



# Notice of Appeal

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Case Number  
PL# 15 - 0071

## Part 1 Appeal Information

Appeals are processed pursuant to Skagit County Code 14.06.

Type of Appeal (check only one)  
 Appeal of an Administrative Interpretation/Decision/Action to the Hearing Examiner (SCC 14.06.110)  
 Appeal of Hearing Examiner Decision/Action to the Board of County Commissioners (SCC 14.06.120)  
 Request for Reconsideration of a Hearing Examiner Decision (SCC 14.06.180)  
 Appeal of Shoreline Master Program Interpretation/Decision/Permit (SCC 14.26)  
 Appeal of Impact Fees: Type \_\_\_\_\_ District/City \_\_\_\_\_ (SCC 14.30)

File # of Appealed Decision or Permit PL13-0468, PL14-0396 Appeal Fee \$ 500 PDS will calculate  
Date of Appealed Decision or Permit Feb. 23, 2015 Publication Fee \$ 120 PDS will calculate

133502

DECISION # 72

PDS staff: do not accept appeal form without full payment of all fees.

## Part 2 Appellant Information

Name Equilon Enterprises, LLC dba Shell Oil Products USA  
Address P.O. Box 622  
City, State Anacortes, WA Zip 98221 Phone 360-293-1761  
E-mail tom.rizzo@shell.com  
Signature [Signature] PDS staff: do not process appeal without appellant's signature.

## Part 3 Attorney or Representative Information

Name Craig Trueblood  
Address K&L Gates LLP, 925 Fourth Ave., Suite 2900  
City, State Seattle, WA Zip 98104 Phone 206-623-7580  
E-mail craig.trueblood@klgates.com

## Part 4 Attachments

- Please attach a copy of the decision you are appealing.
- Please attach a concise statement with numbered responses to the following questions.
  1. What is your interest in this decision?
  2. How are you aggrieved by the decision you are appealing?
  3. What are the specific reasons you believe the decision is wrong?  
e.g. erroneous procedures, error in law, error in judgment, discovery of new evidence
  4. Describe any new evidence.
  5. List relevant sections of Skagit County Code.
  6. Describe your desired outcome or changes to the decision.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS  
IN AND FOR SKAGIT COUNTY, WASHINGTON**

In the Matter of the Appeal of the Application of Equilon Enterprises, LLC (Shell) For a Shoreline Substantial Development Permit and a Shoreline Variance Permit and the SEPA Appeal Related Thereto

**NOS: PL13-0468  
PL14-0396**

**REQUEST FOR CONFIRMATION  
AND, IN THE ALTERNATIVE,  
NOTICE OF APPEAL BY  
EQUILON ENTERPRISES LLC,  
Applicant/Appellant**

**I. INTRODUCTION**

This Request for Confirmation and, in the Alternative, Notice of Appeal (“Request and Notice”), is submitted on behalf of Equilon Enterprises, LLC d/b/a Shell Oil Products U.S.A. (“Shell”). This Request and Notice is submitted pursuant to Skagit County Code 14.06.050(1) and the Skagit County Shoreline Management Master Program Section 13.01. Shell seeks confirmation from the Board of County Commissioners (“Board”) that the Findings of Fact, Conclusions of Law, and Order (“Order”) issued by the Skagit County Hearing Examiner in the above matters is not subject to further administrative appeal at this time pursuant to Skagit County Code. In the alternative, Shell requests that the Board reverse the Order as clearly erroneous and not in accordance with law. A copy of the Order is attached hereto as Exhibit A.

Shell is the applicant in the above matters. Shell requested a Shoreline Substantial Development Permit and Variance (“Permit and Variance”) to allow construction of facilities necessary to receive crude by rail via unit trains at Shell’s existing refinery in Anacortes. The County’s Responsible Official issued a Mitigated Determination of Non-significance (“MDNS”) pursuant to the State Environmental Policy Act (“SEPA”) with respect to Shell’s application. The MDNS was appealed by multiple parties to the Hearing Examiner.

The Hearing Examiner issued the Order on February 23, 2015, following an open record appeal of the MDNS on January 28 and 30, 2015, and following a pre-decisional hearing on the Permit and Variance on January 29, 2015. The Order at p. 15 states:

*The matter is remanded to Skagit County (PDS) for the preparation of an Environmental Impact Statement. The shoreline permit applications are held in abeyance until the EIS is prepared and the County has reviewed the applications in light of the EIS. At that time a Staff Report shall be prepared and a recommendation shall be made reflecting the additional information the impact statement provides. The hearing on the merits is continued until then, at which time it will be resumed. [emphasis added]*

## II. BASIS FOR REQUEST FOR CONFIRMATION

Shell requests confirmation from the Board that the Order is not subject to further administrative review by the Board. On its face, the Order states that the matter is remanded, Shell's applications are held in abeyance, and a hearing on the merits of Shell's applications for the Permit and Variance is continued. Shell interprets the governing regulatory scheme to mean that the Order is not appealable to the Board and is ripe for judicial review.

SEPA and its implementing regulations provide that the County may only provide for one level of administrative review of an MDNS.<sup>1</sup> Consistent with SEPA and its implementing regulations, Skagit County Code ("SCC") provides for only one level of administrative review of an MDNS.<sup>2</sup> That administrative review was conducted by the Hearing Examiner.

The provisions of Chapter 13.01 of the Skagit County Shoreline Management Program provide for an appeal to the Board of Hearing Examiner decisions within five days if the Hearing Examiner grants, denies, rescinds or revises a shoreline permit.<sup>3</sup> The Hearing Examiner did none

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<sup>1</sup> RCW 43.21C.075(3) ("If an agency has a procedure for appeals of agency environmental determinations made under [SEPA], 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)"); WAC 197-11-680(3)(a)(iv) ("An agency shall provide for only one administrative appeal of a threshold determination or of the adequacy of an EIS; successive administrative appeals on these issues within the same agency are not allowed.").

