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BEFORE THE WHATCOM COUNTY HEARING EXAMINER

IN RE THE MATTER OF PHILLIPS 66 )  
REVISED SEPA MDNS—LOGISTICS )  
FLEXIBILITY PROJECT )  
)  
)  
)  
APPLICANT: )  
PHILLIPS 66 FERNDALE REFINERY )  
)

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WHATCOM COUNTY SEPA  
REVISED MDNS 2019-00033  
  
File No. SEP2019-00033  
  
FRIENDS OF THE SAN JUANS  
PRE-HEARING BRIEF

## INTRODUCTION

1  
2  
3 The Phillips 66 Ferndale Refinery (“Refinery”) has applied to Whatcom County for  
4 permits to install a new 300,000-barrel external floating roof crude oil storage tank and an  
5 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the  
6 Refinery. The stated purpose of the proposed Logistics Flexibility Project (“project”) is to  
7 provide additional operating flexibility to manufacture low-sulfur marine fuels in compliance  
8 with regulatory requirements from the International Maritime Association (“IMO”), which go  
9 into effect in 2020. This proposed project requires the Refinery to be able to completely  
10 segregate low-sulfur fuel oil (and the low-sulfur crude oil used in its production) from higher  
11 sulfur fuel oil and crude oil. The project would introduce a new product line; IMO 2020-  
12 compliant fuels.

13 In filling out the required State Environmental Policy Act (“SEPA”) checklist, the  
14 Refinery did not quantify the amount or types of vessel traffic associated with this project, and  
15 thus Whatcom County was unable to assess the potential impacts of project-related vessel traffic  
16 on the Salish Sea ecosystem, including potential impacts to the region’s critically endangered  
17 Southern Resident Killer Whales, prior to issuing a revised Mitigated Determination of  
18 Nonsignificance (“MDNS”) for the project.

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

26 Although the new IMO regulatory requirements were designed to assist the shipping  
27 industry transition to low sulfur, low polluting fuels, this transition cannot take place at the  
28 expense of the critically endangered Southern Resident Killer Whales that live and feed in the

1 waters adjacent to the proposed project site. The project is inconsistent with the policy goals of  
2 Washington’s Southern Resident Killer Whale Recovery Task Force, as well as federal  
3 Endangered Species Act protections for the critically endangered Southern Resident Killer  
4 Whales. As of July 1, 2019, there are only 73 living Southern Resident Killer Whales in  
5 existence on the planet.

6 The plight of this iconic species has become so important to our state that, in March  
7 2018, Governor Jay Inslee issued an Executive Order establishing the Southern Resident Killer  
8 Whale Recovery and Task Force (“Task Force”) to “identify, prioritize, and support the  
9 implementation of a longer term action plan needed for the recovery of Southern Residents and  
10 necessary to secure a healthy and sustained population for the future.” Governor Inslee went on  
11 to declare: “...if Southern Residents were to become extinct, we would suffer an unacceptable  
12 loss to our environment, economy, and way of life.” (Exhibit W)

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

18 The November 2018 Southern Resident Orca Task Force Report identifies the threat that  
19 oil spills, in particular, play in the overall vulnerability of the Southern Resident Killer Whale  
20 population. (Exhibit X)<sup>3</sup> “In addition to the threats related to the disturbance and noise from  
21

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22  
23 <sup>1</sup> SRKW Task Force: Working Group members as of September 5, 2018, available at:  
<https://www.governor.wa.gov/sites/default/files/Working%20group%20lists%20updated%209-5-18.pdf>

24 <sup>2</sup> 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](https://www.governor.wa.gov/sites/default/files/SRKW_TF_Presentations_06.03.19.pdf)

25 <sup>3</sup> See also Exhibit F: “Due to its proximity to Alaska’s crude oil supply, Puget Sound is one of the leading petroleum  
26 refining centers in the U.S. with about 15 billion gallons of crude oil and refined petroleum products transported  
27 through it annually (Puget Sound Action Team, 2005). In marine mammals, acute exposure to petroleum products  
28 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)

1 vessels, major oil spills represent a persistent, low-probability/high-impact risk to Southern  
2 Residents. The population’s vulnerability to oil spills is magnified because so few females are of  
3 reproductive age in the population and pods often aggregate off the San Juan Islands near  
4 portions of the international shipping lanes that show greater relative oil spill risk than much of  
5 the Salish Sea.” (Exhibit X at 29)

6 Given that this proposed project involves an initial hauling of over 12 million gallons of  
7 crude oil<sup>4</sup> via marine vessel just to fill the 300,000 barrel external floating roof crude oil storage  
8 tank *a single time*, Whatcom County acted in a clearly erroneous manner in issuing a revised  
9 MDNS for this project without requiring the Refinery to provide adequate data on project-related  
10 vessel traffic and, concurrently, evaluating and mandating adequate mitigation measures for any  
11 and all impacts to the critically endangered Southern Resident Killer Whales.

