[6] Respondents do not dispute that the zone of interests element has been met here. Joint Response at 19, n. 6.

Engdahl v. City of Burien, SHB No. 10-007, p. 7 (Order on Summ. J., July 16, 2010); *see also*, *Lands Council v. Wash. State Parks Recreation Comm'n,* 176 Wn. App. 787, 309 P.3d 734 (2013) (party wishing to challenge actions under SEPA must meet two-part test: (1) the alleged endangered interest must fall within the zone of interests SEPA protects, and (2) party must allege an injury in fact). The "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be among the injured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). No standing is conferred to a party alleging a conjectural or hypothetical injury. *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994).

Respondents challenge Petitioners' standing mainly on the basis that they have not established the injury in fact element. Specifically, they allege that Petitioners' claimed injuries are not sufficiently concrete, immediate, and specific, and are not caused by the challenged SSDP.

The Board concludes that Petitioners have demonstrated that at least one of their members would have standing to challenge the SSDP in their own right. The seven uncontested declarations submitted by Petitioners' members set forth the following: they live, visit, or recreate in Fidalgo Bay, Padilla Bay, and the shorelines near the project; among the impacts of the CPUP and the MVEC component are increased vessel traffic and attendant heightened risk of spill or vessel collision, increased risk of explosion accident from the proposed natural gas line on the wharf; these impacts could harm the declarants' shoreline recreation and ferry transportation interests; and a decision from the Board vacating the SSDP and FEIS, or requiring

a conditional use permit, could result in preventing the installation and operation of the MVEC, more rigorous review and disclosure of the project's impacts, or more mitigating conditions imposed.

Contrary to Respondents' contention, the claimed injuries to the declarants' recreational use and enjoyment of the waters and shorelines near the project are sufficiently concrete and particularized to satisfy the injury in fact element. *See, e.g., Coal. to Protect Puget Sound Habitat v. Thurston County*, SHB No. 13-006c, pp. 8-9 (Order Denying Motions to Dismiss and Mot. for Summary Judgment, Aug. 6, 2013) (reasonably anticipated injuries to the ongoing and future recreation use of the Petitioners' members from proposed geoduck farms on tidelands are sufficient to confer standing for purposes of challenging SSDPs authorizing farms); *Brown v. Snohomish County*, SHB No. 06-035, p. 10 (Order Granting Summ. J., May 11, 2007) (in challenge to SSDP authorizing construction of kayak dock, nearby landowner's allegations of increased traffic, noise, dust, environmental damage, and pollution were sufficient to establish standing); *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 874, 351 P.3d 875, as amended (June 17, 2015), *review denied sub nom. City of Burlington v. Singh*, 184 Wn.2d 1014 (2015) (party challenging liquor permit relocation not required to prove history of criminal activity at proposed new location to establish standing; sufficient that party shows "potential threat to public safety and its interest in public safety").[7] Petitioners have also satisfied the redressability element because the Board would have authority to redress

[7] The Board's liberal interpretation of standing of parties bringing legitimate environmental interests under the SMA is consistent with the Legislature's directive in RCW 90.58.900 that the SMA be liberally construed to give full effect to the objectives and purpose for which it was enacted. *Coal. to Protect Puget Sound Habitat*, SHB No. 13-006c, p. 9.

Petitioners' claimed injuries by including more conditions in the SSDP or reversing the SSDP. *Brown*, SHB No. 06-035, p. 11.

Respondents also argue that Petitioners lack standing because there is no causal connection between the claimed injuries and the challenged SSDP. Specifically, they contend that the MVEC does not increase vessel traffic or the risk of vessel spill or accident, dictate vessel route, or impact the southern resident killer whale. However, Petitioners have alleged a causal connection between their injuries and the proposed three inch gas line that makes up the MVEC. *See, e.g.*, Wenger Decl., ¶ 11 (based on decades of professional experience with Washington shorelines permitting and personal experience near March Point refinery, there is high possibility of catastrophic accident in shoreline area where new natural gas line will be built on same wharf used to load and unload hazardous, highly ignitable materials); Wilke Decl., ¶ 13; Hillman Decl., ¶ 11. As stated above, concerns about accidents from placement of the gas line on the shorelines of statewide significance are sufficiently concrete and specific for standing purposes. Thus, at least with respect to claimed injury from a gas line related accident, Petitioners have shown a causal connection between injury and the challenged SSDP and FEIS sufficient to confer standing.