<sup>2</sup> SCC 14.12.210(1) ("A final environmental threshold determination for a project proposal is administratively appealable as a Level I decision ... provided, that the decision of the Hearing Examiner shall be a final decision and no further administrative appeals shall be available.")

<sup>3</sup> SCC 14.26.010, Ch. 31.01 ("Any person aggrieved by the granting, denying, rescinding or revisions of a shoreline permit by the Skagit County Hearing Examiner may ... submit an appeal

of those things but instead remanded the matter to County staff to prepare an EIS. Shell believes administrative review has been exhausted as required by SEPA and Skagit County Code, but seeks confirmation to that effect from the Board.

### III. BASIS FOR APPEAL (IN THE ALTERNATIVE)

In an abundance of caution, however, if the Board determines that the Order is subject to further administrative review, Shell offers the following bases for finding that the Hearing Examiner's decision that an EIS is required pursuant to RCW 43.21C.031 is clearly erroneous and not in accordance with law.

1. The Hearing Examiner's Order intrudes upon the Surface Transportation Board's exclusive jurisdiction over interstate railroad operations and facilities pursuant to 49 U.S.C. § 10501(b).
2. The Hearing Examiner improperly placed the burden on proof upon Shell and County staff in the MDNS appeal rather than the appellants below. Hearing Examiner Rules Section 2.09 (Skagit County Resolution # R20080511).
3. The Hearing Examiner failed to give substantial weight to the County Responsible Official's SEPA determination. RCW 43.21C.075(3)(d).
4. The Hearing Examiner improperly relied upon facts not in the record.
5. The Hearing Examiner improperly required analysis of impacts that are "statistically remote."
6. The Hearing Examiner improperly admitted evidence into the record that is irrelevant to Shell's proposal and without proper foundation.
7. The Hearing Examiner made findings contrary to the undisputed evidence.
8. The Hearing Examiner made findings unsupported by the evidence as a whole.
9. The Hearing Examiner erroneously required analysis of alleged impacts across a broad geographic region without articulating any rational basis for the scope of analysis required.

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to the Board of Commissioners ... PROVIDED, all ... appeals must be submitted in writing within five (5) days of the date of the Examiner's written decision ....").

#### IV. RELIEF REQUESTED

1. Shell requests that the Board of County Commissioners confirm that the Order is not subject to further administrative appeal pursuant to Skagit County Code.
2. In the event the Board determines that the Order is subject to further administrative appeal pursuant to Skagit County Code, Shell requests an opportunity to brief the merits of the Order in full on the existing record and to present oral argument why (a) the Order should be reversed as clearly erroneous and not in accordance with law, (b) the MDNS should be affirmed, and (c) the hearing on the merits of the Permit and Variance should proceed to a final decision forthwith.

Respectfully submitted,



Dated: February 27, 2015

Craig Trueblood, WSBA # 18357

Ankur Tohan, WSBA # 36752

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Attorneys for Equilon Enterprises, LLC

Applicant/Appellant

## CERTIFICATE OF SERVICE

I, Ethan Morss, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

I am a legal assistant in the office of K&L Gates LLP;

On February 27, 2015, I caused true and correct copies of "Request for Confirmation and, in the Alternative, Notice of Appeal" to be addressed and deposited for delivery as follows:

Board of County Commissioners  
Skagit County  
1800 Continental Place, Suite 100  
Mount Vernon, WA 98273  
[commissioners@co.skagit.wa.us](mailto:commissioners@co.skagit.wa.us)

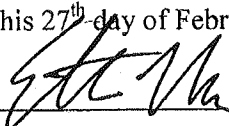
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Attorneys to Appellants before Hearing Examiner

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

EXECUTED at Seattle, Washington on this 27<sup>th</sup> day of February, 2015.



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Declarant

**EXHIBIT A**



**BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

In the Matter of the Application of )  
Equilon Enterprises, LLC (Shell) )  
For a Shoreline Substantial )  
Development Permit and a Shoreline )  
Variance Permit and the SEPA )  
Appeal Related Thereto )

**NOS: PL13-0468  
PL 14-0396**

**RE SOURCES FOR SUSTAINABLE )  
COMMUNITIES, FRIENDS OF THE )  
SAN JUANS, FORESTETHICS, )  
WASHINGTON ENVIRONMENTAL )  
COUNCIL, FRIENDS OF THE EARTH, )  
EVERGREEN ISLANDS. )**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER**

Appellants, )

v. )

**EQUILON ENTERPRISES LLC (SHELL), )  
SKAGIT COUNTY. )**

Respondents. )

**SUMMARY**

**Applicant:** Equilon Enterprises, LLC  
Shell Puget Sound Refinery  
c/o Tom Rizzo, Brian Rhodes  
P. O. Box 622  
Anacortes, WA 98221

**Consultant:** AECOM Technology Corporation (formerly URS)  
1501 Fourth Avenue, Suite 1400  
Seattle, WA 98101

**Request/File No:** Shoreline Substantial Development/Variance Permit, PL13-0468  
SEPA Appeal, PL 14-0396

**Proposal:** To build a rail spur from the existing BNSF line onto Shell property to accommodate unit trains of 102 tank cars containing crude oil. The project would involve pumping oil from the rail cars into the existing Shell refinery and the installation of necessary equipment for that purpose.

**Location:** Shell Puget Sound Refinery located at 8505 South Texas Road, in western Skagit County on March Point, along the southwestern edge of Padilla Bay.

**SEPA Compliance/Appeal:** A Mitigated Determination of Non-Significance (MDNS) was issued on August 14, 2014. The MDNS was timely appealed by a number of environmental organizations on September 11, 2014.

