No. 825992

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

PHILLIPS 66 COMPANY,
Appellant,

v.

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

APPELLANT PHILLIPS 66 COMPANY'S REPLY BRIEF

K. Michael Fandel, WSBA No. 16281
MILLER NASH LLP
Pier 70 – 2801 Alaskan Way, Suite 300
Seattle, WA 98121
206.777.7472

Attorneys for Appellant
PHILLIPS 66 COMPANY

I. INTRODUCTION

Respondent Friends of the San Juans (FOSJ) devotes much of its brief on the same arguments it made before the Hearing Examiner, when FOSJ unsuccessfully sought to have Phillips 66's Mitigated Determination of Non-Significance (MDNS) overturned.[1] But Phillips 66 does not dispute that Southern Resident Killer Whales are endangered, or that increased vessel traffic poses a threat to that species. Those arguments simply are not relevant at this point. All of FOSJ's evidence and arguments were considered by Whatcom County in connection with issuing the MDNS, and presented at length in FOSJ's subsequent appeal to the Hearing Examiner. Mark Personius, Whatcom County's SEPA Responsible Official, testified at the end of the appeal hearing that FOSJ's evidence had not changed his determination that he "didn't see a significant increase in vessel traffic that would lead to a likely

[1] FOSJ incorrectly asserts that it was the prevailing party in the appeal to the Hearing Examiner. FOSJ's Respondent's14. FOSJ was the appellant in that proceeding, and its appeal was denied. Phillips 66, not FOSJ, prevailed in the highest forum exercising fact-finding authority and therefore this court should view the evidence and any reasonable inferences in the light most favorable to Phillips 66. *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 23 (2004).

significant adverse impact on whales." CP 247. The hearing examiner agreed:

> … the County properly issued the MDNS. The MDNS and associated permit will not increase vessel traffic, so the project will not "cause adverse environmental effects in excess of those created by existing uses in the area." Additionally, evidence already in the record and the expert analysis regarding the impact on vessel traffic, show that the Project will not increase environmental impacts associated with existing vessel traffic.

CP 317.

The findings that Phillips 66's Project will not cause adverse environmental impacts are unchallenged (FOSJ has never presented evidence that the Project will cause impacts, just that it might) and are therefore considered verities on appeal. FOSJ cannot alter them now by re-arguing the merits of its unsuccessful appeal. Not only is the Project free of "probable" or "likely" adverse impacts, it will not even cause "possible" or "potential" impacts. This is a Project that will not cause *any* adverse impacts to the environmental resources that are at the root of FOSJ's concerns. Because Washington law requires that any governmental action under SEPA may be conditioned only where specific significant adverse environmental impacts have

been shown to be probable, Condition F to the MDNS must be stricken.

II. ARGUMENT

A. The State Environmental Policy Act (SEPA) prohibits mitigating conditions not tied to specific, probable adverse environmental effects. Therefore, Condition F was improperly imposed as part of the MDNS.

The purpose of SEPA's threshold determination process is to determine if a "proposal is likely to have a *probable* significant adverse environmental impact," and then evaluate whether those impacts can be mitigated. WAC 197-11-330(1)(b) (emphasis added); *see also* WAC 197-11-060(4)(a) (directing agencies to consider "impacts that are likely, not merely speculative."). If there are "no probable significant adverse environmental impacts" from a proposal, then mitigating conditions are not permitted. WAC 197-11-340(1). SEPA allows mitigation for "probable" impacts, but not for impacts "that merely have a possibility of occurring, but are remote or speculative." WAC

197-11-782. This is not a sliding scale analysis, as FOSJ suggests, where mitigation of merely potential impacts is authorized if the impacts would be significant enough.[2] Rather, if impacts are not likely or probable, mitigating conditions simply are not permitted.

