



# Skagit County Planning & Development Services

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## Memorandum

**To:** Skagit County Hearing Examiner

**CC:** **Appellant Representative:** Earthjustice  
**Respondent Representative:** K & L Gates, LLP

**From:** Leah Forbes, AICP, Skagit County Planning & Development Services

**Date:** January 8, 2015

**Re:** Appeal No. PL14-0396

### Type of Hearing:

This is an open record appeal of the issuance of a threshold determination for a shoreline substantial development permit and variance application (PL13-0468) and forest practice conversion application (PL14-0079) under SCC 14.12.210. A SEPA threshold determination is a Level 1 decision. See SCC 14.12.210(1) and SCC 14.06.050(a)(ix). A Level 1 decision is appealable to the Hearing Examiner for an open record hearing pursuant to SCC 14.06.110(11) and SCC 14.06.160. The Responsible Official's SEPA threshold determination shall carry substantial weight in an appeal before the Hearing Examiner (SCC 14.12.210(4)).

### Parties to the appeal:

Project applicant: Equilon Enterprises, LLC, dba Shell Oil Products US

Appellants: RE Sources for Sustainable Communities  
Friends of the San Juans  
ForestEthics  
Washington Environmental Council  
Friends of the Earth  
Evergreen Islands

Appellants'  
Representative: Earthjustice

Respondents: Skagit County  
Shell Oil Products US

Shell Oil Products'  
Representative K & L Gates, LLP

**Project Location:**

The Shell Puget Sound Refinery (PSR) is located at 8505 South Texas Road, Anacortes, WA 98221 in western Skagit County on March's Point, along the southwestern edge of Padilla Bay.

The project area is located on Parcel P33502 in the following Sections, Townships, and Range:

- NW ¼, Section 3, Township 34 N, Range 2 E
- NE ¼, Section 4, Township 34 N, Range 2 E
- NE and SE ¼, Section 33, Township 35 N, Range 2 E
- SW ¼, Section 34, Township 35 N, Range 2 E

**Project Description:**

Shell Puget Sound Refinery (PSR) proposes to build a rail spur from the existing adjacent Burlington Northern Santa Fe (BNSF) mainline onto Shell PSR property with equipment to pump oil from rail cars into the refinery. The intent of the project is to support the fundamental purpose and need of the Shell PSR to provide a variety of fuels to the Pacific Northwest region.

The Shell PSR receives crude oil by ship from Alaska's North Slope. This crude oil supply is in a gradual decline. In its place, there is now an increased availability of Midcontinent Crude and other crudes of opportunity. Shell PSR proposes to construct and operate a new rail facility at the existing refinery to receive crude oil. The crude brought in by rail would replace some supply currently brought in by ship and would serve to maintain current production, not increase capacity. At this time, the only practicable transportation means for transporting crude oil from the mid-continent to the Shell PSR is by the use of rail.

BNSF owns and operates the existing mainline that runs adjacent to the Shell PSR. The railroad line, also known as the Anacortes Subdivision, formerly terminated farther to the west in Anacortes. Today, the railroad line ends on the western side of the peninsula and just south of North Texas Road, south of the adjacent Tesoro Anacortes Refinery, and is actively used by Shell, Tesoro, and other neighboring industries. Shell PSR currently receives an average of three trains per week with an average of 15 cars in each trip.

Existing rail facilities at the refinery are not designed to receive and unload unit train crude shipments. To accommodate the volume of railcars of crude from rail, Shell PSR proposes to construct a rail facility that would allow a train to safely and efficiently move off the adjacent BNSF rail line into an unloading facility at the refinery. Development of the rail facility must address the following basic needs: the facility must accommodate unit trains of crude oil; the facility must meet BNSF, Washington State Department of Transportation (WSDOT) and Federal Railroad Administration (FRA) rail design criteria; the site must be in close proximity to the refinery and the existing BNSF rail line; and the site must also meet basic industry and refinery-specific safety and security requirements.

Shell PSR anticipates that they would receive approximately one unit train per day. Each unit train would include approximately four locomotives and approximately 102 oil tank rail cars containing crude oil. The facility is being designed to receive a maximum of six unit trains per week, for a total of approximately 612 incoming fully loaded oil cars and 612 outgoing empty tank cars on a weekly basis.

The project scope generally includes the following improvements:

- Arrival/departure rail track;
- Unloading area with two tracks and a concrete containment pad;
- Bad order railcar tracks with repair facilities;
- Personnel operations building, appurtenant facilities, and limited parking;
- Perimeter inspection/security road;
- Pumps and below- and above-ground pipelines to connect the proposed project to the existing storage tanks;
- New road connections;
- Relocation of segments of the Olympic Pipeline, the Kinder Morgan Pipeline, and Puget Sound Energy (PSE) power lines;
- New electrical power substation;
- Oil/water separator facilities and containment for a single-car spill; and
- Stormwater facilities.

The rail extension for the crude unloading facility would extend from the existing BNSF rail line and spur (near South March Point Road) in a northwesterly direction approximately 5,500 feet to North Texas Road. The rail facility would consist of approximately 8,000 feet of unloading tracks with a concrete unloading pad, approximately 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. Rail ingress and egress would be provided via a connection to the existing BNSF mainline located to the southeast which would require modifications to the BNSF rail configuration.