The Board concludes that Petitioners have met their burden of demonstrating standing to pursue this appeal on behalf of their members under SEPA and SMA. The Board denies summary judgment to Respondents on Issues 6 and 7, grants summary judgment on those issues in favor of Petitioners, and dismisses Issues 6 and 7.

4. Shoreline Conditional Use Permit (Issues 1, 1a, 1b, 1c, 9, 9a, 9b, and 10)

The SMP designated the shorelines of statewide significance affected by the project as Urban (above the ordinary high water mark), and Aquatic (below the ordinary high water mark). The SMP regulates categories of uses within those designations through specific policies and regulations. The use categories at issue are Ports and Industry, Piers and Docks, and Utilities. Petitioners argue that the regulations for those use categories require a shoreline conditional use permit (SCUP) for the MVEC. Their argument rests on two basis: 1) the MVEC involves a new form of activity at Tesoro's existing wharf, and the wharf is a "fixed bulk liquid or petroleum facility," and 2) the proposed three inch natural gas line component of the MVEC is an "aerial pipeline crossing."

Respondents disagree, contending that Petitioners' claim for requiring an SCUP misunderstands the nature of the MVEC and improperly interprets and applies the SMP. Respondents view the MVEC as not involving any new activity that requires an SCUP. The parties agree that this issue can be decided as a matter of law because it turns on the interpretation and application of the SMA and SMP to undisputed facts.

A. Proposed Activity on Wharf

Tesoro's wharf was built in 1954, and predates the passage of the SMA and SMP. When Skagit County adopted its SMP in 1976, it generally exempted development or activity in operation prior to June 1971 from complying with the SMP. SMP § 2.04.2. However, if existing development "significantly expand or initiate new forms of activity, such expansion or activity shall adhere to the policies, regulations, and permit procedures of" the SMP. *Id.* The SMP

regulation at issue for Ports and Industry uses in the aquatic shoreline area requires compliance "with the policies and regulations for "Piers and Docks," Section 7.10. SMP 7.11.2.A(6)(b). The regulation for piers and docks uses in the aquatic shoreline area states that:

> Monobuoys, sea islands, and other floating or fixed bulk liquid or petroleum transfer facilities are permitted as a conditional use.

SMP 7.10.2.A(6)(b); Winter Decl., Ex. 31, p. 8. Skagit County's staff report concluded that the MVEC was consistent with and complied with the policies and regulations above.

The parties disagree as to the applicability of the "new forms of activity" exception to the existing development exemption. Petitioners claim that because Tesoro is engaging in a new form of activity at its existing wharf, which Petitioners characterize as a "fixed bulk liquid or petroleum facility," Tesoro was required to apply for and obtain an SCUP under the plain language of the SMP provisions above. In Petitioners' view, the loading and export of mixed xylenes is the new activity, and the MVEC system is part of this "new form of activity" at the existing wharf. Petitioners' Mot. at 17-18.

The Board disagrees with Petitioners' interpretation that the MVEC is a new form of activity under the plain language of SMP 2.04.2. Interpretation of a municipal ordinance is a question of law. *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). Municipal ordinances are construed according to rules of statutory interpretation. *Id.* at 743. The fundamental objective in statutory interpretation is to ascertain and give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The reviewing tribunal derives legislative intent from the plain

language enacted by the legislative body, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Id.* at 10-11. Full effect must be given to the language of a municipal ordinance, with no part rendered meaningless or superfluous. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007).

While the Board is not required to accord a legal interpretation by the local government any particular deference under its de novo standard of review, the Board gives substantial weight to a local government's interpretation of its own master program and related shoreline policies. *Buechel v. Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *Foreman v. City of Bellevue*, SHB No. 14-023, COL 3 (2015). The concept of substantial weight means only that a local government's interpretation of its own master program and related policies is relevant and important for the Board to consider in any appeal. *Foreman*, SHB No. 14-023, COL 3.

