BEFORE THE WHATCOM COUNTY HEARING EXAMINER

IN RE THE MATTER OF PHILLIPS 66 REVISED SEPA MDNS—LOGISTICS FLEXIBILITY PROJECT

APPLICANT: PHILLIPS 66 FERNDALE REFINERY

WHATCOM COUNTY SEPA REVISED MDNS 2019-00033

FRIENDS OF THE SAN JUANS PRE-HEARING BRIEF

File No. SEP2019-00033
INTRODUCTION

The Phillips 66 Ferndale Refinery (“Refinery”) has 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. The stated purpose of the proposed Logistics Flexibility Project (“project”) is to provide additional operating flexibility to manufacture low-sulfur marine fuels in compliance with regulatory requirements from the International Maritime Association (“IMO”), which go into effect in 2020. This proposed project requires the Refinery to be able to completely segregate low-sulfur fuel oil (and the low-sulfur crude oil used in its production) from higher sulfur fuel oil and crude oil. The project would introduce a new product line; IMO 2020-compliant fuels.

In filling out the required State Environmental Policy Act (“SEPA”) checklist, the Refinery 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, prior to issuing a revised Mitigated Determination of Nonsignificance (“MDNS”) for the project.

At a minimum, this project involves transporting 300,000 barrels of crude oil through the waters of the Salish Sea to initially fill the refinery’s new 300,000-barrel external floating roof crude oil storage tank. This is equivalent to 12,600,000 gallons of crude oil—roughly 1,600,000 more gallons than what spilled into Alaska’s Prince William Sound during the 1989 Exxon Valdez oil spill. The potential environmental impacts of shipping 12,600,000 gallons of crude oil through the Salish Sea is not insignificant by any stretch of the imagination—and this is only accounting for an initial single filling of one of the brand-new tanks.

Although the new IMO regulatory requirements were designed to assist the shipping industry transition to low sulfur, low polluting fuels, this transition cannot take place at the expense of the critically endangered Southern Resident Killer Whales that live and feed in the
waters adjacent to the proposed project site. The project is inconsistent with the policy goals of Washington’s Southern Resident Killer Whale Recovery Task Force, as well as federal Endangered Species Act protections for the critically endangered Southern Resident Killer Whales. As of July 1, 2019, there are only 73 living Southern Resident Killer Whales in existence on the planet.

The plight of this iconic species has become so important to our state that, in March 2018, Governor Jay Inslee issued an Executive Order establishing the Southern Resident Killer Whale Recovery and Task Force (“Task Force”) to “identify, prioritize, and support the implementation of a longer term action plan needed for the recovery of Southern Residents and necessary to secure a healthy and sustained population for the future.” Governor Inslee went on to declare: “...if Southern Residents were to become extinct, we would suffer an unacceptable loss to our environment, economy, and way of life.” (Exhibit W)

The 49-member Task Force has held 11 day-long public meetings attended by hundreds of members of the public. In addition, 92 people serve on the Task Force Working Groups.¹ In response to Task Force recommendations, the 2019 Regular Session of the Washington State Legislature’s enacted budget included $1.1 billion in support of Southern Resident Killer Whale protection and recovery.²

The November 2018 Southern Resident Orca Task Force Report identifies the threat that oil spills, in particular, play in the overall vulnerability of the Southern Resident Killer Whale population. (Exhibit X)³ “In addition to the threats related to the disturbance and noise from

² June 3, 2019 presentation at the Southern Resident Orca Task Force meeting, available at: https://www.governor.wa.gov/sites/default/files/SRKW_TF_Presentations_06.03.19.pdf
³ See also Exhibit F: “Due to its proximity to Alaska’s crude oil supply, Puget Sound is one of the leading petroleum refining centers in the U.S. with about 15 billion gallons of crude oil and refined petroleum products transported through it annually (Puget Sound Action Team, 2005). In marine mammals, acute exposure to petroleum products can cause changes in behavior and reduced activity, inflammation of mucous membranes, lung congestion, pneumonia, liver disorders and neurological damage (Geraci and St. Aubin, 1990). The Exxon Valdez oil spill was identified as a potential source of mortality for resident and transient killer whales in Prince William Sound, Alaska (Dahlheim and Matkin, 1994) and has raised concerns about potential implications for Southern Residents, particularly if the entire population is together in the vicinity of a spill.” (Exhibit F)
vessels, major oil spills represent a persistent, low-probability/high-impact risk to Southern Residents. The population’s vulnerability to oil spills is magnified because so few females are of reproductive age in the population and pods often aggregate off the San Juan Islands near portions of the international shipping lanes that show greater relative oil spill risk than much of the Salish Sea.” (Exhibit X at 29)

