

No. 82599-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

PHILLIPS 66 COMPANY, Appellant,

v.

**WHATCOM COUNTY; and FRIENDS OF SAN JUANS, a
Washington nonprofit corporation, Respondents.**

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The Phillips 66 Ferndale Refinery (Phillips 66) did not timely appeal the SEPA Official's Revised Mitigated Determination of Nonsignificance (MDNS). The SEPA Official's unchallenged MDNS condition F cannot be appealed now.
2. Further, the Whatcom County Hearing Examiner had authority to modify condition F of the Revised MDNS.
3. The Hearing Examiner's decision was not speculative.
4. Other issues pertaining to appellant's assignments of error to be addressed by co-respondent, Friends of San Juans.

C. FACTS

1. Substantive Facts

The Phillips 66 Ferndale Refinery (Phillips 66) applied to Whatcom County for permits to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the Refinery. CP 308. The stated purpose of the proposed project (Project) is to manufacture low-sulfur marine fuels in compliance with 2020 regulatory requirements from the International Maritime Association (IMO). CP 308. This proposed project requires Phillips 66 to be able to segregate low-sulfur

fuel oil (and the low-sulfur crude oil used in its production) from higher sulfur fuel oil and crude oil. CP 308. The project would introduce a new product line; IMO 2020-compliant fuels. CP 309.

In filling out the required State Environmental Policy Act (SEPA) checklist, Phillips 66 did not quantify the amount or types of vessel traffic associated with this project, and thus Whatcom County was unable to assess the potential impacts of Project-related vessel traffic on the Salish Sea ecosystem, including potential impacts to the region's critically endangered Southern Resident Killer Whales (Southern Residents). CP 369-371.

On July 19, 2019, the Whatcom County SEPA Official issued a Mitigated Determination of Non-Significance (MDNS). CP 308.

On August 20, 2019, following public comment and feedback, Whatcom County issued a "revised" MDNS, which included Condition F- a requirement that Phillips 66 report vessel traffic. CP 308, 312, 316.

On August 30, 2019, FOSJ appealed Whatcom County's issuance of a revised MDNS. CP 366.

On November 17, 2019, the Whatcom County Hearing Examiner modified some of the conditions of the MDNS, including Condition F, to clarify language and requirements that give Whatcom County the ability to

monitor marine vessel traffic to ensure that the Project does not impact the critically endangered Southern Residents. CP 322, 340.

On November 21, 2019, Phillips 66 requested Reconsideration to challenge the Hearing Examiner's final November 17, 2019 decision. In doing so, Phillips 66 attempted to retroactively challenge mitigating Condition F from Whatcom County's August 20, 2019 Revised MDNS. CP 342-348.

In response, the Hearing Examiner issued an Order on Motion for Reconsideration on November 26, 2019, which further clarified and upheld, his November 17, 2019 decision with regard to MDNS condition F. CP 316. The Hearing Examiner ruled that Phillips 66 had not appealed Condition F. CP 316.

Phillips 66 then appealed the Hearing Examiner's decision to Superior Court. CP 1.

2. Procedural Timeline

Procedural timeline:

On July 19, 2019, Mark Personius of Whatcom County Planning issued a Mitigated Determination of Non-Significance (MDNS). CP 39.

On August 16, 2019, Phillips 66 submitted a revised State Environmental Policy Act (SEPA) checklist for the construction of a

300,000-barrel crude oil storage tank and an 80,000-barrel fuel storage tank. CP 35.

On August 20, 2019, Mark Personius issued a revised MDNS with added condition F. CP 39.

On August 30, 2019, an appeal of the revised MDNS was filed by FOSJ. CP 366.

On August 30, 2019, the appeal period for the revised MDNS expired.¹ Phillips 66 did not appeal. CP 316.

On November 17, 2019, the Whatcom County Hearing Examiner issued a decision upholding the MDNS with condition F. 340-341.

On November 20, 2019, Phillips 66 filed a motion for reconsideration. CP 350.

On November 26, 2019, the Hearing Examiner issued a revised decision upholding the MDNS with condition F. CP 32, 47.

¹ The Revised MDNS legal notice states “WHATCOM COUNTY GIVES PUBLIC NOTICE THAT THE FOLLOWING REVISED SEPA THRESHOLD OF MITIGATED DETERMINATION OF NON-SIGNIFICANCE (MDNS) HAS BEEN ISSUED TODAY SUBJECT TO THE 10 DAY APPEAL PERIOD CONCLUDING ON AUGUST 30, 2019.” CP 436.

D. ARGUMENT

1. Standard of Review

Phillips 66 has the burden of meeting one of the six LUPA standards under RCW 36.70C.130(1). Phillips 66 primarily challenges the Hearing Examiner's decision under RCW 36.70C.130(1)(b), which provides: "The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." Standard (b) presents questions of law that this court reviews *de novo*, giving deference to local specialized knowledge and expertise. *Quality Rock Products, Inc. v. Thurston Cty.*, 139 Wn. App. 125, 133, 159 P.3d 1, 5 (2007).

Whatcom County is the prevailing party, as Whatcom County's MDNS was upheld by the Hearing Examiner. CP 49-51. The facts should be viewed in the light most favorable to Whatcom County, which seeks to affirm the Hearing Examiner's revision of condition F.

Whatcom County also has expertise in construction of its own laws, and its interpretation should be given deference. RCW 36.70C.130(1)(b).