Considering the nature and scope of the proposed transfer activities on the wharf, the Board concludes that they do not constitute "new forms of activity" under SMP 2.04.2. That section states in part that "if any existing developments normally exempt *significantly expand or initiate new forms of activity*, such expansion or activity shall adhere to" the SMP's procedures and regulations. SMP 2.04.2 (emphasis added). "[N]ew forms of activity" is not defined, so the Board looks to its plain meaning in the context of SMP §2.04.2 and related code provisions, giving effect to all terms.

The parties agree that the proposed new activities and infrastructure at issue are those that will take place and be constructed on the wharf in the aquatic zone of shorelines of statewide

significance. Petr's' Reply at 13. The parties also characterize the activity at issue as the loading and unloading of petroleum materials and controlling VOC emissions from the loading activities. Petr's Mot. and Mem. For Partial Summ. J. at 17-18 (receiving and piping reformate at wharf, piping mixed xylene across shoreline to wharf for loading into vessels, collecting vapor emissions during loading process by way of piping natural gas and enriched vapors); Joint Resp. to Pet'rs Mot. and Mem. for Partial Summ. J. at 25-26. The wharf has been used since its construction to transfer crude oil and petroleum materials via a rack of pipes (pipeway) that extends from the upland across the causeway to the wharf. The transferred petroleum materials have included gasoline, gasoline blendstocks such as reformate and alkylate, diesel and jet fuel, and crude oil. Spurling Decl., ¶¶ 4-5; Stevenson Decl., ¶ 8. The nature of the shoreline activity remains the same. *See*, Petrovsky Decl., ¶ 4, Ex. 2, pp. 3, 6-9; Stevenson Decl., ¶ 9, Ex. 5, p. 8. Although the Dock Safety Unit and gas line will be added to the wharf and pipeway, such expansion is not significant as neither the wharf nor causeway footprint will be increased. *Id.*[8] Construction of those units is properly viewed as a transfer process improvement or refinement by reducing harmful VOCs from vessel loading, including existing vessel loading operations unrelated to the CPUP project and mixed xylene export. Spurling Decl., ¶ 8.

Interpreting the loading and minimal construction activities on the wharf as not constituting a new form of activity under SMP 2.04.2 also comports with Skagit County's interpretation. Stevenson Decl., ¶¶ 8-9. The Board gives substantial weight to the county's

[8] In contrast to the unsubstantial additions to the wharf and causeway here, a proposal in 1990 to add 12 pilings and decking to extend the same wharf and increase the footprint for marine loading and unloading of petroleum products and crude oil required a conditional use permit. Winter Decl., Ex. 27, pp. 3-14, 17.

interpretation in the absence of inconsistency with past permitting practice. *See* Spurling Decl., ¶ 6, Ex. 8; *Foreman*, SHB No. 14-023, COL 3; *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007).

As stated, in order to trigger the requirement for an SCUP under SMP §§ 7.10.2.A(6)(b), SMP 7.11.2.A(6)(b), and 2.04.2, Petitioners must demonstrate that the project's shoreline activities are a "new form of activity" on a "fixed bulk liquid or petroleum facility." Given the conclusion that the proposed activities are not new activities on the wharf, the Board need not consider Petitioners' related argument that the wharf is a "fixed bulk liquid or petroleum facility" under SMP 7.10.2.A(6)(b).