**Preliminary Procedure:** A Prehearing Conference was held on October 10, 2014, and a tentative schedule of proceedings was established. This schedule was subsequently modified to provide the parties the opportunity to discuss settlement. Settlement discussions failed and a revised schedule was issued. A Prehearing Motion to limit the Scope of Review was filed by Shell, briefed by the parties and then argued on January 12, 2015. The Motion was denied. The matter came on for hearing at the Skagit County Commissioners Hearing Room in Mount Vernon, Washington, on January 28, 2015.

**Hearing:** The hearing was divided into two sessions on the appeal and a session for the reception of public testimony. The Appellants presented their appeal and the County presented its response on January 28, 2015. Public testimony was heard on January 29, 2015. Shell presented its response to the appeal on January 30, 2015. Skagit County Planning and Development Services (PDS) recommended denial of the appeal, and approval of the shoreline permit requests.

At the appeal hearing, Kristen Boyles and Jan Hasselman, Attorneys for Earthjustice, represented the Appellants. Jill Dvorkin, Deputy Prosecuting Attorney, represented Skagit County. Craig Trueblood and Ankur Tohan, Attorneys with K&L Gates, represented Shell.

In the appeals, testimony was heard from 11 witnesses and 126 exhibits were admitted. In the public hearing portion, 67 members of the public testified.

**Decision:** The appeal is granted. The matter is remanded to PDS for the preparation of an environmental impact statement.

**Reconsideration:** A Request for Reconsideration may be filed with PDS within 5 days of this decision.

**Online Text:** The entire decision can be viewed at:  
[www.skagitcounty.net/hearing\\_examiner](http://www.skagitcounty.net/hearing_examiner)

## FINDINGS OF FACT

### The Project

1. March Point is a relatively small peninsula on Fidalgo Island, near the city of Anacortes. It is bordered on the west by Fidalgo Bay and on the east by Padilla Bay. To the north are the Guemes Channel and waters of the northern Puget Sound. The peninsula is shared by two oil refineries: Shell Puget Sound Refinery and Tesoro Anacortes Refinery. These refineries are accessed by sea from large piers extending from the northwest shore of the peninsula. Access to the peninsula by land is from the south.

2. For many years, the refineries have received crude oil from Alaska brought by tanker ships and transferred to the refineries from the ships at the piers. Currently, however, the supply of crude from Alaska is falling off. Shell is seeking to bring in new sources of supply to keep its refinery operating at capacity. No increased production at the refinery is proposed.

3. In this proceeding Shell Puget Sound Refinery seeks a Substantial Development Permit and a Variance under the Shoreline Management Act to build a rail spur on its property on March Point. The spur will extend from the existing Burlington North Santa Fe (BNSF) rail line onto Shell's property. The project will involve the installation of equipment to pump oil from rail cars into the refinery.

4. The purpose of the spur is to accommodate unit trains carrying crude oil to the site. Unit trains contain approximately 102 oil tank cars, each train with four locomotives. The proposed rail spur is intended to receive six unit trains per week, for a total of approximately 612 incoming fully loaded oil cars and 612 outgoing empty tank cars weekly.

5. The neighboring Tesoro refinery has been receiving unit trains since 2012. Tesoro receives an average of three such trains (with approximately 100 cars per train) per week. The Shell unit train facility will add more rail traffic to the immediate area.

6. The BNSF line from which Shell's spur extends is called the Anacortes Subdivision which is itself a spur from the north-south mainline of the railroad. The Anacortes Subdivision is the westernmost surviving segment of a line built in 1890, connecting Anacortes and Rockport. It extends westward about 15 miles from the City of Burlington.

7. The track parallels State Route 2, and runs over a swinging draw bridge at the southern end of Padilla Bay before reaching the March Point peninsula. The bridge crosses the ingress/egress from the Swinomish Channel which connects Padilla Bay with Skagit Bay. The Anacortes Subdivision formerly terminated farther west in the city of Anacortes. Today, the rail line ends on the western side of the peninsula south of Tesoro Anacortes, the other refinery on March Point. The present rail line is actively used by Shell, Tesoro and other industries en route. Presently Shell receives an average of three trains per week with an average of 15 cars each trip.

8. The proposed new spur on Shell's property will take off from the Anacortes Subdivision near the east side of the peninsula, crossing wetlands and pasture land now used for grazing livestock before reaching the refinery proper. The tracks will extend northwesterly. The project includes 8,000 feet of unloading tracks with a concrete unloading pad, about 1,300 feet of track for temporary storage of rail cars that are taken out of service for repair and maintenance, and about 7,200 feet of train-staging track. The largest structure will be a new overhead platform about 20 feet high that runs the length of the unloading area. Some modifications to the BNSF rail configuration off-site will be required.

9. The project includes a personnel operations building, limited parking, a perimeter inspection road, pumps and below-and above- ground pipelines to connect the project to existing storage tanks.

10. The Shell refinery is currently crossed by the Olympia Pipeline, the Kinder-Morgan Pipeline and Puget Sound Electric Power lines. The Kinder-Morgan pipeline brings oil into the refinery. The Olympic pipeline carries product away from the refinery. The subject project will involve the relocation of segments of these pipelines as well as the power lines. The project will add a new electrical power station.

11. Pollution control facilities will include installation of a new oil/water separator, a containment structure for a single-car spill, and stormwater ponds. Two ponds are proposed to provide permanent stormwater control. The drainage design will provide detention capacity for a spill of up to 23 cars. Drainage from the site ultimately will go to Padilla Bay.

12. Site preparation activities will involve clearing and grading, and extension of existing utilities including electricity, sanitary sewer and potable water. Approximately 1,100,000 cubic yards of excavation is anticipated. Surplus excavated materials will be hauled by truck to an approved location within the county. This site has not, to date, been identified. About 30,000 cubic yards of fill will be required. All of the fill will come from on-site.

