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 OPENING BRIEF

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I. INTRODUCTION

Conditions to a Mitigated Determination of Nonsignificance ("MDNS") under the State Environmental Policy Act ("SEPA") must relate to a probable adverse environmental impact actually caused by the underlying project, not just community concern about the project or its potential impacts. Respondent Whatcom County (the "County") issued an MDNS to Petitioner Phillips 66 Company ("Phillips 66") for Phillips 66's project to build two new tanks at its Ferndale refinery (the "Project"). The MDNS stated that the Project would not create adverse environmental impacts, and specifically that the Project presented "no likely significant adverse impacts" to the southern resident killer whale habitat. Despite finding that the Project would not adversely impact the environment, the County imposed a condition to the MDNS to mitigate the mere possibility of such an impact.

Respondent Friends of the San Juans ("FOSJ") filed an appeal challenging the County's finding of no significant adverse impact, alleging that the Project would in fact cause environmental impacts associated with increased vessel traffic and thereby impact southern resident killer whales. On appeal, the Whatcom County Hearing Examiner ("Hearing Examiner")

properly confirmed that the Project would not increase vessel traffic and would not cause any adverse environmental impacts. Nevertheless, the Hearing Examiner upheld MDNS Condition F, which the County admittedly imposed solely to address unfounded community concerns about the potential for increased vessel traffic. The Hearing Examiner then compounded that error by *sua sponte* modifying the condition to impose new, more onerous restrictions on Phillips 66.

Phillips 66 appealed the Hearing Examiner's decision to the Whatcom County Superior Court, arguing, among other things, that the Hearing Examiner lacked jurisdiction to modify the MDNS, and that imposing Condition F despite concluding that the Project would not adversely affect the environment violated Washington law. On April 6, 2021, the Honorable David Freeman of the Whatcom County Superior Court entered an order (the "Order") affirming the Hearing Examiner's decision to impose Condition F as modified.

The County should never have imposed Condition F in the first place, and the Hearing Examiner certainly should not have revised it to Phillips 66's further detriment. The Order of Judge Freeman upholding Condition F to the MDNS was therefore in error. Phillips 66 requests that

this Court reverse the Order insofar as it upheld Condition F, and strike Condition F from the MDNS.

II. ASSIGNMENTS OF ERROR

1. Whether, under SEPA, Whatcom County improperly imposed a condition to the MDNS for the Project to address potential increases in vessel traffic after having concluded that the Project would not cause vessel traffic to increase?

2. Whether the Hearing Examiner lacked jurisdiction under the Whatcom County Code to modify the MDNS.

3. Whether, under SEPA, when a hearing examiner finds that a proposed project will not cause environmental impacts, the examiner may nonetheless approve conditions imposed to mitigate against a speculative potential future impact.

4. Whether, under SEPA, when a hearing examiner finds that a proposed project will not cause environmental impacts, the examiner may nonetheless modify a condition imposed to mitigate against a speculative potential future impact.

5. Whether, in the underlying LUPA appeal, the Superior Court erred by failing to correct errors committed by the hearing examiner.

III. STATEMENT OF THE CASE

A. Phillips 66 Sought Approval to Construct Two New Tanks at its Refinery in Order to Efficiently Produce Environmentally Beneficial Lower-Sulfur Fuel.

On January 1, 2020, the International Maritime Organization (the "IMO") began enforcing a new global rule imposing a sulfur content cap on marine-vessel fuel. CP 309. The new IMO rule is expected to significantly benefit the environment. CP 310. Consistent with Phillips 66's commitment to the environment and energy efficiency,[1] Phillips 66 sought approval for the Project so it could meet the market demands caused by the new IMO rule. CP 308.