The Washington Supreme Court has held that "governmental action under SEPA may be 'conditioned or denied *only on the basis of specific, proven significant environmental impacts.*'" *Levine v. Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991), citing *Nagatani Bros., Inc. v. Skagit Cy. Bd. Of Comm'rs*, 108 Wn.2d 477, 482, 739 P.2d 696 (1987) (emphasis in original in *Levine*). This limitation is

[2] As FOSJ points out, in determining whether a proposal would create probable significant environmental impacts, the definition of "significance" involves considerations of context and intensity. FOSJ's Respondent's Brief, at 12, citing WAC 197-11-794(1). But, in this case, the MDNS was not issued because Whatcom County or Phillips 66 contended that adverse impacts to killer whales would not be significant. Rather, the County determined that the Project *would not cause* such adverse impacts.

unambiguously expressed in SEPA. RCW 43.21C.060 provides in relevant part:

> …Any governmental action may be conditioned or denied pursuant to this chapter: *Provided*,…[s]uch action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.

Condition F to the MDNS for Phillips 66's Project, both as originally issued and as modified by the Hearing Examiner, is irreconcilable with SEPA and the case law interpreting it. Mark Personius testified during the hearing on FOSJ's appeal that the County included Conditions E and F "to specifically address the concerns raised in the comment letters," even though he "didn't see a significant increase in vessel traffic that would lead to a likely significant adverse impact on whales." CP 247. The Hearing Examiner in his order echoed Mr. Personius, finding that "[w[hen the County did issue its Revised MDNS, *it added additional Conditions E through G to address public concerns*," not to address probable environmental impacts. CP 43 (emphasis

added). Neither respondent challenged these findings of fact, so they are verities on appeal. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004); *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). By definition, in the absence of a probable adverse environmental impact, there is nothing to mitigate—the County imposed Condition F for a purpose that SEPA forbids. *See Marantha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("the only opposing evidence was generalized complaints from displeased citizens. Community displeasure cannot be the basis of a permit denial.").

Respondents make no effort in their opposition briefs to establish that Phillips 66's Project will cause specific, proven significant environmental impacts. No evidence in the record supports such a conclusion. FOSJ instead asserts that Phillips 66's reading of SEPA as limiting permissible conditions to those

addressing probable significant adverse environmental impacts is a "muddled and incomplete" reading of the Act. FOSJ's Respondent's Brief, at 15. FOSJ argues that Condition F was properly imposed to address "potential" rather than actual or even probable adverse impacts. FOSJ's Respondent's Brief, at. 1, 7, 8. But FOSJ's interpretation of SEPA is not even a muddled or incomplete reading of the Act: it essentially is a repudiation of it. As much as FOSJ would like the law to allow conditions on land use permits to address potential but not actual or likely impacts, that is not what the law provides. Condition F should be stricken.

B. FOSJ waived its standing argument by not raising it at the initial LUPA hearing.

FOSJ and Whatcom County both argue that Phillips 66 cannot challenge the original imposition of Condition F because it did not timely appeal the original MDNS to the Hearing Examiner. FOSJ's Respondent's Brief, at 8; Whatcom County

Respondent's Brief, at 6. But these are arguments about standing. RCW 36.70C.060(d); *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 659–62, 375 P.3d 681 (2016). Respondents waived all arguments regarding standing and any other procedural issues by failing to raise them at the initial LUPA hearing. RCW 36.70C.080(3) ("The defenses of lack of standing … are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues."); *see also* RCW 36.70C.080(2) (requiring "jurisdictional and procedural issues" to be raised at the initial hearing); *In re Estate of Jepsen*, 184 Wn.2d 376, 382 n.6, 358 P.3d 403 (2015) (noting that, under LUPA, "certain defenses based on procedural noncompliance are waived if not timely raised. RCW 36.70C.080(2)–(3).").

Phillips 66's Amended Land Use petition sought review of "the County's final land use petition that imposes conditions

mitigating non-existent impacts." CP 18. The initial hearing on the LUPA appeal took place on February 7, 2020. Neither FOSJ nor the County raised the standing defense at that time. Accordingly, the Initial Hearing Order provides that "Phillips 66 has standing to bring this action." CP 99. Even through the prior appeal hearing before the Hearing Examiner, neither respondent had taken the position that Phillips 66 could not oppose the imposition of Condition F. In its brief to the Hearing Examiner, Phillips 66 argued:

> …there is no legal basis to require additional SEPA review if vessel traffic exceeds its average over the past three years. Vessel traffic can increase for a variety of reasons, none of which involve the Project. . . . Mitigation requirements must relate to the project subject to SEPA review. WAC 197-11-660(1)(b). Because this project does not increase vessel traffic, any conditions associated with the increased vessel traffic violate SEPA. *Levine v. Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991) (holding that governmental action under SEPA may be conditioned or denied only on the basis of specific, proven significant environmental impacts, and further holding that public comments

> without evidence were inadequate proof of environmental impacts).