Given that this proposed project involves an initial hauling of over 12 million gallons of crude oil via marine vessel just to fill the 300,000 barrel external floating roof crude oil storage tank a single time, Whatcom County acted in a clearly erroneous manner in issuing a revised MDNS for this project without requiring the Refinery to provide adequate data on project-related vessel traffic and, concurrently, evaluating and mandating adequate mitigation measures for any and all impacts to the critically endangered Southern Resident Killer Whales.

I. THE HEARING EXAMINER SHOULD WITHDRAW THE REVISED MDNS UNDER THE COUNTY’S SUBSTANTIVE SEPA AUTHORITY.

SEPA provides broad substantive authority for any state or local government entity to deny a proposed action when “(1) the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement…; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.” RCW 43.21C.060

The Department of Ecology’s SEPA regulations also specify that an entity may deny a proposed action when it finds that “reasonable mitigation measures are insufficient to mitigate the identified impact.” WAC §197-11-660(f)(ii).

a. In issuing the revised MDNS for this project, the Whatcom County Planning & Development Services department erred by: (1) not requiring an adequate

4 Using the calculation that 1 barrel equals 42 U.S. gallons, 300,000 barrels of crude oil = 12,600,000 gallons of crude oil.
assessment of the increase and/or modifications in vessel traffic and (2) not evaluating potential environmental impacts from that vessel traffic on critically endangered Southern Resident Killer Whales.

Southern Resident Killer Whales are listed as Endangered under the Federal Endangered Species Act (Exhibit F), citing three primary risk factors: lack of the whales’ preferred prey, Chinook salmon; chronic and acute underwater noise and physical disturbance from vessel traffic which reduces foraging efficiency; and bioaccumulation of contaminants. Large commercial ships, like those that transport oil in and out of the Ferndale Refinery, impact the Southern Residents’ ability to communicate and successfully hunt (using echolocation) for scarce prey. (Exhibit H) Other vessel traffic impacts include direct vessel strikes, hearing loss, behavioral changes, and oil spill impacts. A recent population viability analysis states, “The population is fragile, with no growth projected under current conditions, and decline expected if new or increased threats are imposed.” (Exhibit I)

In issuing the revised MDNS, Whatcom County disregarded relevant and timely public comments expressing concerns about the proposed project’s potential impacts to Southern Resident Killer Whales, including comments that specifically asked Whatcom County to address the project-related vessel traffic’s adverse impacts, including oil spill risk.

The standard of review for threshold determinations to bypass the SEPA requirement of preparing an EIS (and thus qualify for a DNS or MDNS) was established by the court in Norway Hill Preservation and Protection Assoc. v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976), where the initial burden was placed on the lead agency to demonstrate that actual consideration has been given to environmental factors:

The SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of no environmental significance can be made. See Juanita Bay Valley Community Ass’n v. Kirkland, supra at 73; cf. Arizona Pub. Serv. Co. v. Federal Power Comm’n, 483 F.2d 1275, 1282 (D.C. Cir. 1973); Narrowsview Preservation Ass’n v. Tacoma, 84 Wn.2d 416, 422, 526 P.2d 897 (1974). As a result, a reviewing court will always
have a complete record upon which to review a "negative threshold determination." In the absence of a record sufficient "to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA," *Juanita Bay Valley Community Ass'n v. Kirkland*, supra, a "negative threshold determination" could not be sustained upon review even under the "arbitrary or capricious" standard because the determination would lack sufficient support in the record.