B. Pipeline Crossing

Petitioners argue that another basis for requiring an SCUP here is that the three inch natural gas line component of the MVEC is a "pipeline" under the SMP's use regulations for utilities located in the aquatic shoreline designation. *See* SMP 7.18.2.A(6)(c). That regulation states in relevant part that:

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

SMP 7.18.2.A(6)(c). "Pipeline" is not defined in the SMP. However, the SMP's regulations for utilities shoreline uses distinguishes between many types of utility lines in general. *See, e.g.*, SMP 7.18.2.A.(2) ("[a]erial power transmission cable and pipeline crossings"); SMP 7.18.2.A.6(a) ("submarine or buried water and sewer pipelines, petroleum pipelines, and sewage system outfalls"); SMP 7.18.1.A.(2) ("fuel lines and pipelines"). These other types of utility

lines are also undefined under the SMP. The hearing examiner did not decide whether the three inch gas line was a "pipeline" under SMP 7.18.2.A(6)(c), and concluded that the SMP's broad categories regulating Ports and Industry, Piers and Docks, and Utilities, did not require an SCUP for the MVEC.[9] Winter Decl., Ex. 6, p. 10. The staff report prepared by Skagit County also concluded that the MVEC is consistent with the SMP's policies and regulations for Utilities. Stevenson Decl., Ex. 5, p. 26.

To support their interpretation that the three inch line is a "pipeline" under SMP 7.18.2.A(6)(c), Petitioners mainly rely on a general dictionary definition of the term as "a line of pipe with pumps, valves, and control devices for conveying liquids, gases, or finely divided solids."[10] In contrast, Respondents rely on a technical definition, engineering standards, purpose, size, and state pipeline safety laws to argue that the gas line is process piping instead of a "pipeline."

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[9] Contrary to Petitioners' assertion in their reply, the hearing examiner did not find that the three inch gas line is a form of petroleum pipeline, or a pipeline under SMP 7.18.2.A(6)(c). Instead, the hearing examiner's finding resolved the issue of whether the gas line was a submarine or buried water and sewer pipeline, petroleum pipeline, and sewage outfall system under SMP 7.18.2.A(6)(a) for which an SCUP was required. The findings state in its entirety that:

> 36. *Assuming* that the 3-inch natural gas line involved with the M[]VEC 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.

Winter Decl., Ex. 6, p.6.

[10] Webster's Third New International Dictionary 1722 (2002). Petitioners also argue that Tesoro's own oil spill response plan identifies the other pipes in the same wharf's piperack as "pipelines." However, the plan also refers to "refinery piping," and states that "the only *piping* that runs over water is that along the causeway and on the wharf," and that "there are ten oil *lines* going to the wharf." Second Winter Decl., Ex. 30, p. 7 (emphasis added). Thus, how the oil spill response plan denominates other pipes and lines is not helpful in determining whether the three inch gas line is a "pipeline" under SMP 7.18.A(6)(c).

The purpose of the proposed three inch gas line is to supply natural gas to the Dock Safety Unit on the wharf from an existing gas supply line in the upland refinery in order to enrich and safely remove the VOCs captured from vessel loading. Spurling Decl., ¶¶ 10-11; Petrovsky Decl., ¶ 5. The natural gas will be purchased from Cascade Natural Gas. *Id.*, ¶ 11. The enriched vapors will then be routed upland to the Vapor Combustion Unit through an existing line, and not the three inch gas line. The gas line will not transport reformate from the wharf, or transport mixed xylenes to the wharf. *Id.*, ¶¶ 13-14. The gas line will be installed among other existing pipes in the causeway's and wharf's piperack, and run approximately 3,800 feet along the causeway and 500 feet on the wharf. Petrovsky Decl., ¶ 4, Ex. 2, pp. 7-9; Winter Decl., Ex. 17, p. 27.

Respondents provided the declaration of Peter Petrovsky, a mechanical and civil engineer with field work experience in pipeline industries. Petrovsky Decl, ¶ 1. Mr. Petrovsky looked to the engineering standards and definitions of "pipelines" and "process piping," and reviewed the purpose, design, and specifications of the MVEC system to opine that the three inch gas line is not a "pipeline," but part of refinery process piping. *Id.*, ¶¶ 3-15. Mr. Petrovsky specifically looked to the American Society of Mechanical Engineers (ASME) Standards for pipelines that describe a line of sufficiently large diameter to transfer large volumes of product at higher pressures over longer distances. *Id.*, ¶ 11. He concluded that the three inch natural gas line does not meet the ASME standards for pipelines due to its smaller size, lower flow rate and pressure, location wholly within Tesoro's facility, and the fact that its purpose is not to transport products to or from vessels. *Id.*, ¶¶ 11-13.