CP 1510. Neither respondents nor the Hearing Examiner took issue with Phillips 66's standing to make these arguments until *after* the appeal hearing, when Phillips 66 moved for reconsideration. To the contrary, the Hearing Examiner ruled, contrary to Phillip 66's argument, that "[t]he issuance of these conditions by the County were not erroneous…." CP 316.

By statute, both FOSJ or Whatcom County have waived procedural defenses such as Phillips 66's standing, because they failed to raise the defenses during the initial LUPA hearing RCW 36.70C.080(3). Only the merits of the MDNS conditions that Phillips 66 challenges may be considered. Moreover, regardless of Phillips 66's standing now to appeal the original imposition of Condition F, neither respondent argues that Phillips 66 lacks standing to appeal the Hearing Examiner's *sua sponte* modification of that condition.

C. The Hearing Examiner's revision to Condition F violates SEPA because, like the original Condition, it does not mitigate any adverse environmental impacts caused by the Project.

Even though he properly concluded the Project would not cause environmental impacts, the Hearing Examiner revised Condition F to make it more burdensome to Phillips 66. Modified Condition F requires monitoring of Phillips 66's vessel traffic and mandates additional SEPA review if vessel traffic increases for any reason, including those unrelated to the Project, even though it is undisputed vessel traffic fluctuates for reasons wholly unrelated to the Project, such as market conditions. *See*, *e.g.*, testimony of Todd Barnreiter before the Hearing Examiner, CP 166-169 (vessel traffic increased as a result of law limiting receipt of crude by rail, unrelated to the lower-sulfur fuel Project).

FOSJ argues that the Hearing Examiner properly modified Condition F "to ensure ongoing monitoring of potential [vessel

traffic] impacts". FOSJ's Respondent's Brief, at 28. This monitoring, FOSJ contends, will permit Whatcom County to "investigate" on an ongoing basis "if there is a significant increase in vessel traffic." *Id.*, at 27. But, as discussed above, both the County's SEPA responsible official and the Hearing Examiner determined, after considering all of FOSJ's evidence and advocacy, that no such increase will occur as a result of the Project. SEPA prohibits imposing *any* mitigating conditions, including monitoring, in these circumstances. *See Levine*, 116 Wn.2d at 580 ("governmental action under SEPA may be 'conditioned or denied *only on the basis of specific, proven significant environmental impacts*.'"); *see also* WAC 197-11-660(1)(b) and (d).

FOSJ defends the revised conditions by asserting that the modifications were merely "clarifications that were consistent with the intent and purpose of the Original Condition F." FOSJ's

Respondent's Brief, at 26. As discussed in Phillips 66's opening brief, however, the Hearing Examiner's "clarifications" substantively expanded the scope of original Condition F, mandating further SEPA review if vessel traffic to Phillips 66's terminal increases for reasons unrelated to the Project.[3] *See* Phillips 66's Opening Brief, at 16-18. There is nothing in the record to suggest, much less establish, that the substantive expansion of Condition F was in fact consistent with the intent and purpose of the original condition, which the Hearing Examiner himself characterized as "vague." CP 47. Moreover, assuming for the sake of argument that the modifications were consistent with the purpose and intent of the original Condition F, that condition itself violated SEPA, as discussed above. Rather

[3] FOSJ makes no effort to dispute the implications of the broad language of revised Condition F, nor that the language would trigger SEPA review for increased vessel traffic unrelated to the Project. To the contrary, FOSJ appears to embrace the refinery-wide limitations that revised Condition F potentially creates. FOSJ's Respondent's Brief, at 27. The likelihood that advocates such as FOSJ would exploit the breadth of revised Condition F to demand review of any aspect of the refinery's operation underscores the due process importance of enforcing SEPA's limitations on mitigating conditions.

than correct the condition erroneously imposed to address merely *potential* impacts from the Project, the Hearing Examiner exacerbated the error by increasing the burden of that condition on Phillips 66 in further violation of SEPA. *Levine*, 116 Wn.2d at 580; *Boehm v. City of Vancouver*, 111 Wn. App. 711, 714, 47 P.3d 137 (2002); WAC 197-11-060(4)(a).