The crude oil transfer station would include vent headers, a containment area, drain connections and collection header, and tank car grounding. An operations shelter, storage shed, electrical structure and small employee parking lot would also be constructed in proximity to the crude oil transfer facility.

The proposed project would also include various site preparation activities including, but not limited to, clearing and grading, installation and construction of associated infrastructure improvements, such as stormwater infrastructure, and extension of existing services and utilities, including electricity, sanitary sewer and potable water. Two existing pipelines and some PSE power lines would have segments relocated. Two ponds are proposed to provide permanent stormwater control. An oil/water separator pond would also be provided on the west side of the rail adjacent to the new facilities.

In order to mitigate for 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 on the Shell PSR site, Shell is proposing to purchase credits at an approved Skagit County wetland mitigation bank.

**Procedural Background:**

On December 18, 2013, the applicant submitted permit application PL13-0468 (Exhibit S-2) along with supporting materials, including a SEPA environmental checklist (Exhibit S-7). On March 5, 2014, the applicant submitted application PL14-0079 (Exhibit S-11), along with supporting materials.

A Notice of Development Application was published for PL13-0468 in a newspaper of general circulation on January 9, 2014, and again on January 16, 2014, as required by section 14.26.9.04 of Skagit County

Code (Exhibit S-16)<sup>1</sup>. A Notice of Development Application was published for PL14-0079 on March 13, 2014 (Exhibit S-17). Notification was provided by mail to all property owners within 300 feet of the subject property. There was a 30 day comment period associated with the Notice of Development for PL13-0468, which ended on February 17, 2014, and a 15 day comment period for PL14-0079 which ended on March 31, 2014. Over 150 comments were received during these comment periods (Exhibits PC-1 and PC-2). A majority of the letters received during these comment periods expressed disagreement with the proposal and requested the County seek additional information.

Planning and Development Services requested additional information from the applicant on March 7, 2014 (Exhibit S-18). The applicant submitted the requested information on March 27, 2014 (Exhibit S-19).

Following review of all materials submitted with the permit applications, as well as the additional information requested by the County and submitted on March 27, 2014, a Mitigated Determination of Nonsignificance (MDNS) was issued for the project on April 24, 2014 (Exhibit S-20). The comment period ended on May 9, 2014, and the appeal period ended on May 23, 2014.

During the comment period, more than 400 comments were received (Exhibit PC-3). These comments were both in support of the proposal as well as opposed. Staff again requested additional information from the applicant based on concerns raised in the public comments (Exhibit S-24). The applicant submitted a response to that request on July 17, 2014 (Exhibit S-25).

Following review of the additional information, the County issued a Modified MDNS on August 14, 2014 (Exhibit S-31). The comment period ended on August 28, 2014 and the appeal period ended on September 11, 2014. Approximately 135 additional comments were received during this comment period (Exhibit PC-5).

On September 11, 2014, Earthjustice timely appealed the County's SEPA threshold determination (Exhibit A-1).

On October 8, 2014, a pre-hearing telephonic conference was held before the Hearing Examiner regarding the appeal. The Hearing Examiner issued a Prehearing Order on October 9, 2014, outlining the procedure and schedule for the appeal process (Exhibit A-2).

After being notified by email that the appellants and the project proponent were in discussions regarding a potential settlement, the Hearing Examiner issued a Revised Prehearing Order on November 19, 2014, to allow for continuation of those discussions (Exhibit A-4 and A-5).

At a prehearing telephonic conference on December 3, 2014, the Hearing Examiner was informed that progress was being made toward settlement and agreed to provide some additional time for the parties to reach agreement. December 15, 2014 was set for another telephonic conference.

At a pre-hearing telephonic conference on December 15, 2014 the Hearing Examiner was notified that settlement efforts were not successful. He issued a Revised Schedule on December 16, 2014, to establish the schedule for proceedings (Exhibit A-6).

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<sup>1</sup> All exhibits labeled "S-#" are associated with the staff report prepared for PL13-0468 and PL14-0079. All exhibits labeled "A-#" are additional exhibits associated with the SEPA appeal.

### **SEPA Standard of Review:**

The issue before the Hearing Examiner is whether the issuance of the Modified Mitigated Determination of Nonsignificance for the proposed rail spur is clearly erroneous. A governmental agency's threshold determination of no probable significant adverse impact to the environment is subject to review under the clearly erroneous standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Murden Cove Preservation Association v. Kitsap County*, 41 Wn. App. 515, 523, 704 P. 2n 1242 (1985) (citations omitted). For a threshold determination to survive judicial scrutiny, the county must demonstrate that it actually considered relevant environmental factors before reaching that decision. See *Lasilla v. Wenatchee*, 89 Wn. 2d 804, 813, 576 P. 2d 54 (1978); *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140, *review denied sub nom.*, *State v. Silverthorn*, 83 Wn.2d 1001 (1973). WAC 197-11-444 lists relevant environmental elements. The record must demonstrate that the county adequately considered the environmental factors "in a manner sufficient to be prima facie compliant with the procedural dictates of SEPA." *Lasilla*, 89 Wn.2d at 814, 576 P.2d 54; see also *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The decision to issue a DNS must be based on information sufficient to evaluate the proposal's environmental impact. See *Anderson*, 86 Wn. App. at 302; WAC 197-11-335. Use of mitigation to bring projects into compliance with SEPA without promulgation of an EIS has been viewed favorably by the Washington courts. *Anderson* 86 Wn. App. at 303-304. One court described the use of an MDNS process as "imminently reasonable." *Id* at 303, citing *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164 (1980), overruled on other grounds, *SANE v. Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984). The rules promulgated by the Department of Ecology also encourage the MDNS process. See WAC 197-11-350.