Other cases further support that the burden is on the lead agency to show that it made a threshold determination “which demonstrates that environmental factors were considered in a manner sufficient to be prima facie compliance” with the requirements of SEPA, *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 586 P.2d 470 (1978), and that the lead agency’s consideration of environmental factors must be substantiated by supportive opinion and data and may not be superficial. Cf, *Leschi Imp. Council v. Washington State Highway Commission*, 84 Wn.2d 271, 525 P.2d 774 (1974).

The standard established by *Norway Hill* means that a lead agency’s threshold determination must be based on “actual consideration of environmental factors” in order to be upheld. *Norway Hill Preservation and Protection Assoc. v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). Whatcom County received 29 comments on the project’s initial MDNS, which was issued on July 19, 2019. Of the 29 comments received, 25 included concerns specifically about the proposed project’s impacts to the critically endangered Southern Resident Killer Whales, and 22 comments specifically asked Whatcom County to reconsider the MDNS threshold determination and address the project's vessel traffic-related impacts to the critically endangered Southern Resident Killer Whales.

Whatcom County’s Thomas Brissenden sent an email on August 8, 2019 to Phillips 66’s Kenneth J. Morrill, requesting a modification to the project’s SEPA checklist: "Revise section B question 5(b) of the SEPA checklist to specifically list out any threatened and endangered species on or near the site (e.g. Southern Resident Killer Whale, Cherry Point Herring Stock, Salmon species)." (see SEPA Checklist Modification #4.)
The SEPA checklist that Whatcom County received on August 16, 2019 includes those requested SEPA checklist modifications. The revised MDNS, issued by Whatcom County on August 20, 2019, determined that "there are no likely significant adverse impacts to the habitat of the southern resident killer whale." However, the revised MDNS does not make any attempt to account for—or mitigate—the project’s adverse impacts to the critically endangered Southern Resident Killer Whales, nor does it offer any explanation for how the “no likely significant adverse impacts to the habitat of the southern resident killer whale” determination was reached. Further, the revised MDNS makes no mention in the full record of any review of impacts to Southern Resident Killer Whales beyond the habitat finding and there is no evidence that Whatcom County engaged in scientific research or expert review or consultation in reaching its determination.

Although SEPA does not require that a lead agency have perfect information before issuing an MDNS, Whatcom County, at a minimum, must show that its threshold determination was based on “actual consideration of environmental factors” and, in the absence of clear vessel traffic projections from the application, had a duty to document a “worst-case analysis” regarding the potential impacts from project-related vessel traffic on critically endangered Southern Resident Killer Whales. Norway Hill Preservation and Protection Assoc. v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976); WAC 197-11-083(3)(b).

Since Phillips 66 is proposing to add two new storage tanks to the Refinery, which comprise a 9.6% increase in total storage capacity, Whatcom County should have required a definitive statement regarding project-related vessel traffic projections. If there was not enough information in the record for Whatcom County to adequately evaluate the potential impacts to Southern Resident Killer Whales or to document a worst-case analysis, the correct course of action...

5 The Transportation Study for Ferndale Refinery Logistics Flexibility Project (Phillips 66 Exhibit 11) calculates the increased storage capacity as increasing “by nearly 10 percent, from 3,969,000 bbl to 4,329,000 bbl.” The 360,000 bbl increase subtracts/accounts for the removal of the two 10,000 bbl tanks. However, the SEPA checklist states (on page 11 of 21), “Two tanks slated for removal are inoperable and not currently in use.” The increase in operational storage capacity (assuming there are no other inoperable storage tanks) would be from 3,969,000 bbl to 4,349,000 bbl, a 9.6% increase.
action would have been to require an Environmental Impact Statement (“EIS”) for this project.

b. Whatcom County has a duty to withdraw the MDNS, given that the MDNS was procured by a lack of material disclosure.