2. Phillips 66 Did Not Timely Appeal the Original Revised MDNS Condition F.

The Revised SEPA MDNS was issued by the SEPA Official August 20, 2019. *See* procedural timeline, *supra*. It contained condition F, which was later upheld (and then modified) by the Hearing Examiner. The appeal period for this condition expired ten days after its issuance, on August 30, 2019, and Phillips 66 did not appeal.² Because Phillips 66 did not appeal at the administrative level, they cannot challenge the revised MDNS Condition F during FOSJ's appeal on other issues. Even if Phillips 66 were to successfully challenge the Hearing Examiner's modification of F, the SEPA Official's original revised MDNS Condition F would remain.

Likewise, Phillips 66's arguments that the SEPA Official's MDNS Condition F must be entirely deleted because it is (1) based solely on public comment, and (2) that there is no evidence of actual environmental impacts were not preserved for appeal.

² Whatcom County Code 16.08.170 - Appeals.

A. Whatcom County establishes the following administrative appeal procedures under RCW 43.21C.075 and WAC 197-11-680:

1. Any agency or aggrieved party may appeal the county's procedural compliance with Chapter 197-11 WAC for issuance of the following by filing with the county department of planning and development services (see WCC 16.08.200.A.2 for fee):

a. Appeal of the final DNS, following the comment period when applicable, must be made to the hearing examiner within 10 days of the date the DNS is final (see WAC 197-11-390(2)(a));

Condition F, as it was originally issued in the SEPA Official's Revised MDNS, must be upheld, at a minimum.

3. The Hearing Examiner Had Authority to Modify Condition F.

Phillips submitted a Type I application.³ The SEPA component of that application was appealed. The Whatcom County Code (WCC) makes the Hearing Examiner the final decisionmaker in SEPA appeals.

WCC 2.11.210 Final decisions.

In accordance with the provisions of Chapter 22.05 WCC, the hearing examiner shall conduct open record hearings and prepare a record thereof, and make a final decision upon the following matters:

K. Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance.

(Emphasis added). Final decisions for Type I applications explicitly allow conditions or modifications.

WCC 22.05.110 Final decisions.

(1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are

³ WCC 22.05.020 Project permit processing table.

necessary to comply with all applicable codes.

(Emphasis added).

Phillips 66 focuses solely on subsection (2) of WCC 22.05.110, claiming that the following language—“appeals per WCC 22.05.160(1) shall either grant or deny the application or appeal”—divests the Hearing Examiner of his condition/modification authority as a final decisionmaker under WCC 2.11.210(K) and WCC 22.05.110. Though perhaps inartfully drafted to fit with the overall statutory scheme, the combination of code sections, taken as a whole, do not limit the Hearing Examiner’s power. At worst, the general appeal language of WCC 22.05.110(2) conflicts with the more specific language of WCC 2.11.210(K), which gives the Hearing Examiner final decision authority in SEPA appeals. Given LUPA’s deference to Whatcom County’s expertise in the construction of its own laws under RCW 36.70C.130(1)(b), our Hearing Examiner should not be prohibited from modifying conditions. Indeed, this would be news to our Hearing Examiner, who routinely modifies permit conditions.

4. The Hearing Examiner’s decision was not speculative.

Because SEPA requires that decisionmakers consider “more than the narrow, limited environmental impact of the current proposal,” the Hearing Examiner appropriately modified the conditions to monitor

potential future impacts. *See, Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976). Note that monitoring and prevention of potential future impacts is an obvious primary function of mitigation conditions. Phillips 66 attempts to equate “potential” impacts with “speculative” impacts and then dismisses them. Clearly, vessel traffic is one potential impact of increasing storage of oil products that are imported and exported by vessel. It is not speculative to find that more oil may be shipped if more capacity for oil storage is built. Monitoring is reasonable and minimally onerous,⁴ and the only mitigation required in this case is further SEPA review. CP 51.

The appellate court has addressed the Hearing Examiner’s authority to condition projects in *King Cty. Dep’t of Dev. & Env’tl. Servs. v. King Cty.*, 167 Wn. App. 561, 574, 273 P.3d 490, 497 (2012), rev’d on other grounds, 177 Wn. 2d 636, 305 P.3d 240 (2013). In that case, the hearing examiner *approved* a permit with three conditions. *Id.* The court upheld this authority. *Id.* The court explicitly distinguished Phillips 66’s cited case—*In re King Cty. Hearing Exam’r*, 135 Wn. App. 312, 144 P.3d 345 (2006). *Id.* at 576. In that case, the Hearing Examiner *denied* the

⁴ This is especially true because the monitoring simply requires the applicant to arrange for Whatcom County to receive the same data it already furnishes to the Washington State Department of Ecology. CP 51.

application with conditions. *In re King Cty. Hearing Exam'r*, 135 Wn. App. 312, 320, 144 P.3d 345, 349 (2006). In our case, the Hearing Examiner *approved* the Applicant's permit with conditions ("The approval is granted subject to the following required revised conditions, and any other conditions already put in place by the County."). CP 339.

Also consider *Lanzce* where the Court of Appeals held that the Hearing Examiner "properly considered the impact of added traffic" although the MDNS analysis failed to consider it. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 423, 225 P.3d 448, 456 (2010). In that case, the Hearing Examiner concluded that more information was "relevant in determining the cumulative impact on the community." *Id.* The court upheld the Hearing Examiner's decision, as "an appropriate consideration and an appropriate conclusion." *Id.*

Additional traffic is not a speculative impact.

E. CONCLUSION

The Hearing Examiner's modification of Condition F should be upheld.

The SEPA Official's original version of Condition F stands regardless of whether the Hearing Examiner's modification of Condition F is upheld.

For the above reasons and those contained in co-respondent's briefing, this Court should affirm the Superior Court's decision in its entirety.

Respectfully submitted this 9th day of August, 2021.



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