The Project involves constructing a 300,000-barrel tank to store lower-sulfur crude oil before it is refined, and an 80,000-barrel tank to segregate lower-sulfur IMO-compliant marine fuel after it is refined. CP 308. Phillips 66's current tankage does not allow efficient segregation of crude oil and fuel oil based on sulfur content, and segregation is an important element of the refining process. CP 163, at 60:22–61:14, CP 188,

[1] The EPA has awarded Phillips 66 its ENERGY STAR certification five times in the last six years. CP 162, at 59:3-6. Phillips 66 was one of only five refineries in the country to receive such accolades in 2018, the last year that the EPA evaluated at the time of the hearing. *Id*., at 59:7-14.

at 85:19-25, CP 199, at 99:6-8. Phillips 66 therefore needs the two new tanks to allow it the flexibility needed to efficiently produce lower-sulfur IMO-compliant fuel. *Id*.

B. The County Performed Multiple Rounds of SEPA Review Before Issuing a Revised MDNS for the Project.

In connection with its permit application for the Project, Phillips 66 submitted to the County the checklist required by SEPA. CP 465-483. The checklist specified that the Project would not increase the number of marine vessel trips associated with either unrefined crude brought into the refinery, or refined fuel exported from the refinery. CP 480. The County submitted the application and checklist to rigorous review, including directing Phillips 66 to answer multiple questions about the Project and requiring submission of new checklists that incorporated Phillips 66's answers. CP 208-222. The County's follow-up questions included asking Phillips 66 to clarify "how many new and/or additional marine vessel trips are anticipated in relation to this project." CP 495. Phillips 66 was able to "say with complete certainty that [Project] will not materially affect the number of marine vessels utilizing the Phillips 66 marine terminal in any particular future time period." CP 493. Phillips 66 explained that any new lower-sulfur crude

imported or product produced would be offset by a corresponding decrease in high-sulfur crude or products, so the Project would not affect overall vessel traffic to its marine terminal. CP 453. The County responded that "[t]he information you provided satisfies our previous request for clarification regarding additional trips. The MDNS will be issued with a note indicating no additional vessel trips are anticipated to result from the project." CP 492.

The County issued its first MDNS for the Project in July 2019. CP 461-463. As anticipated, the MDNS included a note that the Project would not materially affect the number of marine vessels utilizing Phillips 66's marine terminal. CP 461. The County received public comment on the MDNS and, based on those comments, withdrew the MDNS and required Phillips 66 to submit another SEPA checklist that responded to additional inquiries from the County and the public. CP 498-502; CP 222 at 115:15-24. Among the supplemental inquiries was a request to "quantify the number of additional vessel trips in relation to this project." CP 499. In response, Phillips 66 submitted a revised SEPA checklist, reiterating that "we will produce and export less heavy fuel oil when we begin exporting the IMO 2020 fuel so the net effect on marine vessel traffic *will not be*

increased." CP 453 (emphasis supplied). The revised checklist also expressly incorporated Phillips 66's previous assurance that it could say "with complete certainty" that the Project would not materially affect the number of marine vessels utilizing its marine terminal in any particular future time period." CP 455.

After this supplemental round of SEPA review, the County issued a revised MDNS (the "Revised MDNS") on August 20, 2019. CP 432-435. The Revised MDNS noted Phillips 66's recent clarification regarding the lack of a material increase in vessel traffic resulting from the Project. CP. 432. The Revised MDNS added Condition F, which required Phillips 66 to report its vessel traffic to the County using the same system (referred to as "ANTS") that Phillips 66 uses to report its vessel traffic to the State.[2] CP 435.

C. FOSJ Appeals the Revised MDNS.

FOSJ appealed the Revised MDNS. CP 366-374. FOSJ contended, among other things, that the County should have required Phillips 66 to

[2] "ANTS" is the Advanced Notice of Transfer System of the Washington State Department of Ecology ("Ecology"). Phillips 66 must accurately report vessel traffic to Ecology. *See* WAC 173-184-100. Phillips 66 is subject to regulatory penalties if its reporting is inaccurate. *See* WAC 173-184-040. Phillips 66 takes its regulatory obligations very seriously, and it accurately reports vessel traffic to ANTS. CP 184 at 81:20-25.

quantify both the "additional vessel traffic associated with this project" and "the project-related vessel traffic's potential adverse impacts." CP 369-370. FOSJ sought to have the MDNS overturned and returned to the County for revision; it did request that the Hearing Examiner modify Condition F. CP 308-09. FOSJ's appeal was heard by the Whatcom County Hearing Examiner in a contested hearing on November 1, 2020. CP 103-255.