13. The project area is approximately 50 acres bordered on the north by North Texas Road and on the south by South March Point Road. Developed areas of the refinery are to the northwest. Forest and pasture are to the southwest. The east side consists of pasture and forest bordered by East March Point Road. Just across East March Point Road are the waters of Padilla Bay.

14. The project will result in 21.41 acres of direct permanent wetland impacts, 3.88 acres of indirect permanent wetland impacts, 0.41 acre of permanent wetland conversion, and up to 6.98 acres of temporary wetland impacts.

15. One stream (Stream S) occurs along the southern portion of the project area. Approximately 175 linear feet of channel will be rerouted and 50 linear feet will be placed in a culvert. Portions of ten ditches will be rerouted or placed in culverts.

#### **Review of This Application/MDNS Issuance**

16. Notice of Development of Shell's shoreline permit application was published on January 9 and January 16, 2014, and posted and mailed as required by law. Over 150 comments were received during the initial comment period. Planning and Development Service requested and received additional information from the applicant and, then, issued an MDNS on April 24, 2014. During the MDNS comment period more than 400 comments were received. Additional information was again requested from the applicant. The applicant's response was received on July 17, 2014. Following review of this material, a Modified MDNS was issued on August 14, 2014. During the ensuing comment period another 135 comments were received. The Modified MDNS imposed the following conditions:

1. The applicant shall receive and comply with all permits and approvals from Northwest Clean Air Agency requirements.
2. The applicant shall receive and comply with the Eagle Non-purposeful Take Permit and Eagle Nest Take Permit from U. S Fish and Wildlife prior to disturbance on any eagle nest tree.

3. The applicant shall receive and comply with all permits and approvals from the Washington State Department of Fish and Wildlife including but not necessarily limited to the Hydraulic Project Approval.
4. The applicant shall receive and comply with all permits and approvals from the Washington State Department of Ecology, including but not limited to the 401 Water Quality Certification and Coastal Zone Management Consistency.
5. The applicant shall receive and comply with all permits and approvals from the U.S. Army Corps of Engineers including but not necessarily limited to the Section 404 Individual Permit.
6. The applicant shall comply with applicable provisions and regulations of the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration.
7. The applicant shall comply with all applicable provisions of Skagit County Code (SCC) 14.24, the Critical Areas Ordinance.
8. The applicant shall comply with all applicable provisions of SCC 14.32, the Drainage Ordinance.
9. The applicant shall comply with the International Building Code.
10. The applicant shall comply with the International Fire Code.
11. The applicant shall work in good faith with BNSF and other local oil refiners to develop a mutual aid agreement associated with responding to crude railcar incidents off-site of the refinery property.
12. The applicant shall comply with United States Department of Transportation safety advisory 2014-01.
13. The applicant must fully transition out of using "legacy" DOT 111 cars in its fleet for transporting crude as soon as practicable. All new rail cars added to the applicant's fleet will be "good faith CPC 1232" type cars unless the federal standards change.
14. The applicant must not knowingly accept at its facility any rail cars that do not meet all United States Department of Transportation regulations.
15. The applicant shall ensure that all lighting installed for this proposal will be International Dark Sky Association Dark Sky compliant.
16. The applicant shall comply with the Washington State Department of Fish and Wildlife noise buffer guidelines and distances for great blue heron colonies.
17. The project will not involve any change in refining capacity, nor involve an increase in the amount of crude transported over marine waters.
18. The applicant shall make a request of BNSF that trains arrive and depart during non-peak traffic hours.
19. The avoidance and minimization measures list on pages 20 and 21 of the July 17, 2014 response from Shell must be completed as proposed.

17. On pages 20 and 21 of its letter dated July 17, 2014, Shell advised that it would take the following measures to reduce the "project's cumulative effects at March Point and along the Anacortes Subdivision." Having thus confined the scope of its cumulative effects review, Shell listed the following mitigation measures (here numbered, rather than bulleted):

1. The project will comply with local, state, and federal regulations, which contribute to a significant slowing of wetland loss by requiring avoidance, minimization and mitigation for regulated and permitted activities.
2. The project was re-designed to:
  - a. avoid the fish-accessible mid to lower reaches of Stream S and all of its wooded riparian area, which parallels the existing BNSF tracks;
  - b. avoid the tidal salt march portion of Wetland 11;

- c. avoid all permanent impacts west of the existing Shell railroad spur, including a large Category II forested wetland (Wetland S) and its buffer;
  - d. avoid all direct impacts to Padilla bay or its adjacent wetlands by avoiding rail impacts east of the East March Point Road intersection;
  - e. optimize both railroad track spacing and use an overhead platform to reduce the overall width of the unloading area;
  - f. locate the northern stormwater pond away from the eagle nest #2;
  - g. move planned access roads to serve unloading track operations to coincide with existing access roads wherever possible; and
  - h. use retaining walls rather than sloped sides for the bridge on 4th Street that would span the tracks to minimize permanent wetland impacts.
3. During construction, the boundaries of the project site would be clearly marked ahead of time and maintained throughout construction. These "no work" areas would be off limits to construction personnel during non-work activities (breaks, walking, etc.) Construction workers would receive "Environmental Awareness Training," emphasizing the avoidance of adjacent natural areas (no-work areas). This would minimize potential disturbance from pedestrian encroachment in natural areas.
4. A spill prevention and control plan would be prepared that would avoid the potential for wetlands to be affected if a spill occurs during operation.
5. An erosion and sediment control plan would be prepared for the project and would include measures to minimize or eliminate water quality impacts.
6. One bald eagle nest tree would be removed for construction of the project. Shell has received a permit from U.S. Fish and Wildlife Service (USFWS) to remove the nest and would mitigate for this impact through the design and development of two new bald eagle nesting platforms.
7. Construction activities would largely be confined to daylight hours to avoid the use of artificial lighting during the nighttime, which would pose a potential impact to wildlife.
8. Lights would be shield and directed downward. The photometric analysis shows that light from the nearest fixture from the March Point great blue heron colony would dissipate to zero approximately 50 feet from the source. Therefore, no additional light would result from the project for more than 1,950 feet from the northwest corner of the March Point heronry.