SEPA does not authorize imposition of conditions to mitigate environmental impacts unrelated to a proposed Project. Here, modified Condition F attempts to mitigate all vessel traffic to P66's facility, even though the Project would be only a small part of that facility and the undisputed record shows that the amount of vessel traffic to the facility fluctuates for reasons wholly unrelated to the Project.

D. The Hearing Examiner lacked authority to modify Condition F.

Respondents attempt to confer authority on the Hearing Examiner to have issued Condition F by muddying the

distinction between the authority the Whatcom County Code gives to final decision-makers in *applications* with that conferred on final decision-makers in *appeals*. Simply stated, only the former decision-makers have authority to impose conditions when granting permits while the latter do not. Since the Hearing Examiner was acting in an appellate capacity when he sought to impose modified Condition F to Phillips 66's permit, he exceeded his authority as a matter of law.

Courts strictly construe the limits of a hearing examiner's jurisdiction. For example, in *In re King Cty. Hr'g Examiner*, 135 Wn. App 312, 319–22, 144 P.3d 345 (2006), a hearing examiner denied an appeal of an Environmental Impact Statement under SEPA but added conditions. The Court of Appeals held the hearing examiner lacked jurisdiction to take that action because the King County Code allowed him to grant an appeal with conditions, but not deny an appeal with conditions. *Id*. *In re King*

Cty. Hr'g Examiner stands for the proposition that a hearing examiner cannot rely on "inherent authority," as the Superior Court held, but must obtain his or her power from express code language.[4] CP 1703.

The *In re King Cty. Hr'g Examiner* case is also instructive insofar as the language of the King County Code in that case contrasts with the language of the Whatcom County Code at issue here. Unlike the Whatcom County Code, which separately describes the Hearing Examiner's authority when dealing with applications and appeals, the King County Code expressly provides that the scope of authority is the same in both cases. The King County Code states that a hearing examiner may "grant or deny the application *or appeal*, or the examiner may grant the

[4] The Superior Court held that WCC 22.110(1) and (2) do not "divest" the Hearing Examiner of the authority to deny an appeal with modifications, as occurred here. But this is not a matter of divesting authority. The Hearing Examiner in Whatcom County was never *in*vested with the authority he purported to exercise.

application *or appeal* with such conditions, modifications, and restrictions as the examiner finds necessary." *In re King Cty. Hr'g Examiner*, 135 Wn. App. at 319, citing KCC 20.24.080(A)(1). If the Whatcom County Code read the way the King County Code does, there would be no dispute here as to the Hearing Examiner's authority to modify Condition F.

But that is not how the Whatcom County Code reads. Rather, WCC 22.05.110 provides that "the director or his designee" may grant Type I applications subject to conditions, modifications, or restrictions" but confines the hearing examiner's authority to impose conditions to those situations in which she or he grant Type III applications. The hearing examiner's appellate authority over Type I appeals, such as the Project permit here, is limited to granting or denying the appeal.

Both respondents assert, without any supporting evidence or citation, that the Whatcom County hearing examiner routinely

imposes permit conditions. Whatcom County's Respondent's Brief, at 8; FOSJ's Respondent's Brief, at 24. The Court should ignore these assertions as unsupported by the record. Moreover, neither respondent describes the context in which such alleged modifications occur. As discussed above, the Whatcom County Code *does* authorize the hearing examiner to grant Type III applications with conditions, which presumably the examiner routinely does. It just does not authorize the examiner to modify conditions that have been imposed by the director or his designee in granting Type I applications. The distinction in the Code on this point is clear.