1. The Hearing Examiner correctly confirmed the County's finding that the Project would not increase vessel traffic or cause adverse environmental impacts.

Following the hearing, the Hearing Examiner issued his first decision on November 17, 2019 (the "Initial Decision"). CP 56-75. He rejected FOSJ's arguments that the MDNS was erroneous and found that the County properly issued the MDNS because the Project would not cause environmental impacts. CP 72. The Hearing Examiner found that the County "repeatedly and responsibly asked for quantification data [regarding vessel traffic impacts] from the Applicant at least as early as May 9, 2019." CP 69. The Initial Decision states:

> 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.
>
> In the case at hand, the County has correctly determined that the permit and MDNS as issued should not present any additional risk or harm to the environment in general or the Killer Whales in particular. The evidence shows that there will be no increased vessel traffic. Only "significant" impacts would require additional study under SEPA, and because there is no increase in significant adverse environmental impacts associated with the Project, the MNDS is proper. RCW 43.21C.031; WAC 197-11-350.

CP 72. The same language appears in the Hearing Examiner's November 26, 2019 revised decision, discussed further below. CP 317-18.

The Hearing Examiner's decision relied in part upon an October 4, 2019 study prepared by ERM-West, Inc. and submitted by Phillips 66 entitled "Transportation Study for Ferndale Refinery Logistics Flexibility Project." CP 63, 72, 1633-57. The study concludes that the Project will not, in itself, increase or decrease the number of vessel calls at Phillips 66's Refinery or the size and type of vessels. CP 1652. It would have "***no impact*** on vessel traffic in the study area." *Id.* (emphasis in original).

The reason the Project will not impact vessel traffic is because it

does not increase the "throughput" of the refinery. CP 180 at 77:8-78:9. Generally, "throughput" is the maximum rate that a refinery can process crude oil. CP 179 at 76:16-77:7. At the hearing, Phillips 66 presented testimony that the production of lower-sulfur IMO-compliant fuel will replace existing production of higher-sulfur fuel at its refinery. CP 181 at 78:4-14. FOSJ offered no contrary evidence to challenge the absence of vessel traffic impacts. The record conclusively established that the Project will not increase vessel traffic, and thus could not cause impacts created by increased vessel traffic.[3]

2. FOSJ's appeal revealed that the County imposed Condition F as a result of community pressure, not environmental impacts.

At the appeal hearing, Mark Personius, Whatcom County's SEPA Responsible Official, revealed for the first time that the County's reason for adding Condition F was primarily community concern, in addition to a policy reflected in a temporary County moratorium—not because of any increased vessel traffic or other environmental impact caused by the Project.

[3] The only exception to this could be the filling of the tanks' heel, which is a one-time process for safety and function. CP 191 at 88:3-25. To address this concern, Phillips 66 volunteered a condition to the MDNS that would ensure the filling of the heel would not increase vessel traffic. CP 192 at 89:1-14. Phillips 66 does not challenge that condition.

CP 247 at 144:15-145:10; CP 73. Mr. Personius testified that the Project would not cause any material adverse environmental impacts, and that none of the evidence provided by FOSJ during the appeal changed his mind about that determination. CP 247 at 144:7-19.

D. The Hearing Examiner *Sua Sponte* Revised Condition F to Make it More Severe After Determining That the MDNS Was Proper.

The Initial Decision denied FOSJ's appeal but also modified Condition F in a way FOSJ had not requested. CP 308-09, 316. Whereas the County's MDNS has stated that an increase in vessel traffic "may" result in additional SEPA review, the Hearing Examiner made such additional review mandatory. CP 316-20. On November 21, 2019, Phillips 66 filed a motion for reconsideration that challenged the Hearing Examiner's modification to Condition F. CP 342-49. The Hearing Examiner issued a final decision on November 26, 2019, upholding his Initial Decision and further revising Conditions E and F without curing the defects Phillips 66 had identified. CP 318-20.

