EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 17, 2011

Tyler Schroeder
Whatcom County Planning & Development
5280 Northwest Drive
Bellingham, WA 98226

Re: Gateway Pacific Terminal Major Project Permit Application

Dear Mr. Schroeder:

We are writing on behalf of Climate Solutions, Sierra Club, and RE Sources (collectively "Climate Solutions"). These organizations and their members are opposed to construction of a coal-export terminal at Cherry Point in Whatcom County. It is our understanding that Whatcom County is currently considering whether or not the application filed by Pacific International Terminals, Inc. ("PIT") on June 10, 2011 is complete and will issue a determination as to completeness on or before June 24, 2011.

According to the cover letter and master land use application, PIT is seeking a Major Project Permit and a "Shoreline Substantial Development Permit Revision." Somewhat inconsistently, the cover letter further states that its existing permit "would allow us to construct Stage 1 of the proposal" and that the applications seek new permits for the "difference in scope between the approved project and our full buildout plan." Cover Letter at 1. Regardless, PIT misreads the 1997 permit as well as the governing statutes and regulations, and its approach to the Shoreline Permit in this important matter is neither lawful nor sensible. Because PIT has inappropriately requested a permit revision rather than a new permit, we believe the permit application is incomplete. We ask you to reject the application as required by state and county law.

I. OVERVIEW OF RULES GOVERNING PERMIT REVISIONS.

Shoreline Management Act ("SMA") regulations provide extensive direction on what kinds of changes to existing Shoreline Substantial Development permits require a formal revision or, alternatively, a completely new permit. A permit revision is only allowed where the revision is within the "scope and intent" of the original permit. WAC 173-27-100(1), (2). As the Shorelines Hearings Board has emphasized, "the purpose of the revision rule is to accommodate a minor alteration or afterthought in a proposal which has already been subjected to the full public notice and approval procedures of the Shoreline Management Act." Valentine v. Chelan County, 1997 WL 707043 (Shorelines Hearings Board Oct. 15, 1997) (emphasis added). A proposed revision is not within the "scope and intent" of the original permit if it will:

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a) allow any additional over water construction (except for an up to10%, or 500 square feet increase in the size of piers or docks, whichever is less);

b) allow any expansion of ground area coverage or height beyond 10%;

. . .;

e) allow any change in the "use" authorized by the original permit, or

f) allow any "adverse environmental impact."

WAC 173-27-100(2).[1] Jurisdictions may—but are not required to—authorize permit revisions that meet these criteria, and may do so administratively, without any additional public process. Conversely, if the proposed permit revision does not meet all of these criteria, "local government shall require that the applicant apply for a new permit." WAC 173-27-100(4); WCC 23.60.170(E) (new permit is required if revision is beyond "scope and intent" of original permit).

The Shorelines Hearings Board applies these criteria very strictly. For example, in one recent case, the Board rejected a permit revision that authorized an additional 10 feet to a previously-permitted 100 foot dock. Specifically, the Board found that the revision failed to meet the SMA criteria because it authorized a 15% increase in surface area of the dock, and the changes would cause an "adverse environmental impact" by forcing near-shore boaters further into the channel and by "increasing the visual and aesthetic impact" of the structure. Hayes v. Mason County, 2009 WL 43481 (Shorelines Hearings Board, Jan. 23, 2009). In another case, the Board rejected the use of a permit revision for a facility expansion at a marina to add approval of a snack bar at the marina site. Ecology v. Jefferson County, 1999 WL 825754 (Shorelines Hearings Board, Oct. 6, 1999); see also Lockhaven Marina v. City of Seattle, 1986 WL 27535 (Shorelines Hearings Board, Feb. 3, 1986) (short gravel driveway for emergency vehicle access to marina cannot be authorized through permit revision). Because permit revisions can be accomplished administratively, with no public process, the Board applies the SMA criteria strictly to ensure that only truly minor changes to projects proceed through revisions rather than going through the entire process.

II. PIT NEEDS A NEW SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT COVERING THE ENTIRE SCOPE OF THIS PROJECT.

PIT applied for a Shoreline Substantial Development Permit ("Permit") for a bulk commodity terminal at the existing site in 1992, and received its Permit in 1997. The 1997

[1] Whatcom County has adopted identical criteria as part of its own shoreline master plan. WCC 23.60.170.

Permit authorizes shipment of "grains, petroleum coke, iron ore, sulfur, potash, and wood chips." Coal is not an approved commodity under the 1997 Permit. 1997 Permit at 10. The facility was expected to handle 8.2 million tons of these cargoes annually, necessitating around 140 ship calls annually. Id. The Permit suggests that additional approval would be required to ship different cargoes or different quantities: "If the facility is approved for additional or different product cargoes in the future, the number of ship visits would change." Id. The Permit was appealed, and PIT never initiated construction authorized by that Permit.