18. In addition to the conditions of the MDNS, including the undertakings required under Condition 19, Shell has limited the project (and promised to abide by such limits) in several ways: a) Shell has not asked for the shoreline permits to include the shipment of crude oil by boat and has agreed not make any such shipments; b) Shell has limited its application to bringing in crude sufficient to maintain the present production capacity of the refinery and not enlarging production; c) Shell has agreed not to let DOT 111 tank cars be used for delivery of crude to the refinery, and has stated: "Shell will only use/and or accept from 3rd parties tank cars that meet the CPC 1232 or subsequent specifications as provided by applicable law."

#### **Context -- Bakken Crude and the Oil Train Phenomenon**

19. Within the past few years, the extensive use of oil trains has emerged as the main method for moving crude oil extracted from the Bakken shale formation in North Dakota and Montana to refineries.

20. The amount of oil transported by train has skyrocketed. In 2008, 9,500 tank cars of crude were transported by rail. In 2013, that number was 400,000 car loads, an increase of over 4000%. The amount of oil shipped by rail is likely to continue to grow.

21. This sudden and dramatic growth of the oil train phenomenon is being experienced in the Pacific Northwest. The first such train travelled up Puget Sound on September 4, 2012. Overnight this kind of traffic has grown with startling rapidity, spurred by the construction of new facilities to refine or trans-ship the oil. Presently eleven crude-by-rail projects in the Oregon/Washington region are in operation or planned. If all are built, the amount of oil moved to these facilities would significantly exceed that of the proposed Keystone Pipeline.

22. Bakken crude is expected, at least initially, to be the primary source of oil used at the Shell refinery on March Point to offset the dwindling supply from Alaska

23. The rail transport supplying crude-by-rail projects involves the use of unit trains, each with around 100 cars and four locomotives, extending over a mile in length. The path from midcontinent to northwest Washington traverses around 1,000 miles. Currently that path enters Washington State near Spokane, proceeds southwest diagonally to the Vancouver (Washington) area and then goes north to the Puget Sound.

24. Bakken crude, thus transported, has unique hazardous characteristics, including relatively high volatility and flammability. It also presents a potential for groundwater intrusion due to solubility.

25. Another (now much smaller) inland source of crude transported by rail to the Northwest Washington refineries is oil derived from Canadian tar sands. This is shipped as diluted bitumen and presents a separate set of risks. Heavier portions of diluted bitumen may sink if spilled into water, presenting extraordinary clean-up problems.

26. The primary model of tank car for shipping crude oil by rail has been the DOT-111. This car, put into service decades ago, is widely understood to be unsafe for such transport. The shell of the DOE-111 is relatively easy to puncture and the valves on the top and bottom of the car may shear off or rip open, increasing the risks of fire or explosion in derailments or collisions.

27. DOT-111's are being replaced by a new design called the CPC 1232 which is supposed to be safer. In an effort to increase safety, Shell has adopted a policy that it will accept only tank cars that meet 1232 standards at its refineries. Though an improvement, even the CPC 1232 is susceptible to puncture at relatively low speeds. The Examiner takes notice that a recent nationally reported derailment of unit trains and its resulting fires involved CPC 1232 cars.

#### **Context -- Other Projects Nearby**

28. Adjacent to the subject Shell refinery, the Tesoro refinery is also receiving crude by rail. The Tesoro capacity is 50,000 barrels per day.

29. At this time two refineries in Ferndale, a short distance north of Anacortes are receiving or have been cleared to receive crude by rail off the BNSF line. These are the British Petroleum Refinery (BP) and the Phillips 66 Refinery. BP has a handling capacity of 70,000 barrels per day. Phillips' capacity is 35,000 barrels per day.

30. Each of these facilities was considered separately for approval. For none was an Environmental Impact Statement required. All were approved after issuance of a Mitigated Determination of Non-Significance (MDNS).

## **Context -- Risk of Spills and Explosions -- Effectiveness of Control Measures**

31. It is clear that new hazards have been introduced by the enormous volumes of crude oil being shipped by rail, by the great length of crude-oil trains, and by the high volatility or flammability of Bakken crudes. It is also clear that despite efforts to insure safety, numerous accidents have occurred involving the shipment of crude oil by rail.

32. In 2013, more than 1.1 million gallons of crude oil were spilled in this country from rail transport. This is more than the total amount from the previous 37 years. The record shows that derailments along the rail system are common.

33. The Examiner takes notice that one needs only open the daily newspaper to find reports of fires and explosions involving the transport of crude by rail. The most notorious of these was the tragedy at Lac Megantic, Quebec on July 16, 2013 where 60 cars breached and the resulting explosion killed 47 people. Numerous other examples of explosions and fires with attendant environmental damage were put into evidence.

34. The case made by the applicant and the County deals with such occurrences only in the sense that there is information on efforts to make things safe. The instant record provides no examination of the risks involved, and there is no convincing evidence that the safety efforts are really effective.

35. The weight of evidence is that local spill response plans and capabilities for potential spills along the route of the oil trains are neither adequate, nor likely to result in rapid and effective clean-up. The record contains no evaluation of the likelihood of damage that eludes clean-up efforts.

36. The Environmental Checklist states that BNSF maintains its own spill response plans and programs for spills that could occur on their right-of-way outside of the refinery. The railway provides hazmat assistance and enters into mutual aid agreements with local first responders. BNSF also conducts frequent track inspections and employs technology for detecting potential problems in freight cars used along its routes. However no convincing analysis of the effectiveness of BNSF's response efforts was provided.