A reviewing body must accord substantial weight to an agency's decision to issue a DNS and not require an EIS. See SCC 14.12.210(4); RCW 43.21C.090 ("In any action involving an attack on a determination by a government agency relative to the requirement or absence of the requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight."); *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).

### **Summary of SEPA Review Process:**

In reaching its threshold determination, the County undertook an iterative process with the applicants and other agencies to ensure that potential environmental impacts associated with the project were identified, considered and adequately addressed. The County relied on information available in a number of documents to conclude that no probable significant adverse environmental impacts would occur as a result of the proposed project when conditioned with appropriate mitigation. The following documents were the primary documents relied upon:

- Environmental Checklist, December 12, 2013 (Exhibit S-7)
- Wetland Mitigation Bank Use Plan, December 17, 2013 (Exhibit S-6)
- Shoreline Substantial Development Application, December 18, 2013 (Exhibit S-2)
- Wetland Delineation Report and Critical Areas Assessment, November 6, 2013 (Exhibit S-5)
- Biological Evaluation and Essential Fish Habitat Analysis, dated April 18, 2014 (Exhibit S-8)
- Drinking Well Summary - Shell PSR Site (Exhibit S-13)

- Floodplain Permit Application, FP13-0070, December 18, 2013 (Exhibit S-12)
- Forest Practice Conversion Application, PL14-0079, March 5, 2014 (Exhibit S-11)
- Joint Aquatic Resources Permit Application (JARPA), March 17, 2014 (Exhibit S-10)
- URS Reply to Request for Additional Information, March 27, 2014 (Exhibit S-19)
- Shell Crude by Rail Response to Skagit County, July 17, 2014 (Exhibit S-25)
- Review of state and federal regulatory requirements related to the proposal.

The potential issues identified by the Department based on its review of the application materials and public comments were: (1) local fire and spill response plans both onsite and offsite, including various types of crude that may be transported; (2) potential impacts on the heronry located southeast of the project site; (3) potential for increase in marine vessel traffic; (4) potential indirect impacts of wetland fill on Padilla Bay; (5) tank car safety; (6) rail safety; (7) traffic impacts; (8) wetland, salt marsh, and wildlife impacts; (9) cumulative impacts.

After reviewing the materials provided by the applicant and review of the permitting authority and requirements of other agencies, the County is satisfied that all of these issues have been adequately addressed and none will result in probable significant adverse environmental impacts requiring an Environmental Impact Statement under SEPA. Further, the County's threshold determination for the project includes several conditions to ensure any potential impacts are mitigated to the point of no probable significant adverse impact. The conditions identified in the Modified MDNS will be included as permit conditions to make them enforceable. A summary of the County's review and consideration of specific impacts are addressed below in the response to the specific issues raised on appeal.

**Issues on Appeal:**

In summary, the following issues have been raised by the appellants:

1. The MDNS fails to account for the significant environmental impacts posed by crude oil spill risks and impacts along the rail route and at the facility; increased rail traffic and necessary coordination; impacts to streams, wetlands, salmon, and fishing areas; air quality and respiratory impacts; rail tank car safety; types of crude shipped and its unique properties for health risks, explosions, spill clean-up, and climate impacts; impacts on historic and cultural resources; and global warming impacts from transportation, refining and combustion of oils.
2. The cumulative impacts of Shell's proposed facility with other crude-by-rail and coal export facilities in Puget Sound.
3. The direct, indirect, and cumulative impacts of transporting crude oil long distances to the facility by rail, including risks of derailment and explosion, risks of oil spills along the rail line and/or into fresh water to species and the aquatic environment, risks to human health from air toxics released during transport, transfer, and storage, increase in rail traffic, and harm to safety, recreation, and aesthetics.
4. The direct, indirect, and cumulative impacts of transporting crude oil long distances from the facility by marine vessels, including impacts to commercial, recreational, and fishing, risks of oil spills into Puget Sound, and harm to safety, recreation, and aesthetics.
5. Instead of performing a project-specific analysis of the mitigation necessary to avoid adverse environmental effects, the MDNS includes as mitigation already-required compliance with various laws and permitting structures.

**Department Response to Issues on Appeal:**

1. *The MDNS fails to account for the significant environmental impacts posed by crude oil spill risks and impacts along the rail route and at the facility; increased rail traffic and necessary coordination; impacts to streams, wetlands, salmon, and fishing areas; air quality and respiratory impacts; rail tank car safety; types of crude shipped and its unique properties for health risks, explosions, spill clean-up, and climate impacts; impacts on historic and cultural resources; and global warming impacts from transportation, refining and combustion of oils.*

- a. *Impacts posed by crude oil spill risks along the rail route*

The applicant has provided adequate information regarding the local fire and spill response plans, both on and offsite, including response strategies for various types of crude that may be transported. The material supplied has shown compliance with applicable state regulations. This information can be found in the March 27, 2014 (Exhibit S-19, p. 1) and the July 17, 2014 (Exhibit S-25, pp. 1-6) responses from the applicant.