The Board disagrees with Petitioners' interpretation of "pipeline" as applying to the three inch gas line at issue. Given that the SMP's use regulations on utilities distinguish between many kinds of utility lines, the Board concludes that Respondents' interpretation of "pipeline," supported by more than a general dictionary definition, is more persuasive.[11] Considering the gas line's length, function, and purpose, as well as technical standards and definitions for "pipeline" and "process piping," the Board concludes that the gas line is not a "pipeline" under SMP 7.18.2.A(6)(c) that requires an SCUP. It is more appropriately characterized as process piping or a process line routing gases within a processing facility to aid in disposing harmful vapors.

The Board denies summary judgment to Petitioners on Issues 1, 1a, 1b, 1c, grants summary judgment to Respondents on Issues 1, 1a, 1b, 1c, 9, 9a, 9b, and 10, and dismisses those issues.

5. SEPA FEIS (Issues 2, 3, 4, 5, 8, 11)

The remainder of the parties' summary judgment motions involve the adequacy of the FEIS under SEPA. Petitioners argue in Issues 2, 3, 3a, and 3b that the analysis in the FEIS of the project's direct and indirect greenhouse gas emissions was clearly erroneous and contrary to SEPA. They also contend in issues 5a and 5d that the FEIS's analysis of the direct, indirect, and cumulative impacts of vessel routes and spill risks associated with the production and transport of mixed xylenes was clearly erroneous.

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[11] The Board notes that other general dictionary definitions of "pipeline" support Respondents' interpretation that "pipeline" refers to pipes used to transport oil or gas over longer distances. *See, e.g.*, Petrovsky Decl., ¶ 8; https://en.oxforddictionaries.com/definition/pipeline,(last visited Sept. 19, 2018) (defining "pipeline" as "long pipe, typically underground, for conveying oil, gas, etc. over long distances).

Respondents move for summary judgment on Issue 8 (among other issues), which asks whether Petitioners are barred from contesting adequacy of the EIS based on the common law, statutory, and regulatory doctrines of administrative finality and waiver. Respondents contend that Petitioners are barred from challenging the adequacy of the FEIS's greenhouse gas emissions analysis because they failed to appeal the underlying governmental action – the PSD permit issued for the project by Ecology[12] -- as required by SEPA. In issuing the PSD permit, Ecology relied on the FEIS to evaluate the direct, indirect, and cumulative greenhouse gas impacts of the project. Ecology concluded that Tesoro complied with SEPA. Spurling Decl., Ex. 11, p. 25.

In general, SEPA "sets forth a state policy of protection, restoration, and enhancement of the environment." *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 63, 578 P.2d 1309 (1978); RCW 43.21C.010. An EIS ensures that SEPA policies are an integral part of the ongoing programs and actions of state and local government such that the EIS is actually used by, and informs the decision of those government agencies. WAC 197-11-400. "The primary function of an EIS is to identify adverse impacts to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal." *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990).

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[12] Ecology administers the PSD permit program as part of the federally approved State Implementation Plan under the Clean Air Act. *See* Approval and Promulgation of Implementation Plans; Washington: Prevention of Significant Deterioration and Visibility Protection, 80 Fed. Reg. 23,721 (Apr. 29, 2015). The objective of the PSD permit program is to prevent significant adverse environmental impact from emissions into the atmosphere by a proposed new major source or major modification to an existing major source. The program limits degradation of air quality to that which is not considered "significant." Spurling Decl., Ex. 11, p. 7.

Parties may appeal both procedural and substantive decisions made under SEPA, including a procedural appeal challenging the adequacy of an EIS such as here.[13] WAC 197-11-680(3)(a); -680(4)(a). The general rule in both administrative and judicial appeals of SEPA issues is that they must be linked with the appeal of the government action subject to SEPA. RCW 43.21C.075(2)-(3), (6);[14] *State v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993). The purposes of this linkage requirement are to: preclude judicial review of SEPA compliance before an agency has taken final action on a proposal, foreclose multiple lawsuits challenging a single agency action, and deny the existence of "orphan" SEPA claims unrelated to any government action. *Grays Harbor County*, 122 Wn.2d at 251 (citing R. Settle, The Washington State Environmental Policy Act § 20.01, at 20-3 – 20-4 (2017)).