37. Both Shell and the BNSF emphasize their safety programs, but the very existence of these programs presupposes that the occurrence of disasters is a distinct possibility. This record provides no analysis of the possible consequences (impacts) of major events that overwhelm local response efforts.

## **Project Impacts on the Environment in the Vicinity of the Project**

38. Shell and the County largely confined their environmental impact analysis to effects on the refinery site and along the Anacortes Subdivision. Within this narrow geographic area, the analysis appears to have been adequate with two glaring exceptions: a) handling of excavated material, b) the possibility and consequences of a spill reaching Padilla Bay. If the scope of analysis is expanded only to include the rail route in Skagit County, other potential impacts of the crude by rail operation are apparent but were not analyzed.

39. On-site provisions for stormwater management and spill containment appear adequate to prevent significant adverse environmental impacts. No new marine outfalls will be created. The project is not expected to present problems of well interference or to have any effects on the water table.



40. The March Point heron colony is located in a forest stand approximately 1,300 feet southeast of the project site, on land owned by the Skagit Land Trust and other private owners. There are 300 or more nests associated with the colony. The location of the colony is farther from the project site than necessary to meet the Washington Department of Fish and Wildlife's (WDFW) recommended buffer. Noise from the project is not expected to reach levels that would necessitate increasing this buffer. In addition, no additional light from the project would be discernible within the recommended WDFW buffer.

41. Nevertheless, there is considerable public concern for this colony, which is one of the largest of its kind in the country. Arguments were made that a more thorough look at possible impacts on the herons should be conducted.

42. Two bald eagle nests are located within the project area: one is located directly within the new rail alignment; the other is adjacent to a proposed storm water pond. Two federal permits have been issued. The nest within the rail alignment may be destroyed. Two replacement nest platforms must be constructed on the project site. Vegetation may be removed within 660 feet of the second nest but monitoring of the site must occur. Shell is required to comply with these permits under the terms of the County's MDNS.

43. Some wetland impacts at this site are considered unavoidable, but most of the high-quality forested wetlands as well as all estuarine wetlands will be avoided. The storm water ponds were sited on uplands. Rail track spacing has been reduced, to lessen impact to wetlands across the site. The largest wetlands impacts will occur to low quality, grazed pasture wetlands.

44. March Point is a relatively small peninsula. Refinery development and the proximity of the bays on either side render on-site mitigation of unavoidable wetland impacts impossible. No appropriate mitigation site in the near vicinity of the impact area was found. Therefore, Shell intends to purchase credits from the county-approved Nookachamps Wetland Mitigation Bank, adjacent to the Skagit River to the north and east of Mount Vernon. The mitigation site is approximately 2.2 miles outside the bank service area, but its use has been approved on the basis that the replacement wetlands are located within the same Water Resource Inventory Area and are generally more high-functioning wetlands than the on-site wetlands impacted.

45. Potential noise impacts in the project area were professionally analyzed on behalf of the applicant and no likely severe impacts were found to be likely. Moderate impacts were predicted at three locations. However, the few receivers that might be expected to experience moderate impacts are already affected by high levels of noise from activities on both SR-20 and the existing rail line. The additive effect of the project on noise is expected to be *de minimis*.

46. The likelihood of adverse air quality impacts was evaluated using conservative locomotive emission rates and dispersion modeling for the site and along the Anacortes subdivision trackage. The result was a conclusion that air pollution from the trains will not likely cause any National Ambient Air Quality Standard to be exceeded in the area of study. Construction and operation of this project may not proceed without approval from the Northwest Clean Air Agency which will require compliance with the national standards and ongoing monitoring.

47. Beyond the assurance of compliance with national ambient air standards, there was no evaluation of the health consequences of exposure to diesel particulates on the specific populations exposed to the unit trains within Skagit and Whatcom Counties, including Swinomish Tribal members and abnormally susceptible persons. There was no examination of the health consequences that could

result from the accidental release of toxic or hazardous materials. Appellant's health expert advocated a Health Impact Assessment.

48. Shell's consultant conducted a study analyzing the traffic impacts of bringing unit trains into the new receiving facility at the refinery. Unit trains are expected to travel at 25 miles per hour over most of the Anacortes Subdivision. However, there is a track curve within Burlington where the spur leaves the mainline, where train speeds are assumed to be 10 miles per hour. Outside of town, the average peak hour intersection clearance times (after train passage), would add two to three minutes of waiting. However within urban Burlington at Rio Vista and Burlington Road the time to clear average peak hour queues is estimated 18.5 minutes and 15 minutes depending on the movement direction. All of these waits will get worse in the future as road traffic increases.

49. The traffic study also looked at the impact of train traffic on emergency response times within a defined area. It was assumed that emergency vehicles would seek alternate routes to avoid rail crossing events. In general, within a travel shed around Burlington modeled for a five-minute time frame, the study found little difference in emergency vehicle accessibility with or without a train.

50. Of course, the trains bringing crude oil to the Shell refinery will pass through urban areas in the county other than Burlington. No traffic analysis was done for any intersections in Mount Vernon or Conway, nor was any analysis done of the influence of unit trains on emergency response in those areas.

51. Waterborne traffic was not examined because Shell is not applying to transport crude oil by water or otherwise to increase water transport. Since the applications do not ask for permission for this kind of activity, any approval given could not authorize such activity. Activity exceeding the limits of an approval presents an enforcement matter.