The Department included a condition in the Modified MDNS to work in good faith with other local oil refiners and BNSF to develop a mutual aid agreement associated with responding to crude railcar incidents off-site of the refinery property (Condition 11). BNSF provided information to support these efforts in the July 17, 2014, response. The information provided by BNSF also describes the general oversight of freight rail governing bodies. They provided information on current efforts to address emergency response concerns, such as working on a mutual aid agreement with local refineries and first responders. BNSF provides essential training, has emergency response equipment available, and shares geographic emergency response plans (Exhibit S-25, exhibit 1).

BNSF inspects tracks and bridges more frequently than required by the FRA to ensure they are safe. Most key routes are inspected up to four times per week, more than twice the inspection frequency required by the FRA. Depending on the class of track, inspections on tracks in Anacortes and Skagit County are performed two to four days per week. BNSF's track inspection program also utilizes state-of-the-art technology, including rail detectors and track geometry cars, to help identify defects or problem areas that cannot be detected by the human eye. They have made significant investments in inspection and detection technology to enhance the regular manual inspection process. BNSF also uses special detection technology such as wheel impact load detectors, warm bearing detection system, hot/cold wheel detector and technology drive train inspection, acoustic bearing detector, machine vision system, and truck performance detector as part of the monitoring program to identify potential problems that could cause premature equipment wear or failure (Exhibit S-25, exhibit 1).

Inspections of all railway bridge structures, including those within Skagit County, are performed a minimum of twice per year. BNSF bridge inspectors and engineering staff are also supported by consultants and contractors in efforts to inspect and maintain bridges (Exhibit S-25, exhibit 1).

Numerous federal agencies are tasked with oversight of freight rail. The Federal Railroad Administration (FRA) is the monitoring and enforcing arm of the United States Department of Transportation (USDOT) as it relates to the rail industry. This agency promotes and regulates safety throughout the railroad industry. They closely monitor data and trends to eliminate risk by developing and enforcing regulations. The Pipeline and Hazardous Material Safety Administration (PHMSA) establishes national policy, sets and enforces standards, and conducts research to prevent

incidents. Their goal is to protect people and the environment from the risks of hazardous materials transportation.

Based on the information provided and review of the regulations enforced by agencies such as the FRA and PHMSA, the Department determined that the possible impacts posed by crude oil spills along the rail route are mitigated to the point of no probable significant adverse impact (Conditions 11, 12, 13, and 14).

*b. Impacts posed by crude oil spill risks at the facility*

The applicant has provided adequate information regarding the local fire and spill response plans including response strategies for various types of crude that may be transported. The project has been designed to minimize the potential for leaks or spills as well as to contain any inadvertent leaks or spills within the project containment system. The unloading facility will be staffed by trained personnel at all times train cars are present. A vapor detection system will also be installed to promptly alert operators of any potential leak not detected during routine inspections. The applicant has also provided relevant portions of the oil spill contingency plan per WAC 173-182. The material supplied has shown compliance with applicable state regulations. This information can be found in the March 27, 2014 (Exhibit S-19, p. 1) and the July 17, 2014 (Exhibit S-25, pp. 1-6) response from the applicant.

The Washington State Department of Ecology is the lead on spill prevention, preparedness, and response plans at oil transfer facilities. The focus of the Spills Program is to prevent oil spills to Washington waters and land and ensuring effective response to oil and hazardous substance spills whenever they occur. The goals and objectives of the Spills Program, supported by Washington State Laws, together with the information provided by the applicant describing how the project has been designed to avoid on-site spills have led the Department to determine that the possible impacts posed by crude oil spills at the refinery are mitigated to the point of no probable significant adverse impact (Conditions 4, 12, 13, and 14).

*c. Increased rail traffic and necessary coordination*

URS Corporation prepared a traffic study to analyze the possible impacts on local traffic and emergency response times from construction and operation of the proposed rail facility (Exhibit S-25, exhibit 2). Potential impacts to roadways and intersections along the rail route include delays resulting in Level of Service reductions and restricting access to businesses due to backups during the time trains are in the at-grade crossings. Trains serving the Shell facility will not increase the delay time at any intersection beyond that which would occur when current unit trains serving Tesoro pass by. The potential impact is a matter of frequency of occurrence, not duration of delay. An analysis of emergency response times was also completed. The study concluded that there is little difference in emergency vehicle accessibility and response time with or without a train.

Skagit County Public Works Transportation Programs staff reviewed the study and concurred with the findings (Exhibit S-26). They found that the study appears accurate and depicts current volumes and delays as well as a sustainable growth rate. Recommended mitigation included intersection improvements as well as running trains during non-peak hours.

Because train schedules are controlled by BNSF, the Department included Condition 18 in the Modified MDNS requiring that the applicant work with BNSF to request trains arrive and depart

during non-peak traffic hours to limit the potential impacts to local traffic. Based on the information provided and the condition added, the Department concluded that any possible impacts to local traffic are mitigated to the point of no probable significant adverse impact.

*d. Impacts to wetlands, streams, and local habitat.*

**Wetland Impacts:**

The applicant has submitted a Wetland Delineation Report and Critical Areas Assessment dated November 6, 2013 (Exhibit S-5), the SEPA checklist dated December 12, 2013 (Exhibit S-7), and the Revised JARPA submitted March 17, 2014 (Exhibit S-10). The applicant also submitted the Mitigation Bank Use Plan dated December 17, 2013 (Exhibit S-6), and Clean Water Act Alternatives Analysis dated December 10, 2013 (Exhibit S-9), which were prepared for the required U.S. Army Corps of Engineers permit. Following the request for additional information on both March 7, 2014, and June 3, 2014, the applicant provided detailed responses (Exhibit S-19, pp. 3-5 and Exhibit S-25, pp. 8, 12-13).