The relevant portion of Condition F, as originally issued in the revised MDNS, provided that Phillips 66 would share with the County the same vessel traffic data that it shares with the State, and further stated that

increased vessel traffic may be subject to additional SEPA review:

> The applicant shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track and report marine fuel oil shipments by vessel. Vessel trips to/from the marine terminal that cumulatively exceed the range of average annual marine fuel oil vessel activity identified in the 2017-2019 period (as identified in ANTS) **may be subject** to additional SEPA review.

CP 435.

As described above, the hearing established that the Project would have no effect on vessel traffic. The record also established that vessel traffic could, and already had been, increased by factors unrelated to the Project. CP 166-167, at 63:21-64:19. Despite this uncontroverted evidence, the Hearing Examiner revised Condition F by finding that it "was erroneously vague, as it set no standard, quantifiable or otherwise, as to what excess of the 'range of average annual marine fuel oil vessel activity' would *in fact* trigger additional SEPA review." Rec. at 16 (emphasis in original). His solution to a problem not caused by the Project was to make SEPA review mandatory:

> The applicant shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track and report marine

> fuel oil shipments by vessel. If vessel trips to/from the marine terminal cumulatively exceed the highest of the average annual marine fuel oil vessel activity identified in any calendar year from 2017 to 2019 (as identified in ANTS) this project **shall be subject** to additional SEPA review. As part of their annual reporting to PDS the applicant shall arrange for PDS to receive the ANTS data.

CP 320. As modified by the Hearing Examiner, any increase of vessel traffic, regardless of whether it is associated with the Project or not, will necessarily be subject to additional SEPA review**.**

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals stands in the same position as the Whatcom County Superior Court in evaluating the Hearing Examiner's decision on FOSJ's appeal of the MDNS, and reviews the local land use decision on the administrative record. *City of Federal Way v. Town & Country Real Estate, LLC,* 161 Wn. App. 17, 36, 252 P.3d 382 (2011). Under the Land Use Petition Act ("LUPA"), a court may grant relief from a land use decision if the party challenging the decision establishes that one of the standards of RCW 36.70C.131(1) has been met. *Id.* Whether a land use decision is based

on an erroneous interpretation of law under RCW 36.70C.131(1)(b) is a question of law that this court reviews *de novo*, after giving due deference to the expertise of the local jurisdiction. *Id.*, at 37. Whether a land use decision is a clearly erroneous application of law to the facts under RCW 36.70C.130(1)(d) depends upon whether this court is left with a definite and firm conviction that a mistake has been committed. *Id.* Here, Phillips 66 contends that the Hearing Examiner's decision to uphold the County's issuance of Condition F to the MDNS, and his decision that modification of Condition F was appropriate, both involve an erroneous interpretation of the law and both reflect clearly erroneous application of law to the facts. The issue of whether the Hearing Examiner had authority to modify Condition F in the first place is an issue of law subject to *de novo* review. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 829 (2011).

B. The County's imposition of Condition F to mitigate potential future impacts was improper.

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 there are no impacts to mitigate. 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. SEPA prohibits mitigating conditions for potential future impacts for good reason. Allowing such conditions invites litigation over speculative impacts.[4]

In arguing otherwise to the Superior Court, FOSJ cited *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976). CP 1704. The issue in *Cheney* was whether an EIS for an urban arterial construction project adequately disclosed the environmental impacts from the potential future development of an abutting private parcel. 87 Wn.2d at 344. The Supreme Court found the future development was too remote and speculative to require study in an EIS. *Id*. at 346. Nothing in *Cheney* enables

[4] Before the Superior Court, the County asserted Phillips 66 could not challenge Condition F because it did not appeal the MDNS, essentially arguing that Phillips 66 did not exhaust its administrative remedies. Under LUPA, exhaustion relates to an appellant's standing. RCW 36.70C.060(2)(d). The Respondents failed to challenge Phillips 66's allegedly inadequate standing at the initial hearing. CP 99-101. Consequently, the Respondents have waived their ability to dispute Phillips 66's alleged lack of standing to challenge Condition F. RCW 36.70C.080(3).

the County to impose conditions for impacts that are not proven to be probable.