52. No information was provided as to the ultimate resting place of the 1,100,000 cubic yards of excavated material that will be removed from the construction site during the project. The Environmental Checklist states that approximately 236,281 cubic yards will be excavated from wetlands on the Shell site. There is no information on handling the mix of materials to be removed, whether a single disposal site will be used for all materials, whether the disposal site(s) will be suitable, or what environmental problems might result from leaving large amounts of material at the selected disposal site(s). There is no information on the size and number of trucks required to move this material off-site, on how many trips they will have to take and for how long, or on the routes such the trucks will use. The operation of these trucks, of course, has implications for interference with normal traffic. The record is mute on all of this.

53. The project will occur in the immediate vicinity of Padilla Bay. The Anacortes Subdivision rail route borders the Bay, and crosses an old swing bridge at the entrance to the Swinomish Channel, before arriving at the uplands of March Point. A spill along the route could result in oil reaching Padilla Bay. The consequences of such an event were not analyzed in the application materials.

54. Under the Shoreline Management Act, the Bay is designated a Shoreline of Statewide Significance. In its policy statement (RCW 90.58.020), the act declares that "the interest of all of the people shall be paramount in the management of shorelines of statewide significance." Specific preference on such shorelines is given to preserving the natural character of the shoreline and protecting the resources and ecology of the shoreline.

55. Padilla Bay contains a National Estuarine Research Reserve set aside for the preservation and study of a diverse natural marine environment of a type which is rapidly disappearing. It contains a wide variety of seagrass, salt marsh and mudflat habitats that support an astonishing diversity for flora and fauna. There is a huge eelgrass meadow, one of the largest contiguous beds along the west coast of North

America. Numerous types of small invertebrates are abundant and provide an important part of the food web for larger organisms. Fish include herring, smelt and four different types of salmon. More than 250 species of birds can be found at Padilla Bay, among them black brant, great blue heron, bald eagles, peregrine falcons and myriad shore birds. The abundant biology has attracted many scientists and students to carry out research

56. The record does not deal with the potential extent and nature of loss or the prognosis for recovery of an oil spill reaching Padilla Bay. The bay is shallow and normally without big waves so a relatively small spill could soak into the substrate and persist. Booming would doubtless help, but experience shows that only a small amount of oil is usually recovered from spills in marine waters.

57. Because of its narrow geographic scope, the environmental inquiry also fails to disclose any analysis of the potential impacts of spills to other nearby environmentally sensitive sites the railway traverses in Skagit County.

58. The Skagit River is the most productive producer of wild salmon in the Puget Sound area. There is an aging railroad bridge over the river leading from Mount Vernon to Burlington over which oil trains must pass. There is no discussion in the record of the safety of this bridge or of the consequences of a spill into the Skagit should this bridge fail.

59. The tracks also pass the south fork of the Skagit adjacent to the river's estuary, an area which is being rehabilitated as an important habitat for young salmon. No mention of the consequences of a spill along this area is made.

#### **Cumulative Impacts/Mitigation**

60. The cumulative impacts analysis provided by Shell (and accepted by the County) is limited to efforts to reduce the project effects at March Point and along the Anacortes Subdivision. Within this confined area the company asserted that compliance with contemplated mitigation measures would reduce cumulative effects. They stated compliance with local, state and federal regulations would slow wetland loss. They listed project design efforts to reduce effects on-site. They said that no direct or indirect construction-related impacts would occur within Padilla Bay. They asserted that impacts on marine and terrestrial life, and impacts of noise, light, air quality and traffic would all be below the level of significance in the immediate area. They argued that their emergency response teams would adequately respond to spills or fires within refinery boundaries and cooperate with BNSF within the geographic scope of the Anacortes Subdivision. They said there is no quantified or detailed information available "to suggest that the impact of Shell's proposal--directly, indirectly or cumulatively -- will have more than a moderate effect on the environment."

61. The County cited the conditions of the MDNS as adequate mitigation to reduce the impacts of the project below the level of significance. However, the County's explanation did not succeed in demonstrating how this would occur. As noted, those conditions are largely recitations of regulations of other entities which need to be complied with. The County assumed that the spill response prevention efforts of BNSF and federal and local entities would be effective to reduce spills along the route to an insignificant level. There is nothing in the record which even arguably proves this proposition.

62. The County relied on federal regulations to assure rail car safety and noted Shell's commitment to using upgraded cars. There was no suggestion that the old and the new cars are, in fact, unsafe.

63. The County agreed with Shell that limiting the cumulative impacts analysis to facilities on the Anacortes spur was appropriate, but did not even explain how the impacts of Shell's project and Tesoro's taken together would still result in insignificant impact. The County essentially relied on Shell's cumulative effects analysis.

64. Because of the limited scope of the inquiry, Shell's (and the County's) cumulative effects analysis is really a reiteration of assertions about the lack of local direct and indirect effects. There is really no analysis of cumulative effects at all. Shell's discussion included nothing about the cumulative risks created by the introduction of the proposed six loaded unit trains per week into a region where three other refineries are also importing crude by rail in large quantities.

## DISCUSSION

Shell and the County severely truncated the environmental inquiry here by reducing it to such a limited geographic scope. It is probably asking too much to require an environmental impact statement covering specific possible physical effects along the entire route of the rail system from North Dakota to Anacortes. But it seems appropriate to ask for an analysis of the potential effects of crude by rail activity on features within Skagit County. This was not done.

Furthermore, discussion of safety issues and the suitability of the trains that carry the oil to March Point involve no geographic limitation. The environmental review done in this case assumes that the whole big ball of federal, state and local regulations will somehow make the trains safe. And that if an accident happens, the response efforts described on paper will result in effective clean up, so that no significant adverse effects are experienced. There is no proven basis for such conclusions.

Reviewing each of the Skagit/Whatcom refinery projects in isolation has produced predictable results. Until now, none of the projects has triggered an impact statement. As a result, not one of the decisions has been predicated on a look at the whole Northwest Washington scene and what the oil train phenomenon may mean for the environment there.