The federal Clean Water Act allows states to approve, condition, or deny projects proposed in waters of the United States, including wetlands. Projects that may result in a discharge to these waters must first receive a permit or license from one of several federal agencies.

Issuance of a 401 Certification means that Ecology has reasonable assurance that the applicant's project will comply with state water quality standards and other aquatic resources protection requirements under Ecology's authority. The 401 Certification can cover both the construction and operation of a proposed project. Conditions of the 401 Certification become conditions of the Federal permit or license. (See Condition 4, SEPA MDNS, Exhibit S-31).

Activities and development located within Washington's coastal counties which involve federal activities, federal licenses or permits, and federal assistance programs (funding) require a written Coastal Zone Management (CZM) Consistency Determination by Ecology. Activities and developments performed by or for federal agencies require a CZM determination be submitted stating that the project is consistent with Washington's Coastal Zone Management Program (CZMP) to the "maximum extent practicable." Federally permitted/licensed projects require a certification that they are consistent with Washington's CZMP.

Project review is often a collaborative process between Ecology, the permitting Federal agency, and the applicant. Ecology will work with the applicant and applicable permitting agencies to make sure application information is complete, mitigation requirements are being met, and to ensure that projects will meet state water quality standards, coastal resource protection requirements, fish and wildlife habitat standards, and other applicable regulations.

Washington's 401 Certification decision and CZM Consistency determination provide a strong opportunity to protect and enhance water quality, aquatic species and habitats, water resources, coastal resources, floodplains, and other environmental elements.

After review of the documents submitted, the Department concluded that adequate information has been supplied to verify that the project as designed and the mitigation proposed will adequately mitigate possible adverse impacts to the onsite wetlands.

County regulations support the use of a wetland mitigation bank for unavoidable, adverse impacts associated with development proposals (SCC 14.24.250(4)). Mitigation banks are an important regulatory tool for providing compensatory mitigation for unavoidable impacts to wetlands and WAC 173-700-100 declares it the policy of Washington State to support wetland banking.

The project site is located outside of the service area for both wetland mitigation banks operating in Skagit County. However, WAC 173-700-502 provides guidance for use of credits for projects outside of the service area. The applicant prepared the Mitigation Bank Use Plan to justify the use of credits to mitigate for the proposed project impacts. If the use of mitigation bank credits cannot be approved by the appropriate agencies, the applicant will need to provide an alternative compensation for the proposed wetland impacts. The conditions placed on the Modified MDNS to receive and comply with permits from both the Washington State Department of Ecology and Army Corps of Engineers ensures that all proposed wetland impacts will be adequately mitigated (Conditions 4, 5, and 19).

#### **Stream/Salt Marsh Impacts:**

The project includes potential impacts to one stream onsite as well as the salt marsh adjacent to Padilla Bay. The proposed project has been located to avoid and minimize adverse impacts to all streams, ditches and other waters to the maximum extent possible. Multiple sites, alignments, and layouts were assessed within the constraints of the railroad layout design specifications and access to the refinery facility. Unavoidable stream channel modifications include placement of a culvert, rerouting a portion of the channel, and placement of riprap at culvert outfalls (Exhibit S-10, p12).

Impacts to estuarine waters will be entirely avoided. Impacts to the stream are limited to the upper, non-fish bearing reach. The lower two-thirds of the stream and the estuarine wetlands and their buffers will be fenced off from cattle grazing. Native woody plants will be installed in the fenced riparian area of the onsite stream and salt marsh.

To allow for any impacts to the stream channel, the applicant has applied for and is required to obtain an Hydraulic Project Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW). They administer the HPA program under the State Hydraulic Code (Chapter 77.55 RCW) which was specifically designed to protect fish life. WDFW is the agency with expertise and authority to ensure any possible stream or salt marsh impacts will be adequately mitigated (Condition 3).

Based on the information provided and the condition added, the Department concluded that stream and salt marsh impacts are mitigated to the point of no probable significant adverse impact.

#### **Bald Eagle Impacts:**

Although the Bald Eagle is no longer a federally listed species under the Endangered Species Act, it is still considered a sensitive species and a species of local importance. The bird is protected by the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act. Both laws prohibit killing, selling or otherwise harming eagles, their nests, or eggs. The U.S. Fish and Wildlife Service (USFWS) has developed guidelines that describe circumstances under which provisions of the Bald and Golden Eagle Protection Act and MBTA may apply.

The proposed project is expected to result in tree removal, which will impact a known bald eagle nest tree in the project construction area. Removal of a bald eagle nest is regulated under the

MBTA and requires a permit from the USFWS. When issuing a permit for bald eagle nest removal, the USFWS requires mitigation to ensure that bald eagle nesting habitat is maintained (e.g., move the existing nest or construct an artificial nesting platform) in the area of a project. The County's MDNS is conditioned on Shell obtaining a permit from the USFWS to remove or relocate the bald eagle nest. Shell will be subject to the terms and conditions of the USFWS permits. Failure to obtain or comply with a USFWS permit could result in a federal enforcement action. The USFWS permit will mitigate the probable significant adverse environmental impact from the project because nesting habitat would be maintained.