FOSJ also cited *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448 (2010). CP 1705. In *Lanzce*, a city issued an MDNS for a development, but the hearing examiner found the project required an EIS. 154 Wn. App. at 414-15. The relevant issue in *Lanzce* was whether the hearing examiner showed proper deference to the city's SEPA responsible official's decision to issue an MDNS. *Id*. at 423. The Court of Appeals upheld the hearing examiner's decision. *Id*. at 424. That case is a far cry from this dispute. In *Lanzce*, the hearing examiner relied upon evidence that showed the project would cause an impact before reversing an MDNS. *Id*. Here, the Hearing Examiner found the Project would not cause any impacts and upheld the MDNS. Aside from referencing SEPA, *Lanzce* is irrelevant.

C. Condition F violates SEPA because it imposes broad restrictions on Phillips 66 for potential changes in vessel traffic that are unrelated to the Project.

Condition F, as revised by the Hearing Examiner, subjects Phillips 66 to mandatory additional SEPA review if vessel traffic associated with its marine terminal increases for any reason, without confining the condition

to changes related to the Project. The condition disregards the complexity of Phillips 66's operations, and how changes in the market or the law—events that have no relation to the Project—can and do cause fluctuations in vessel traffic. CP 164-66, at 61:19-64:13. For example, the record shows that state legislation (SB 5579) restricted rail traffic to the refinery, which yielded a corresponding increase in vessel traffic. CP 165-171, at 63:23-67:14.[5] That observed increase in vessel traffic had nothing to do with the Project. CP 166, at 64:14-19. However, under revised Condition F such an unrelated increase in traffic would subject Phillips 66 to additional SEPA review.

Whatcom County is not entitled to use a Project to construct two tanks as a basis to restrict all of Phillips 66's operations. *See Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 534, 979 P.2d 864 (1999) (recognizing mitigating conditions must be "roughly proportional to the impact they are designed to mitigate."). Because Condition F restricts far more than the (nonexistent) impacts caused by the Project and functionally regulates the

[5] FOSJ even cited that unrelated increase in traffic as support for Condition F. CP 1708-09.

entire Phillips 66 operation, it must be stricken. *See* WAC 197-11-660(1)(d) ("Responsibility for implementing mitigation measures may be imposed upon an applicant *only to the extent attributable to the identified adverse impacts* of its proposal.").

D. The Hearing Examiner Improperly Upheld Condition F After the County Revealed That It Added The Condition as a Result of Public Pressure.

Condition F should not have been upheld because it was imposed as result of public pressure, as acknowledged by the County. Public concern alone is an improper basis to impose conditions on a permit; conditions must mitigate an actual environmental impact. *Levine v. Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991); *Maranatha Min., Inc. v. Pierce Cty.*, 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."). In *Levine*, in response to neighbors' concerns about potential impacts of a project, Jefferson County imposed mitigative restrictions on the project. 116 Wn.2d at 581. The Supreme Court of Washington upheld the reversal of those conditions and held there was "no evidence that the perceived ill effects that concerned the neighbors would actually materialize." *Id.* The Court justified its

holding because there were "no agency findings of fact indicating that the restrictions reflect actual adverse impacts" and no evidence "the County considered any identifiable policies in attaching mitigative restrictions." *Id*.

Similarly, here, the Hearing Examiner had no evidence that the potential vessel traffic impacts that concerned some members of the public would actually materialize. Mr. Personius acknowledged that the County added Condition F despite determining that it did not mitigate any actual environmental impacts:

> We put in those additional conditions [E and F] in the revised MDNS to specifically address the concerns raised in the comment letters. Still didn't see a significant increase in vessel traffic that would lead to a likely significant adverse impact on whales.