The nexus among the activities of this group of refineries is crude by rail. To access these refineries oil trains headed north from Central Puget Sound must past through a single corridor. The total impact of the entirety of the massive upsurge in shipments of crude along this route has not been analyzed. The risks that adding one more actor to this scene poses to the environment and to health and safety can only be appreciated after a cumulative analysis of the entire picture.

The crude oil being brought in large quantities to a small area in the northwest Washington State is highly flammable and explosive. Catastrophes have occurred elsewhere. No one doubts that such a thing could occur here.

In this record, there is a lot of information about efforts to prevent accidents, and a lot of information about preparations for responding to accidents should they occur. But there is no information on the probability of their occurrence, nor on how adding another oil train to the area affects that probability. Also missing is any information about of the potential environmental consequences of such accidents when they occur. There is a need to describe the potential impacts that all the safety programs seek to avoid.

The core of the argument against writing an impact statement is that the probability of oil spills, fires or explosions, either en route or at the refinery, is remote. Despite the odds, however, all the disaster plans, drills and emergency equipment aimed at dealing with accidental releases indicate a common sense perception that accidents do happen and that the potential consequences of such events are so grave as to justify significant expenditures on preparedness. The refineries are not refusing to buy fire engines.

Notice is taken that there is experience on March Point with explosions. There is also experience elsewhere with disasters involving Bakken crude in rail transport. Even if the likelihood of such events is statistically remote, the question that needs answering is whether the reasonably foreseeable results of such events are consequences the public is willing to accept.

Unquestionably, the potential magnitude and duration of environmental and human harm from oil train operations in Northwest Washington could be very great. Under such circumstances, the environmental review will not be complete until there is an independent analysis of the level of risk entailed by implementing this project, in context with the other projects in the area. Further, to appreciate the risk, estimates of the potential harm from a spill or explosion are needed, as well.

The conduct of this analysis of risk and consequences is particularly important in light of the location of the refinery and rail route next to Padilla Bay, a nationally recognized natural resource for estuarine preservation and study.

Shell is in a difficult position as the last player in line for permission in this region. Subjecting them to a process none of the others have had to endure may seem unfair. However, the need for this process is compelled by the law and basic prudence.

### CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding. Skagit County Shoreline Management Master Program (SMP) 8.07(1)(a), 9.06(1), 10.02(3), SCC 14.06.050(A)(ix), SCC 14.12.210(1).

2. The appeal is of a threshold decision under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. The threshold at issue is whether an Environmental Impact Statement (EIS) needs to be prepared prior to a decision on Shell's application. The issuance of a Determination of Non-Significance (DNS) was, in effect, a decision that no impact statement is required.

3. The Hearing Examiner must apply the "clearly erroneous" standard to review of a DNS. *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn. 2d 267 (1976). Under this standard, a DNS may be reversed if "although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. See *Norway Hill*, 87 Wn.2d at 274.

4. The "clearly erroneous standard" requires that the Examiner "consider the public policy and environmental values of SEPA." *Sisley v. San Juan Cty*, 89 Wn.2d 78, 84 (1977). Include among these are the avoidance of risk to public health and safety. See RCW 43.21C.020

5. An EIS is needed for proposals for "major actions significantly affecting the quality of the environment." WAC 197-11-330. The key inquiry in deciding whether an impact statement is required is whether the action proposed is "significant."

6. "Significant" is defined the SEPA rules at WAC 197-11-794 as follows:

(1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

(3) WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.

7. Under WAC 197-11-330, in determining an impact's significance, the decision maker is to take into account, among other things, that a proposal may to a significant degree adversely affect environmentally sensitive areas or may affect public health or safety.

8. This project involves the very situation the definition describes. Considering the context, the activities for which permission is sought present the potential for spills and explosions resulting in significant environmental impacts. These impacts could occur in environmentally sensitive areas and could result in harm to public health and safety.

9. Insufficient evidence was presented to prove that the combined effect of applying existing laws and regulations would reduce impacts to an insignificant level.

10. On the record made, the Examiner is left with a definite and firm conviction that a mistake has been committed. He concludes that Shell's proposal is a major action significantly affecting the quality of the environment and that an Environmental Impact Statement should be prepared.

11. While not attempting to limit the scope of such a statement, the Examiner is persuaded that it should address at least the following:

- a) The potential risks of spills, fires and explosions from oil trains in transit or at destination, considering the cumulative impact of the rail traffic generated by all four Northwest Washington refineries.
- b) Evaluation of the safety of railroad bridges in Skagit County in light of the oil train traffic anticipated by the four refineries,
- c) Discussion of the environmental impacts of oil-train-connected spills to sensitive environments within Skagit County, with particular attention to Padilla Bay.
- d) Analysis of the effectiveness of emergency preparedness efforts in Skagit County to respond to spills, fires and explosions.
- e) Analysis of likely traffic impacts of oil trains on a Skagit-County-wide basis, including all urban areas affected.
- f) Analysis of traffic and other impacts of the removal, transport and storage of excavated material from the Shell refinery site.

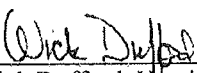
12. The Examiner appreciates that the County has limited means available to absorb the cost of such an undertaking. Nevertheless, he urges that every effort be made to assure that the statement prepared is an objective analysis.

**DECISION**

The matter is remanded to Skagit County (PDS) for the preparation of an Environmental Impact Statement. The shoreline permit applications are held in abeyance until the EIS is prepared and the County has reviewed the applications in light of the EIS. At that time a Staff Report shall be prepared and a recommendation shall be made reflecting the additional information the impact statement provides. The hearing on the merits is continued until then, at which time it will be resumed.

The EIS scoping process should proceed as set forth in WAC 197-11-408.

**SO ORDERED**, this 23<sup>rd</sup> day of February, 2015.

  
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Wick Dufford, Hearing Examiner

Transmitted to: Parties of Record February 23, 2015