The applicant has received USFWS Permit Take Authorizations for removal of one inactive bald eagle nest and disturbance of one bald eagle nest. Receipt of these approvals was included in Conditions 2 and 19. Required mitigation includes monitoring the use of the nest areas, following timing restrictions on vegetation clearing within 660 feet of the nest, construction of two nest platforms, and providing reports to USFWS as detailed by the approved authorizations (Exhibits S-32 and S-33).

Based on the information provided and receipt of the necessary permit from USFWS, the Department concluded that any impacts to the bald eagle habitat onsite will be mitigated to the point of no probable significant adverse impact.

#### **Great Blue Heron Impacts:**

Great Blue Heron nest sites are considered a habitat of local importance under SCC 14.24.500(4). The applicant has provided a detailed analysis of how the project has been designed to avoid impacts using the WDFW Management Recommendations for Washington's Priority Habitats and Species – Great Blue Herons (Azerrad 2012). The proposed project will be located approximately 1,350 feet from the colony. The project was designed to avoid direct impacts to Padilla Bay and the adjacent tidal wetlands which ensures protection of heron foraging habitat. Lighting design and location, minimization of construction disturbance, and other mitigation measures were also included to address potential impacts to the heron colony (Exhibits S-19, pp. 2-3 and S-25, pp. 7-9).

Based on the analysis provided and the conditions included, the Department concludes that the project has been designed and will be constructed to mitigate the probable significant adverse environmental impact from the project on the heron colony located between State Route 20 and South March Point Road (Exhibits S-19 and S-25, Conditions 3, 7, 15, 16, and 19).

#### *e. Air quality and respiratory impacts.*

Potential impacts to air quality are possible during construction and during operation of the unloading facility. During construction, combustion emissions and dust could temporarily be emitted from construction equipment. Those emissions are short-term and are not anticipated to result in air quality impacts. During operations, increased employee traffic would result in increased greenhouse gas (GHG) emissions. This project may also increase volatile organic compound (VOC) emissions due to fugitive leaks from equipment installed as part of the project (Exhibit S-7, pp. 9-12).

The applicant provided detailed information on potential impacts from emissions during construction and operation of the facility. The project-related GHG emissions were quantified to ensure a thorough analysis of the potential air quality impacts. The documentation included analysis of direct and indirect GHG emissions following Ecology's GHG guidance for SEPA review (Exhibit S-7, pp. 9-12 and S-25, p. 25).

By state law (RCW 70.94), the applicant is required to comply with the Clean Air Act as administered by the Northwest Clean Air Agency (NWCAA). NWCAA has staff with the knowledge, expertise, and authority to ensure compliance with applicable regulations. The applicant cannot begin construction of this project without first obtaining approval from the NWCAA.

Shell is required to obtain an Air Operating Permit (AOP) for its refinery facility. An AOP provides the framework to:

- Collect and record a facility's air pollution control requirements in one document. This gives the public, regulators and the facility a clear picture of what the facility is required to do to keep its air pollution under the legal limits.
- Require the facility to report regularly on how it is tracking its emissions and the controls it is using to limit its emissions.
- Clarify monitoring, testing and record keeping requirements.
- Require the source to certify each year whether it has met the permit's air pollution requirements.
- Make the terms of the air operating permit federally enforceable. This means that the U.S. Environmental Protection Agency, state Department of Ecology, Northwest Clean Air Agency and the public can enforce the terms of the permit.

The Air Operating Permit (AOP) for Shell Puget Sound Refinery was renewed on November 5, 2014 (Exhibit S-34). The applicant is still required to receive an Order of Approval to Construct (OAC) from NWCAA prior to construction of the project.

Based on the information provided and review of NWCAA permitting authority, the project is expected to have no probable significant adverse impact on air quality (Condition 1 and 4).

*f. Rail tank car safety.*

In the event of an accident or derailment, transportation of a flammable liquid by rail tank car can lead to explosion or fire. Rail tank car safety is regulated at the federal level by the United States Department of Transportation (USDOT) under the Federal Railroad Administration (FRA). USDOT determines the type of rail car that must be used for transporting crude oil by rail. The Pipeline and Hazardous Material Safety Administration (PHMSA) is in the process of reviewing the current standards for crude rail car design and crude oil transport. Working with USDOT and the FRA, they have taken action on multiple fronts to address the safe transport of flammable liquids by rail including but not limited to requiring notification of state emergency response commissions when and where flammable liquids are being transported, issuing emergency orders requiring stricter standards to transport crude by rail, verifying that crude oil is properly classified, and issuing safety advisories.

The applicant has supplied adequate information to confirm compliance with applicable federal regulatory requirements in regards to the type of rail car used. The applicant has also committed to transitioning to upgraded tank cars as cars are added to the fleet and to not knowingly accepting at its facility any rail cars that do not meet federal safety regulations (Exhibit S-25, pp. 5-6, Conditions 6, 12, 13, 14, and 18). As federal regulations are modified in the future, the applicant will continue to comply with all applicable federal safety regulations.

Based on the information provided, review of applicable federal regulations and the conditions in the MDNS, the Department determined that the potential impact regarding rail tank car safety is mitigated to the point of no probable significant adverse impact.