CP 247, at 144:15-19. Relying on this testimony, the Hearing Examiner found that "When the County did issue its Revised MDNS, *it added additional Conditions E through G to address public concerns*." CP 312 (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).

Mr. Personius's testimony demonstrates that the County included Condition F because of "concerns" in comment letters, not because of evidence of "actual adverse impacts." This testimony, by itself, is a sufficient basis to strike the condition because the Hearing Examiner correctly found that the Project would *not* increase vessel traffic. CP 318. The Hearing Examiner improperly applied the law to the facts (including his own finding of facts) by upholding Condition F without evidence of actual adverse impacts, and the Superior Court should therefore have wholly stricken Condition F.

E. The Hearing Examiner Improperly Revised Condition F.

The Hearing Examiner compounded the County's error in imposing Condition F, and his own error in upholding the condition, by improperly revising it to make it even more burdensome.

1. The Hearing Examiner lacked authority to modify the condition.

This court should reverse the Hearing Examiner's modification of Condition F as a matter of law because the Hearing Examiner lacked authority to make the modification. Whatcom County Code (WCC) chapter 2.11, defines the "authority and responsibilities" of the office of the hearing

examiner. WCC 2.11.010. Among the powers granted to a hearing examiner in the code is the ability to "make a final decision" on appeals from SEPA mitigated determinations of non-significance. WCC 2.11.210(k). But a hearing examiner's final decision on an appeal of a final permit decision on "Type I" project applications "shall either grant or deny" the appeal—nothing more. WCC 22.05.110(2).[6]

The Code only permits the hearing examiner to impose conditions or to modify grants of *Type III* applications, not appeals of Type I permit decisions. WCC 22.05.110(2)(a). Only the Director/"Decision Maker" has authority to grant a Type I permit subject to conditions, modifications, or restrictions. WCC 22.05.110(1). With respect to appeals of a SEPA DNS determination in particular, a hearing examiner may only "reverse the threshold determination of the responsible official if the determination is found to be clearly erroneous." WCC 16.08.170(A)(4). In this instance, since the Hearing Examiner did not find the County's MDNS or its conditions to be clearly erroneous, his only option was to deny the appeal

[6] Whatcom County's project permit processing table identifies Land Disturbance Permit applications, such as the one submitted by Phillips 66 for the Project, to be Type I Applications. WCC 22.05.020. That table identifies the "County Decision Maker" as the Director (meaning the director of planning and development or his/her designee, per WCC 20.050010(3) and 20.97.099.4) and the Appeal Body as the Hearing Examiner.

and uphold the permit as written by the county decision maker.[7] CP 316 ("The issuance of these conditions by the County were not erroneous and indeed were appropriate."). In modifying a condition of a permit that was not clearly erroneous, the Hearing Examiner in this case exceeded his authority.

The Superior Court rejected Phillip 66's contention that the Hearing Examiner's authority is limited in this way, agreeing with FOSJ that he had "inherent authority" to impose Condition F. CP 1703. But courts strictly construe the limits of a hearing examiner's jurisdiction. *See, In re King Cty. Hr'g Examiner*, 135 Wn. App. 312, 319–22, 144 P.3d 345 (2006). The finding of inherent authority ignores the express distinction in the Whatcom County Code between a hearing examiners authority to grant Type III applications and his or her authority in deciding appeals. The Superior Court determined that WCC 22.05.110(1) and (2) were intended only "to frame the authority of the respective bodies in issuing an initial 'final decision.'" There is no such term or concept as "initial final decision" in the Whatcom

[7] Further, because standing is a jurisdictional matter, and FOSJ lacked standing to appeal certain issues, the Hearing Examiner lacked jurisdiction to take any action related to those issues, including revising conditions. *See Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

County Code. The trial court's creation and use of that term to expand the Hearing Examiner's authority renders the actual language of the Code meaningless. The Superior Court erred in failing to find that the Hearing Examiner overstepped his jurisdiction when he modified Condition F. RCW 36.70C.130(1)(e).