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[13] Substantive challenges include appeals of an agency's use or failure to use SEPA substantive authority to condition or deny a proposal. RCW 43.21C.060.

[14] RCW 43.21C.075 states in part:

> (1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. [SEPA] provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. [SEPA] is not intended to create a cause of action unrelated to a specific governmental action.
> (2) Unless otherwise provided by this section:
> (a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.
> (b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.
> (3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:
> (a) Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement);
> (b) Shall consolidate an appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) with a hearing or appeal on the underlying governmental action . . ..
> (6)....
> (c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

Respondents argue that the "government action" here is Ecology's issuance of the PSD permit. The PSD permit, along with the Northwest Clean Air Agency's Order of Approval to Construct, were both issued on July 18, 2017, eight days after the FEIS was issued. Both permits are substantive agency actions on Tesoro's project. Spurling Decl., Ex. 9, p. 1; Ex. 10, p. 1. Given the SEPA requirements of linking appeals of the underlying government action with its accompanying environmental determination (EIS), and commencing such appeals within the time required to appeal the governmental action, Respondents further argue that any challenge to the greenhouse gas emissions analysis in the FEIS had to be filed within the PSD permit's appeal period, or by August 17, 2017.[15] Since Petitioners never appealed the PSD Permit or the Order of Approval to Construct, Respondents claim that Petitioners' challenge to the greenhouse gas emissions analysis in the FEIS is either barred or untimely. Respondents view this post-PSD permit challenge to the FEIS as a collateral attack on Ecology's substantive decision to issue the PSD permit that must be prohibited.

Petitioners disagree, arguing that they are not challenging the PSD permit, but the FEIS prepared by Skagit County which concluded that the project's emissions of greenhouse gases are not significant. Respondents point out that the Legislature granted the Shorelines Hearings Board exclusive jurisdictive over this combined appeal of the SSDP and FEIS. *See* RCW 43.21C.075.

[15] The PSD permit was issued on July 18, 2017, and stated that the permit or any conditions within it may be appealed to the Pollution Control Hearings Board as provided in ch. 43.21B. RCW and ch. 317-08 WA. *See* Spurling Decl., Ex. 9, p. 13. Appeals of the PSD Permit must be filed within 30 days of receipt of the permit. RCW 43.21B.110(1)(d); RCW 43.21B.230; WAC 371-08-335.

There is no dispute that the Board has jurisdiction over appeals of both the SSDP and the FEIS issued for the project. However, the inquiry under Issue 8 is whether the FEIS adequacy appeal is barred under SEPA. The Board concludes that Petitioners are barred from contesting the adequacy of the entire FEIS, not just the adequacy of the FEIS's greenhouse gas emissions analysis. Granting or denying a PSD permit is a governmental action under RCW 43.21.C.075(1)-(2). *See* WAC 197-11-704(2) ("project actions" defined to include agency decision to license an activity conducted by applicant); WAC 197-11-700(2)(d); ("permit" means "license"); WAC 197-11-760 ("license" means written permission to engage in activity and includes agency permit to facilitate a proposal). Ecology, as the agency authorized to issue or deny PSD permits under the Clean Air Act, relied on the FEIS's discussion of air impacts and concluded that Tesoro had demonstrated compliance with SEPA requirements. Spurling Decl., Ex. 11, pp. 23, 25. Ecology was required to use the FEIS in its PSD permit decision, unless it determined that substantial change to the project or new information warranted further inquiry. *See* WAC 197-11-600(3) (any agency acting on same proposal "shall use" an environmental document unchanged except in certain circumstances). Ecology did not so determine. Under the linkage requirement in RCW 43.21C.075(1)-(2), Petitioners' appeal of the FEIS's adequacy had to be linked with an appeal of the earlier issued PSD permit and commenced within the PSD permit's appeal period. Petitioners never appealed the PSD permit, or the Order of Approval to Construct. Thus, Petitioners' appeal of the FEIS's adequacy under SEPA together with the SSDP appeal several months after issuance of the PSD permit is untimely.