*g. Impacts from different types of crude oil shipped and unique properties for health risks, explosions, spill clean-up, and climate impacts.*

The refinery currently receives and processes a wide variety of crude oil and other feedstock materials. Shell has a current Oil Spill Response Plan (OSRP) that meets the requirements outlined in WAC 173 and RCW 90.56 (Exhibit S-25, pp. 10-12). The Washington State Department of Ecology (Ecology) is the lead on spill prevention, preparedness, and response plans. The focus of the Spills Program is to prevent oil spills to Washington waters and land and ensuring effective response to oil and hazardous substance spills whenever they occur. The OSRP includes response guidelines for different oil groups consistent with applicable regulations. The applicant is obligated to modify the response plan as necessary to ensure it continues to meet the requirements of state law.

Further, as described in subsection "f" above, the applicant is committed to ensuring that the rail cars it uses meet or exceed federal standards, and that any new guidelines related to the type of crude transported will be adhered to. The goals and objectives of the Spills Program, supported by Washington State Laws, together with the information provided by the applicant, have led the Department to determine that the possible impacts posed by various types of crude oil are mitigated to the point of no probable significant adverse impact (Conditions 4, 6, 11, 12, 13, and 14).

*h. Impacts on historic and cultural resources.*

A cultural resources survey dated May 6, 2013, was conducted for this project by URS Corporation. A copy of this report is on file at the Washington State Department of Archaeology and Historic Preservation (DAHP). No archaeological sites or historic structures were identified in the initial project area. The project area was subsequently expanded based on design considerations and included a portion of the BNSF rail right-of-way. A cultural resources survey dated November 4, 2013 was conducted for this expanded project area by URS.

The study identified two previously unrecorded archaeological sites and one historic rail line segment within the project area and two archaeological sites next to the project area that would not be directly affected or altered by the proposed project. A copy of this report was distributed to the affected Tribes and DAHP for review.

The study identified two historic archaeological debris scatter sites. The project was re-routed to avoid the sites, and they would not be directly affected or altered by the proposed project. A segment of the Seattle and Northern/Seattle and Montana/Great Northern Anacortes to Rockport rail line was identified within the project area. URS recommended these historic resources are not significant and not eligible for listing in the National Register of Historic Places. A Determination of Eligibility was sent to DAHP for review. DAHP, under the direction of the State Historic Preservation Officer (SHPO), is Washington State's primary agency with knowledge and expertise in historic preservation. They advocate for the preservation of Washington's irreplaceable historic and cultural resources. DAHP is responsible for fulfilling the requirements of federal historic preservation legislation.

Based on the cultural resources reports, DAHP concluded that the project as proposed will have no adverse effect on National Register eligible or listed historic and cultural resources (Exhibit S-27). Jackie Ferry, Cultural Resources, Samish Indian Nation, provided an email response concurring with the report recommendations (Exhibit S-28).

URS will prepare and implement an Archaeological Resources Monitoring Plan and Inadvertent Discovery Plan (ARMP/IDP) for the project, and a professional archaeologist will be present for the duration of major ground-disturbing activities.

Based on the information provided, the Department determined that the project as designed will have no probable significant adverse impact on historic or cultural resources.

*i. Global warming impacts from transportation, refining, and combustion of oil.*

The applicant provided detailed information on potential impacts from emissions during construction and operation of the facility. The project greenhouse gas (GHG) emissions were quantified to ensure a thorough analysis of the potential air quality impacts. The documentation included analysis of direct and indirect GHG emissions following the requirements of Ecology's GHG guidance for SEPA reviews. The projected GHG emissions from the rail traffic would be approximately 8, 249 metric tons of CO<sub>2</sub>e annually, and do not come close to reaching 25,000 metric tons per year of CO<sub>2</sub>e identified by Ecology's guidance as significant emissions requiring mitigation. Based on the data provided, the project is expected to have no probable significant adverse impact from emissions of GHG (Exhibit S-7, pp. 9-12 and S-25 p. 25).

See also response to "1-e" on pages 11-12 of this memo.

2. *The cumulative impacts of Shell's proposed facility with other crude-by-rail and coal export facilities in Puget Sound.*

The Department worked with the applicant to ensure a cumulative impacts analysis that is practical and based on available information to support meaningful consideration of impacts. The applicant provided a detailed cumulative impacts analysis in its July 2014 response to the Department's request for additional information in support of the SEPA threshold determination (Exhibit S-25, pp. 16-28). The Department reviewed the analysis and concurs with the findings.

The analysis of cumulative impacts related to Shell's proposal in relation to other similar facilities was limited to those facilities west of the BNSF mainline, specifically the Tesoro facility. An attempt to analyze impacts beyond this area, such as rail traffic on the BNSF main line, would not be meaningful because such impacts do not arise directly or indirectly from Shell's proposal, and they are remote and speculative.

The project may result in increased rail traffic within the local vicinity (Anacortes Subdivision) potentially impacting vehicle traffic, including emergency response vehicles. Shell currently receives an average of three trains per week with an average of 15 cars in each trip. Tesoro currently receives three unit trains per week. The proposed facility is designed to receive a maximum of six unit trains per week. This rail project has been designed to avoid blocking East March Point Road by providing adequate rail track to move the train onto the Shell site. Safety mechanisms at road crossings have been established in accordance with FRA and WSDOT regulations to prevent accidents at crossings in the project vicinity. Given the low density of population in the project vicinity, small increase in rail traffic resulting from the project, infrequency of the trains, and no blocking of East March Point Road, the proposed project would have minor to no impact on emergency access compared to existing conditions.