The SEPA checklist, upon which the revised MDNS was procured, did not disclose the project-related increase in vessel traffic as a result of the passage of Washington State’s ENGROSSED SUBSTITUTE SENATE BILL 5579 CRUDE OIL BY RAIL—VAPOR PRESSURE (“ESSB 5579”), which was signed into law by the Governor on May 9, 2019. (Exhibit V) A public hearing on ESSB 5579 was held before the House Environment & Energy Committee on March 19, 2019, where six employees of the Phillips 66 Ferndale Refinery testified as opposed to this bill. (Exhibit U)

The Phillips 66 Ferndale Refinery Manager, Jolie Rhinehart, stated:

I would have no option, if this bill passes, other than to shut down the crude rail facility at my refinery. … In addition if the crude rail facility could not be used because the Bakken is unable to be unloaded it would force additional crude to be brought over the water. The only crude that's of comparable quality for low sulfur and high yields, which are very beneficial to the refineries in Washington State, would have to come from West Africa, Saudi Arabia, or Russia. That would all be brought in via additional and significant vessel bound traffic.\(^6\)

The original MDNS, issued on July 19, 2019, included a SEPA checklist signed by Ken Morrill, Phillips 66 Project Manager, as “true and complete to the best of my knowledge” and was submitted on May 15, 2019, six days after the Governor had signed ESSB 5579 into law on May 9, 2019 (Exhibit V) and 57 days after the March 19, 2019 public hearing. The revised MDNS issued on August 20, 2019 included a SEPA checklist (received by Whatcom County on August 16, 2019), which was signed by Ken Morrill, Phillips 66 Project Manager, as “true and complete to the best of my knowledge” 98 days after the Governor had signed ESSB 5579 into

\(^6\) House Environment & Energy Committee March 19, 3:30 pm Public Hearing: ESSB 5579, SB 5811, available at: https://www.tvw.org/watch/?eventID=2019031219 (Jolie Rhinehart’s testimony begins at 1:37.)
law (Exhibit V), 149 days after the March 19, 2019 public hearing (Exhibit U), and 18 days after ESSB 5579’s July 28, 2019 effective date. (Exhibit V)

A lead agency is required to withdraw a DNS if the DNS was procured by misrepresentation or lack of material disclosure. WAC 197-11-340(3)(a)(iii). The revised MDNS issued on August 20, 2019 included a SEPA checklist that was received by Whatcom County on August 16, 2019. On March 19, 2019 Phillips 66 Ferndale Refinery Manager, Jolie Rhinehart, had testified publicly before the House Environment & Energy Committee—providing conflicting information to what was given to Whatcom County in the procurement of the revised MDNS for this Project. This conflicting information constitutes a lack of material disclosure and Whatcom County is thus required to withdraw the MDNS.

c. **Whatcom County has a duty to withdraw the MDNS, if there is significant new information on a proposal’s probable significant adverse environmental impacts**

A lead agency is required to withdraw a DNS if there is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts. WAC 197-11-340(3)(a)(ii). After the revised MDNS was issued on August 20, 2019, Jolie Rhinehart submitted a comment letter on September 23, 2019 re: the Pipeline and Hazardous Materials Safety Administration (PHMSA) Notice: Hazardous Materials: Washington Crude Oil By Rail-Vapor Pressure Requirements (PHMSA-2019-0149-4120). (Exhibit T) This comment letter from the Phillips 66 Ferndale Refinery Manager to the US Department of Transportation clearly shows the connection between ESSB 5579 and the proposed project:

Because SB5579 has forced Phillips 66 to drastically reduce the volume of Bakken crude oil it can receive via rail, Phillips 66 intends to obtain crude oil from other sources that can be substituted for low-sulfur Bakken crude oil in the production of IMO 2020-compliant fuel. Presently, the only crude oils that have similar low-sulfur quality comparable to Bakken crude oil are from Russia, Saudi Arabia, and West Africa, which are received by...
the Ferndale Refinery at its marine terminal. In addition, although these foreign crude oils are of similar quality in terms of sulfur content, their relatively significant distance from the Ferndale Refinery will likely result in (as compared to Bakken crude oil): increased transportation emissions; increased vessel traffic in the Salish Sea… (Exhibit T)

This letter is unequivocal in stating the connection between ESSB 5579 (signed into law on May 9, 2019; Exhibit V) and the resulting replacement of the low-sulfur crude oil received by rail with low-sulfur crude oil received by vessel which would result in a project-related increase in vessel traffic and associated impacts. This letter identifies significant new information related to the proposed project’s probable significant adverse environmental impacts, including impacts to the Salish Sea ecosystem and surrounding communities and the critically endangered Southern Resident Killer Whales.