Fourteen years later, PIT's plans for the site have significantly changed. See Project Information Document at 1-9 ("The Terminal layout and design have evolved from the project design previously permitted for the Gateway Pacific Terminal."). It is now proposing a vastly expanded commodity terminal, with coal as its primary product. A substantially reconfigured upland site will be developed in stages to handle about 54 million tons of material annually, the substantial majority of which will be coal, a commodity with significant risks, environmental impacts, and controversy. At full operational capacity, PIT now anticipates 487 ship calls annually, including a significant percentage of "Cape Sized" vessels—the largest class of cargo vessel in the world. Project Information Document at 4-54.

Applying the regulations and governing caselaw to these facts, we believe that a new SMA permit is required for PIT to proceed with this project. First, it should be self-evident that the existing permit does not in any way authorize PIT to undertake action without additional approval. We are deeply concerned by the statement in the application that the existing Permit "would allow [PIT] to construct Stage 1 of the proposal." PIT Application Cover Letter at 1 (June 6, 2011). According to the application itself, Stage 1 will include construction of the coal-related components of the project, which were not previously approved. See, e.g., PIT Land Disturbance and Clearing Application at 3 (Stage 1 will include construction for the East Loop—which is the coal side of the project); Project Information Document at 4-47 (Stage 1 will meet goal of 25 million tons annually). Because PIT has previously publicly stated that it would not seek to proceed with any construction on the basis of its existing Permit, we find this statement troubling.

Second, because the current proposal is not within the "scope and intent" of the original Permit, as defined by SMA regulations, PIT does not qualify for a permit revision and must obtain a new permit. PIT proposes an entirely new "use" compared to its previously-permitted activity. WAC 173-27-100(2)(e). Export of coal involves substantially different environmental, health, fire control, and safety risks compared to other products; it uses different practices for handling, dust control, loading, and transport; and it is exceedingly controversial with the public. Simply put, the previously-approved dock will be put to a new "use"—loading of huge volumes of coal—and that requires a new permit.

Moreover, using the previously-permitted infrastructure for much higher volumes of materials—54 million tons as compared to 8 million tons—involves a number of different

"adverse environmental impacts." WAC 173-27-100(2)(f). Moving this larger volume, most of which will be coal, involves substantially more ship calls, and ships of larger sizes, impacting aquatic habitat, marine species, and increasing the risk of spills and introduction of exotic species. Experience with other coal terminals reveal that all of them have had problems with spillage and dust at conveyor belts and during loading. Coal is a toxic material that is harmful to the aquatic environment—for example, studies have shown a major aquatic "dead zone" surrounding the coal terminal near Vancouver, B.C. Substantially increased rail and ship traffic through the upland zone will impact air quality in the shoreline area, Project Information Document at 5-132 (discussing air quality impacts of rail and ships), and will involve substantially increased emissions of greenhouse gases. Id. at 5-135. A dramatic increase in wetlands fill from the original Permit threatens to impact the shoreline if the wetlands are connected, as some evidence suggests. If forcing kayakers to paddle around a 10-foot extension of a dock is an "adverse environmental impact" under these regulations, as in the Hayes case cited above, any one of the impacts listed above would be sufficient to trigger a new permit.

The proposed change in use to the previously-permitted dock and trestle likely will also require additional overwater construction. WAC 173-27-100(2)(a). PIT plans to use independent conveyor systems for coal and other materials, so it appears that additional over-water work on the pier (specifically, additional conveyor infrastructure and different shiploaders) will be required. See Project Information Document at 4-21 (describing three conveyor lines). Similarly, coal will require use of "fog based dust collection systems" at the point of transfer to the cargo vessel—presumably, this will require new infrastructure not authorized by the 1997 Permit. Project Information Document at 4-54. Moreover, if the additional conveyors or shiploaders change the height of the originally-permitted facility by more than 10%, that is an additional reason why a permit revision is prohibited. Project Information Document at Fig 4-10 (graphic of shiploader).

In short, the Shorelines Hearings Board has emphasized that permit revisions offer a streamlined procedure for truly minor changes to existing permits. It makes sense that such insignificant changes can be approved without full public input. That is not the case here. PIT is proposing a project involving completely different materials and a vast increase in volume and ship traffic—all of which has significant environmental implications for the shoreline area and the public's interest in weighing in on this decision.

III. THE IMPLICATIONS OF FAILING TO REQUIRE A NEW PERMIT ARE SIGNIFICANT.

This is not a minor or technical issue. Rather, it is one that threatens to undermine the integrity of the public process for this project and weaken applicable environmental standards. There are several reasons for this.