Based on a review of the Cumulative Impacts Analysis, the project design, and mitigation measures required as part of other agency permits or SEPA conditions, the Department concluded there will be no probable significant cumulative adverse impacts associated with this project and other crude-by-rail facilities that are reasonably foreseeable as a result of the proposed action.

3. *The direct, indirect, and cumulative impacts of transporting crude oil long distances to the facility by rail, including risks of derailment and explosion, risks of oil spills along the rail line and/or into fresh water to species and the aquatic environment, risks to human health from air toxics released during transport, transfer, and storage, increase in rail traffic, and harm to safety, recreation, and aesthetics.*

See pp. 17-18 of Shell's July response to comments for study area rationale for its cumulative impacts analysis (Exhibit S-25). The Department concurs with this rationale. The cumulative impacts analysis undertakes a detailed review of potential impacts to various environmental elements. The Department concurs with the conclusions in this analysis, and also refers to the impact-specific responses to appellants' Appeal Issue 1, above.

Currently there are no recreation opportunities adjacent to the project boundary. Properties surrounding the proposed facility expansion are private. The current recreational uses at March Point are located on the west side of the refinery and will not be visible from or impacted by the proposed project.

Potential aesthetic impacts within the study area will be limited to the change in rail traffic, the additional track to be located between the existing rail line and South March Point Road and expanded industrial structures within the boundaries of the refinery property.

Based on the information provided, mitigation measures included and conditions applied, there will be no probable significant direct, indirect, or cumulative adverse impacts of transporting crude oil to the facility that are reasonably foreseeable as a result of the proposed action.

4. *The direct, indirect, and cumulative impacts of transporting crude oil long distances from the facility by marine vessels, including impacts to commercial, recreational, and fishing, risks of oil spills into Puget Sound, and harm to safety, recreation, and aesthetics.*

The applicant states in the original Shoreline Substantial Development and Shoreline Variance Application (Exhibit S-2) and in the March 27, 2014 (Exhibit S-19), response that the intent of this project is to provide Shell with an alternate source of crude. The project will not increase crude capacity at the refinery. The project would therefore be expected to lead to less crude oil marine vessel traffic. In addition, this project will not materially affect the volumes of products produced at the refinery and therefore will not impact the current levels of product marine traffic.

Based on the information provided, the Department concluded there will be no direct, indirect, or cumulative impacts that are reasonably foreseeable resulting from transport of crude oil by marine vessel as a result of this proposal (Condition 17).

5. *Instead of performing a project-specific analysis of the mitigation necessary to avoid adverse environmental effects, the MDNS includes as mitigation already-required compliance with various laws and permitting structures.*

A primary goal of SEPA is to reduce or eliminate environmental impacts. If significant impacts are identified that would require the preparation of an EIS, those impacts can be reduced either by the applicant(s) making changes to the proposal or by requiring mitigation measures as a condition of approving the project. When changes to the proposal or mitigation measures are identified that will reduce likely significant adverse environmental impacts down to a nonsignificant level, a "mitigated DNS" is issued [WAC 197-11-350]. A jurisdiction may also require conditions through the use of SEPA substantive authority to reduce or eliminate adverse environmental impacts that may be less than "significant" [WAC 197-11-660(1)(b)].

Mitigation of environmental impacts begins with the application of development and other permit regulations. Remaining impacts may be addressed by the use of SEPA substantive authority. Before requiring mitigation measures under SEPA substantive authority, agencies must consider whether local, state, or federal requirements and enforcement would mitigate the identified significant adverse impacts [WAC 197-11-660(1)(e)].

The County reviewed and analyzed the role of other state and federal agencies in regulating some of the potential adverse impacts arising from the project. For several of the specific impacts, the County concluded that the state or federal regulation, either alone or in combination with additional mitigation, was sufficient to ensure that there would be no probable significant adverse impact. While this review is reflected in specific conditions in the MDNS (e.g. conditions 1, 2, 3, 4, 5, 6, and 12), this largely reflects the County's SEPA analysis pursuant to WAC 197-11-660(1)(e). The County's review and analysis of the role of other agencies, laws, and regulations, is discussed with each specific impact under Issue 1, above. The County's reliance on these other regulations did not substitute a project-specific analysis, rather the County undertook a project-specific analysis and concluded, where appropriate, that these regulations adequately addressed potential impacts.

### **Exhibits**

All exhibits labeled "S-#" are associated with the staff report prepared for PL13-0468 & PL14-0079. All exhibits labeled "A-#" are additional materials associated with the SEPA appeal.

- A-1. Notice of Appeal submitted September 11, 2014
- A-2. Prehearing Order dated October 9, 2014
- A-3. Respondent Equilon Enterprises LLC's Prehearing Motion dated November 7, 2014
- A-4. Email notification from K & L Gates to Wick Dufford regarding settlement discussions dated November 18, 2014
- A-5. Revised Prehearing Order dated November 19, 2014
- A-6. Revised Schedule dated December 16, 2014

### **Recommendation/Desired Outcome**

Skagit County Planning and Development Services recommends that the Hearing Examiner uphold the Department's threshold determination under SEPA (Modified MDNS) and deny Appeal No. PL14-0396.