Both the March 19, 2019 public testimony from the Phillips 66 Ferndale Refinery Manager, Jolie Rhinehart, and her September 23, 2019 comment letter provides information that conflicts with what was given to Whatcom County in the procurement of the MDNS for this Project.

The information included in the October 4, 2019 Transportation Study for Ferndale Refinery Logistics Flexibility Project (“Transportation Study” — Phillips 66 Exhibit 11) also conflicts with the information in the Phillips 66 Ferndale Refinery’s September 23, 2019 letter to the US Department of Transportation. (Exhibit T)

The Refinery’s own Transportation Study concludes: “Changes in marine spill risk are directly correlated to changes in vessel traffic.” (Phillips 66 Exhibit 11, Section 3.4.2) We agree with this statement. However, the Transportation Study does not include any discussion of the “increased vessel traffic in the Salish Sea” that is discussed in Phillips 66 Ferndale Refinery’s September 23, 2019 letter to the US Department of Transportation.

The following statements are patently false if the crude oil currently being received at the Refinery by rail is replaced with crude oil received at the Refinery’s Marine Terminal:

The proposed new storage tanks and production of low sulfur marine fuel
at the Refinery would not, in itself, increase or decrease the number of vessel calls at the Refinery or the size and type of vessels. The Project would only change the type of material carried on vessels that call at the Marine Terminal. Therefore, Project operations would have no impact on vessel traffic in the study area...the Project would not change the Refinery’s throughput, and thus would not change the number of vessel calls at the Marine Terminal or the average number of daily vessel movements in the northern Salish Sea. (Phillips 66 Exhibit 11)

In addition to the Refinery’s unequivocal statements that this project will result in an increase in vessel traffic (as stated in the September 23, 2019 letter; Exhibit T), logic applied to the statements above tells us that overall throughput at the Refinery does not have to change for there to be an increase in marine vessel traffic and a corresponding increase in accident and oil spill risk in the Salish Sea.

Even if there were to be no increase in vessel traffic for this project—and low sulfur crude oil from Russia, Saudi Arabia, and West Africa were to replace the existing sources of crude oil received at the Refinery’s Marine Terminal—the Transportation Study is deficient in not evaluating the potential increase in accident and oil spill risk from the change in the tank vessels that would deliver crude oil to the Refinery for the Logistics Flexibility Project.

As noted on its public website, Phillips 66 currently purchases crude oil and condensate through its North American Supply and Trading business operation. Alaska is a primary source of crude oil that the Phillips 66 Ferndale Refinery receives via Polar Tankers, which are owned and operated by ConocoPhillips. These tankers that transport Alaska North slope crude oil to the Refinery are considered to be “best-of-class tankers” and have even been awarded the prestigious ECOPRO award from Washington State’s Department of Ecology for achieving excellence in marine safety and environmental stewardship.

The Refinery does not provide any information on the tankers that would transport Russian, Saudi Arabian, and West African low-sulfur crude oil, including whether or not these tankers would also be “best-of-class tankers” or any documentation of safety or environmental

7 https://www.phillips66.com/customers/crude-oil
records for these tankers. If ConocoPhillips Polar Tankers were to be replaced by tankers that have lower engineering, safety, quality, and operational standards, and environmental management systems, the Transportation Study is incorrect in concluding that the Logistics Flexibility Project operations would have no impact on vessel traffic, or its associated environmental impacts to the Salish Sea ecosystem.