Under the Whatcom County Code, the regulations governing approval of a project are the ones in effect at the time the application was submitted. WCC 20.04.031; Project Information Document at 2-1 (in 1992, Whatcom County "vested the project under the then existing" code and shoreline plan). When PIT first submitted its application in 1992, Whatcom County did not have the robust shoreline program, critical areas ordinances, and other environmental protections that it has today. Yet, if it is allowed to vest to 1992 standards, PIT would not have to meet existing environmental standards, including the current shoreline plan. See, e.g., 23.100.170(B)(1)(a)(iii) (allowing activities in Cherry Point management area only where they meet a "no net loss" of environmental function standard). Whatcom County and its citizens have worked hard, and are justly proud, of their current shorelines master program. PIT should not seek to circumvent these codes by relying on the vesting status of its 1992 application.

Moreover, as repeatedly noted, permit revisions do not require complete public processes and may simply be approved administratively. WAC 173-27-100(7). None of the extensive public process required of a new permit is needed when considering a revision. We are concerned that PIT may be seeking to avoid full public consideration of the dock and other facilities by using a revision. For example, under SEPA, PIT may seek to argue that the EIS should only consider the difference between the existing Permit and the new one, substantially confusing the issues and complicating the analysis. In light of the significant changes to the project, full public process and complete consideration of the environmental impacts of the project is warranted.

Finally, permit revisions are subject to much more limited oversight and review by the Shorelines Hearings Board as compared to new permits. WAC 173-27-100(8). Appeals of permit revisions are limited exclusively to whether or not they meet the criteria for permit revisions. Id. In light of the great importance of this project for the future of Whatcom County and its residents, PIT should not be allowed to circumvent either the most current environmental standards or a complete and fair process.

IV. BECAUSE PIT DID NOT PROPERLY APPLY FOR A NEW SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT, ITS APPLICATION IS INCOMPLETE.

PIT's application is incomplete because it did not apply for a shoreline substantial development permit. Although PIT asserts in its cover letter that it is seeking a new permit to "cover the difference in scope between the approved project and our full buildout plan," the argument simply doesn't make any sense. If PIT wishes to change the previously-approved project, there are two and only two options: if it qualifies as a permit revision, the County "may" grant a revision. If it does not, PIT needs a new permit. There is no option, and certainly no precedent, for simply permitting the "difference" between the old and the new proposals.

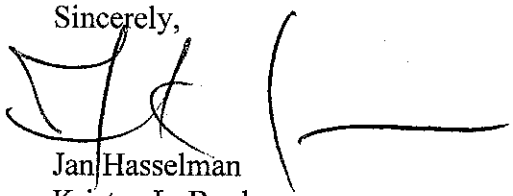
Moreover, the county code explicitly requires that shoreline permits be submitted on forms supplied by the County. See WCC 23.60.050(5); 2.33.040 ("Applications for a project

permit shall be submitted using forms provided by the review authority."). The County has a standard form for shoreline permit applications. PIT has neither used this form nor otherwise sought to apply for a new shoreline permit. Rather, it appears to have unilaterally modified the County's form for a major project permit by editing the check box for "Shoreline Substantial Development" by adding the words "Permit Revision" in a way that makes it impossible to discern that the form has been altered without close comparison to the original.[2] If the County did not authorize this change to the form, a full explanation from PIT is warranted.

In short, the construction and operation of a massive coal-export terminal that will move close to 50 million tons of coal annually through Whatcom County constitutes a fundamentally different project than the one permitted 14 years ago and will require a new permit application and process. We believe that this project is inconsistent with the County's values, culture, and the governing legal standards, including its shoreline master program. The permit process provides an opportunity for all parties to make their case about this project to the public and the elected decisionmakers. We are deeply concerned that PIT is trying—at the earliest stage of the process—to circumvent that close scrutiny, public process, and regulatory review by applying for a permit revision rather than a new permit. We ask you to make a formal determination that PIT's application is incomplete because it does fails to include the requisite materials for a new shorelines permit. Doing so will require PIT to reapply with a valid shoreline development permit application and allow the process to proceed appropriately.

Please do not hesitate to contact either of us if you have any questions or would like to discuss the substance of this letter any further.

Sincerely,



Jan Hasselman
Kristen L. Boyles

[2] Compare page 10 of the PDF of PIT's application at the County's website: http://www.whatcomcounty.us/pds/plan/current/gpt-ssa/pdf/20110610-applications.pdf with the actual application form required by the county: http://www.whatcomcounty.us/pds/forms/pdf/mdp-02-major-project-permit-20110310.pdf.