Concluding that SEPA appeals challenging EIS adequacy must be linked with an appeal of the first government action on the underlying proposal furthers the purposes of the SEPA linkage requirement to avoid multiple and fragmented agency review of SEPA determinations. *Cf. Leider v. Point Ruston LLC*; SHB No. 09-005, pp. 6-10 (Order Granting Summ. J. Dismissing SEPA Issues (Legal Issues 3,4,5, and 6) (jurisdictions allowed to use environmental documents already prepared on a proposal, and are required to do so under SEPA's coordinated review processes in WAC 197-11-600(3)(b)). It is also consistent with long-standing interpretations of SEPA that encourage consideration of environmental factors as early as possible so decision makers will have all relevant information before them. *Spokane Rock Products, Inc. v. Spokane County Air Pollution Control Auth.*, PCHB No. 05-127, pp. 8-9 (Order Granting Mot. for Summ. J. and Denying Pet. for Recons., Feb. 13, 2006) (citing *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993). Requiring Petitioners to link their SEPA claims together with an appeal of the first government action on the project promotes finality and certainty of the SEPA process and efficient use of EIS, while still affording project opponents reasonable time and venue to bring SEPA claims.

Although Petitioners assert that they are seeking review by this Board of the FEIS prepared by Skagit County, and not the PSD permit issued by Ecology, Petitioners could have accomplished their desired result by appealing the PSD permit to the Pollution Control Hearings Board and combined it with their SEPA appeal challenging FEIS adequacy.[16] It could have also

[16] This forecloses Petitioners' claim that it is unclear whether they could have sought review of the FEIS at an earlier time since they had appealed the FEIS together with the appeal of the decision on the SSDP to the Board of County

resolved earlier Petitioners' challenges to various aspects of the FEIS and the process by which it was developed, and likely avoided at least two of the many permits required for the project being issued in reliance on an allegedly inadequate FEIS. Petitioners do not claim that they were prevented from appealing the PSD permit. Petitioners were on notice from the FEIS that local and state agencies may use the FEIS to inform permit decisions for the project, and that permits to construct and operate the project may be issued seven days following FEIS issuance. The FEIS thus clearly informed parties of the project's anticipated permits, which specifically referenced the PSD permit and the Notice of Construction Approval Permit. Moreover, the PSD permit itself stated the procedure for appealing the permit.

In sum, the Board concludes that Petitioners are barred from contesting the adequacy of the FEIS due to their failure to raise this challenge at the PSD Permit stage. The Board grants summary judgment to Respondents on Issue 8, and dismisses that issue along with remaining Issues 2, 3, 3a, 3b, 4, 5, 5a-5g, and 11, which all involve the adequacy of the FEIS.

Commissioners, and had to wait until that local administrative review was exhausted before initiating judicial review of any SEPA issues. RCW 43.21C.075(4); WAC 197-11-680(3)(c).

ORDER

In accordance with the analysis above, the Board GRANTS summary judgment to Petitioners Stand.Earth, Re Sources for Sustainable Communities, Evergreen Islands, Friends of the San Juans, Friends of the Earth, The Sierra Club, and Puget Soundkeeper Alliance on Issues 6 and 7. The Board GRANTS summary judgment to Respondents Skagit County and Tesoro Anacortes Refining and Marketing Company, LLC, on Issues 1, 1a, 1b, 1c, 8, 9, 9a, 9b, 10 and dismisses those issues along with Issues 2, 3, 3a, 3b, 4, 5, 5a – 5g, and 11. There being no remaining issues in this case, SHB No. 18-011 is hereby DISMISSED.

SO ORDERED this 28th day of September, 2018.

SHORELINES HEARINGS BOARD

DAVID BAKER, Member

ROBERT GELDER, Member

NEIL L. WISE, Member

CAROLINA SUN-WIDROW, Presiding
Administrative Appeals Judge