Other new information that has come to light after the issuance of the revised MDNS for this project is the announcement of the new Green Apple Renewable Fuels facility (“Green Apple”), which would be co-located at the Phillips 66 Ferndale Refinery. Public comments for the Green Apple facility opened on October 23, 2019. This project’s increase in vessel traffic should be evaluated with respect to cumulative impacts the Green Apple project-related vessel traffic, given that both projects will use the same Marine Terminal. The SEPA checklist for the revised MDNS states, “The Renewable Diesel project is a separate project from a different project proponent and environmental impacts will be reviewed separately.” However, in light of the information that this project will increase vessel traffic at the Refinery’s Marine Terminal, and the fact that the proposed Green Apple Renewable Fuels project will also increase vessel traffic by 144 vessel trips per year at the same Marine Terminal, a cumulative evaluation of both project’s increases in vessel traffic is needed. “SEPA requires preparation of an EIS prior to governmental authorization of the first of a series of projects which, considered cumulatively, constitute a major action significantly affecting the quality of the environment." Juanita Bay Valley Community Ass'n v. Kirkland, 9 Wash.App. 59, 510 P.2d 1140 (1973).

Given the new information presented in this brief, Whatcom County has a duty to withdraw the MDNS for this project, as a lead agency must withdraw and reconsider its DNS where new information suggests likely significant adverse environmental impacts. WAC 197-11-340(3)(a)(ii-iii); Crawford v. City of Shoreline, 126 Wn. App. 1011 (2005).

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9 https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Industrial-facilities-permits/Green-Apple
II. THE REVISED MDNS IS INCONSISTENT WITH THE INTERIM MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF APPLICATIONS AND PERMITS FOR NEW OR EXPANDED FACILITIES IN THE CHERRY POINT UGA.

The export prohibition in the revised MDNS does not explicitly prohibit the “shipping” of crude oil to other United States-based destinations. The use of the word “export” could be interpreted narrowly as transport to a foreign country, in which case it would violate Whatcom County’s moratorium on the “shipping” of crude oil out of Cherry Point. (Exhibit D)

The revised MDNS uses language that conveys uncertainty as to whether Whatcom County would withdraw this MDNS if the Phillips 66 Ferndale Refinery’s stipulations in the SEPA Checklist regarding vessel traffic prove to be untrue. The use of the word “may” in “may be subject to additional SEPA review” instead of “shall” does not convey any certainty that an additional SEPA review would take place if vessel trips to/from the marine terminal exceed the average activity from the 2017-2019 period. Furthermore, any potential mitigation requirements that could result from an additional SEPA review are not addressed.

In addition, Whatcom County relies on Phillips 66 Ferndale Refinery’s self-reporting to verify the information that Phillips 66 Ferndale Refinery provided in the SEPA Checklist. Given that the MDNS was procured by a lack of material disclosure and given that there is no external verification of vessel traffic coming in or out of the Refinery, there is no way to guarantee that the Refinery’s self-reporting can be relied upon to document project-related vessel traffic or the Refinery’s adherence to the mandate of the moratorium.
VII. CONCLUSION

Friends of the San Juans asks the Hearing Examiner to withdraw Whatcom County’s MDNS threshold determination for this project under Washington’s Executive Order 18-02, the County’s substantive SEPA authority, and Whatcom County Code.

Respectfully Submitted this 28th day of October, 2019.

FRIENDS OF THE SAN JUANS

By: s/ Jennifer Barcelos
    Jennifer Barcelos, WSBA #43879
    Attorney for Appellant,
    Friends of the San Juans
DECLARATION OF SERVICE

I, Jennifer Barcelos, declare under penalty of perjury and the laws of the State of Washington that, on October 28, 2019, I caused the foregoing pre-hearing brief to be served on the persons listed below by email:

The Honorable Rajeev Majumdar
Whatcom County Hearing Examiner
c/o Carole Magner
CMagner@co.whatcom.wa.us
hearingexaminerooffice@co.whatcom.wa.us

Royce Buckingham
Civil Deputy Prosecuting Attorney
Whatcom County
RBucking@co.whatcom.wa.us

Andy Murphy
LeAnne Bremer
Attorneys for Phillips 66
Miller Nash Graham & Dunn LLP
Andy.Murphy@MillerNash.com

Mark Personius
Director, Planning & Development Services
Whatcom County
MPersoni@co.whatcom.wa.us

DATED and certified this 28th day of October 2019, in Eastsound, Washington.

s/ Jennifer Barcelos
Jennifer Barcelos, WSBA #43879
Attorney for Appellant,
Friends of the San Juans