Whatcom County describes the Whatcom County Code as "inartfully drafted" but the code actually is consistent in how it deals with permit modifications. Whatcom County Respondent's brief, at 8. Modifications can be imposed in final decisions on applications of *all* types, but not in appeals of *any* type. WCC

22.05.110(1) and (2). Under standard rules of statutory construction, the decision to empower the Hearing Examiner to impose conditions on Type III applications but not Type I applications like the Project is intentional. *See Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). There is nothing in the Code to suggest that the County intended that distinction in authority to impose conditions to become irrelevant at the appeal stage. To the contrary, particularly in an area of law where authority must be expressly conferred in order to be exercised, and where such authority is narrowly construed, the only reasonable conclusion is that the hearing examiner in this case arrogated to himself authority not granted to him in WCC 22.05.110.

III. CONCLUSION

This is not an appeal about whether southern resident killer whales should be protected from adverse environmental impacts.

Rather, it is about whether Phillips 66 is entitled to proceed with its lower-sulfur fuel Project without mitigating conditions when both the SEPA responsible official and the hearing examiner in Whatcom County concluded that the Project will not cause adverse environmental impacts. It is also about whether the Whatcom County Code limits the ability of a hearing examiner to impose further conditions on a Type I permit when acting in an appellate capacity. Here, Whatcom County improperly imposed Condition F to soothe community concerns rather than to mitigate any adverse Project impact. The Hearing Examiner then exacerbated that error by exceeding his jurisdiction and modifying Condition F and extending it to potential impacts unrelated to the Project. Phillips 66 respectfully requests the Court to strike Conditions F from the MDNS, or at the very least to strike the hearing examiner's modification of that condition.

DATED this 8th day of September, 2021.

MILLER NASH LLP

s/K. Michael Fandel

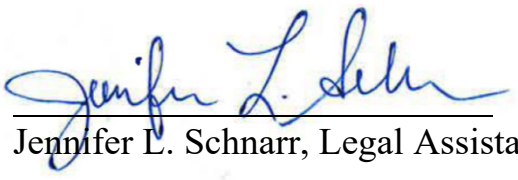
K. Michael Fandel, WSBA No. 16281
Pier 70 – 2801 Alaskan Way, Suite 300
Seattle, WA 98121
Tel: 206.777.7472
Fax: 206.340.9599
Email: Michael.Fandel@millernash.com
Attorneys for Appellant PHILLIPS 66 COMPANY

DECLARATION OF SERVICE

I, Jennifer Schnarr, hereby declare under penalty of perjury under the laws of the state of Washington, that on this 8th day of September, 2021, a copy of the foregoing document was served electronically on the following at the address stated below.

Whatcom County Prosecuting Attorney Royce S. Buckingham, Civil Deputy Prosecutor 311 Grand Avenue, Suite 201 Bellingham, WA 98225 RBucking@co.whatcom.wa.us AWebb@co.whatcom.wa.us	Friends of the San Juans Shawn Alexander, WSBA #30019 PO Box 359 Olga, WA 98279 positivelaw@gmail.com
Friends of the San Juans P.O. Box 1344 Friday Harbor, WA 98250 brent@sanjuans.org lovel@sanjuans.org	

SIGNED at Burien, Washington, this 8th day of September, 2021.



Jennifer L. Schnarr, Legal Assistant

MILLER NASH LLP

September 08, 2021 - 2:51 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82599-2
Appellate Court Case Title:	Phillips 66 Company, Appellant v. Whatcom County Washington, et al, Respondents
Superior Court Case Number:	19-2-02360-7

The following documents have been uploaded:

- 825992_Briefs_20210908144912D1805978_3435.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- andy.murphy@millernash.com
- awebb@co.whatcom.wa.us
- brent@sanjuans.org
- dbrechtel@earthjustice.org
- jeni@aya.yale.edu
- jennifer.schnarr@millernash.com
- jhasselman@earthjustice.org
- lovel@sanjuans.org
- mohara@earthjustice.org
- positivelaw@gmail.com
- rbucking@co.whatcom.wa.us
- salexan701@aol.com
- semile@earthjustice.org

Comments:

Sender Name: Emily O'Neill - Email: emily.oneill@millernash.com
Filing on Behalf of: Kent Michael Fandel - Email: Michael.Fandel@millernash.com (Alternate Email: sealitsupport@millernash.com)

Address:
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA, 98121
Phone: (206) 777-7542

Note: The Filing Id is 20210908144912D1805978