2. The Hearing Examiner improperly revised Condition F to account for speculative vessel traffic increases.

The Hearing Examiner erred by failing to connect his revisions of Condition F to any adverse environmental impact. He revised Condition F to require additional SEPA review if vessel traffic increased, even if that increase had nothing to do with the Project. CP 320. But the Hearing Examiner correctly concluded that "The evidence shows that there will be no increased vessel traffic." CP 318. Any concern regarding the cumulative increase of vessel traffic related to the Project was thus baseless and speculative. *See Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-21, 47 P.3d 137 (2002). SEPA review should not address cumulative impacts when those impacts are speculative. *Id.* at 720.

The Hearing Examiner further erred by failing to account in revised Condition F for other factors, independent of the Project, that can and do

affect the volume of vessel traffic to Phillips 66's marine terminal. As the MDNS recognizes, there is no reason to expect that the Project will cause vessel traffic to increase, but such traffic may indeed increase for other reasons. If the Hearing Examiner was authorized to revise Condition F rather than simply strike it, then he should have limited it so that only vessel traffic increases directly attributable to the Project are implicated, rather than stretching it to apply to operations that are not subject to the underlying permit. The County cannot use a project that has no effect on vessel traffic as a backdoor to regulate all other Phillips 66 operations that do impact vessel traffic. The Hearing Examiner's revision effectively imposes Condition F on projects that were not before the Hearing Examiner, so he acted in excess of his jurisdiction over the Project.

3. The Hearing Examiner improperly revised Condition F when he found that condition "erroneously vague."

The Hearing Examiner made multiple modifications to the County's conditions on the Revised MDNS despite finding that it complied with SEPA. *See* 315-21. The Hearing Examiner properly noted that he was required to review the Revised MDNS under a clearly erroneous standard, and that FOSJ bore the burden of proof. Rec. at 14 (citing *Moss v. City of*

Bellingham, 109 Wn. App. 6, 13, 31 P.3d 703 (2001)). The Hearing Examiner also correctly found that FOSJ did not carry its burden. CP 72. Despite citing the correct authority, the Hearing Examiner did not apply it correctly. The Hearing Examiner's own findings of the sufficiency of the Revised MDNS belie any evidence that the Hearing Examiner held a "firm conviction that a mistake was made[.]" *Moss*, 109 Wn. App. at 13. Even if the Hearing Examiner considered the Conditions to be "erroneously vague," "[t]he County's decision to issue an MDNS 'must be accorded substantial weight.'" CP 314 (citing *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)). So with the deference owed to the County, and no clear error proved by FOSJ, the Hearing Examiner had no basis to revise the County's condition. The Hearing Examiner's revisions to the condition should be struck.

V. CONCLUSION

This Court should reverse the Superior Court and strike Condition F in both its original form and as revised by the Hearing Examiner. Condition F was issued out of baseless concern that the Project would cause environmental impacts, which the County had already determined would not occur. At a minimum, this Court should strike the Hearing Examiner's

revisions to Condition F because they exacerbate the burden created by the County's conditions, and they are not tethered to any adverse impact caused by the Project. In either instance, this Court should also strike the Hearing Examiner's findings of fact that are not supported by the record's substantial evidence.

DATED this 8th day of July, 2021.

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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 July, 2021, a copy of the foregoing document was served electronically on the following at the address stated below.

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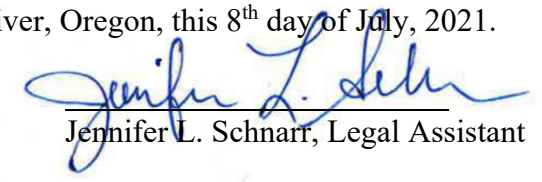
SIGNED at Sunriver, Oregon, this 8th day of July, 2021.



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4839-9717-6559.3

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July 08, 2021 - 12:45 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

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