12  
13 **I. THE HEARING EXAMINER SHOULD WITHDRAW THE REVISED**  
14 **MDNS UNDER THE COUNTY’S SUBSTANTIVE SEPA AUTHORITY.**

15  
16 SEPA provides broad substantive authority for any state or local government entity to  
17 deny a proposed action when “(1) the proposal would result in significant adverse impacts  
18 identified in a final or supplemental environmental impact statement...; and (2) reasonable  
19 mitigation measures are insufficient to mitigate the identified impact.” RCW 43.21C.060

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

- 23 a. In issuing the revised MDNS for this project, the Whatcom County Planning  
24 & Development Services department erred by: (1) not requiring an adequate  
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27  
28 <sup>4</sup> Using the calculation that 1 barrel equals 42 U.S. gallons, 300,000 barrels of crude oil = 12,600,000 gallons of  
crude oil.

1 assessment of the increase and/or modifications in vessel traffic and (2) not  
2 evaluating potential environmental impacts from that vessel traffic on  
3 critically endangered Southern Resident Killer Whales.

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

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

18 The standard of review for threshold determinations to bypass the SEPA requirement of  
19 preparing an EIS (and thus qualify for a DNS or MDNS) was established by the court in *Norway*  
20 *Hill Preservation and Protection Assoc. v. King County Council*, 87 Wn.2d 267, 552 P.2d 674  
21 (1976), where the initial burden was placed on the lead agency to demonstrate that actual  
22 consideration has been given to environmental factors:

23  
24 The SEPA policies of full disclosure and consideration of  
25 environmental values require actual consideration of  
26 environmental factors before a determination of no environmental  
27 significance can be made. *See Juanita Bay Valley Community*  
28 *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

1 have a complete record upon which to review a "negative threshold  
2 determination." In the absence of a record sufficient "to  
3 demonstrate that environmental factors were considered in a  
4 manner sufficient to amount to prima facie compliance with the  
5 procedural requirements of SEPA," *Juanita Bay Valley Community  
6 Ass'n v. Kirkland*, supra, a "negative threshold determination"  
7 could not be sustained upon review even under the "arbitrary or  
8 capricious" standard because the determination would lack  
9 sufficient support in the record.

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

17 The standard established by *Norway Hill* means that a lead agency's threshold  
18 determination must be based on "actual consideration of environmental factors" in order to be  
19 upheld. *Norway Hill Preservation and Protection Assoc. v. King County Council*, 87 Wn.2d 267,  
20 552 P.2d 674 (1976). Whatcom County received 29 comments on the project's initial MDNS,  
21 which was issued on July 19, 2019. Of the 29 comments received, 25 included concerns  
22 specifically about the proposed project's impacts to the critically endangered Southern Resident  
23 Killer Whales, and 22 comments specifically asked Whatcom County to reconsider the MDNS  
24 threshold determination and address the project's vessel traffic-related impacts to the critically  
25 endangered Southern Resident Killer Whales.

26 Whatcom County's Thomas Brissenden sent an email on August 8, 2019 to Phillips 66's  
27 Kenneth J. Morrill, requesting a modification to the project's SEPA checklist: "Revise section B  
28 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.)

1 The SEPA checklist that Whatcom County received on August 16, 2019 includes those  
2 requested SEPA checklist modifications. The revised MDNS, issued by Whatcom County on  
3 August 20, 2019, determined that "there are no likely significant adverse impacts to the habitat of  
4 the southern resident killer whale." However, the revised MDNS does not make any attempt to  
5 account for—or mitigate—the project’s adverse impacts to the critically endangered Southern  
6 Resident Killer Whales, nor does it offer any explanation for how the “no likely significant  
7 adverse impacts to the habitat of the southern resident killer whale” determination was reached.  
8 Further, the revised MDNS makes no mention in the full record of any review of impacts to  
9 Southern Resident Killer Whales beyond the habitat finding and there is no evidence that  
10 Whatcom County engaged in scientific research or expert review or consultation in reaching its  
11 determination.

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

19 Since Phillips 66 is proposing to add two new storage tanks to the Refinery, which  
20 comprise a 9.6% increase in total storage capacity<sup>5</sup>, Whatcom County should have required a  
21 definitive statement regarding project-related vessel traffic projections. If there was not enough  
22 information in the record for Whatcom County to adequately evaluate the potential impacts to  
23 Southern Resident Killer Whales or to document a worst-case analysis, the correct course of  
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26 <sup>5</sup> The Transportation Study for Ferndale Refinery Logistics Flexibility Project (Phillips 66 Exhibit 11) calculates  
27 the increased storage capacity as increasing “by nearly 10 percent, from 3,969,000 bbl to 4,329,000 bbl.” The  
28 360,000 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.

1 action would have been to require an Environmental Impact Statement (“EIS”) for this project.

- 2  
3 b. Whatcom County has a duty to withdraw the MDNS, given that the MDNS  
4 was procured by a lack of material disclosure.

5  
6 The SEPA checklist, upon which the revised MDNS was procured, did not disclose the  
7 project-related increase in vessel traffic as a result of the passage of Washington State’s  
8 ENGROSSED SUBSTITUTE SENATE BILL 5579 CRUDE OIL BY RAIL—VAPOR  
9 PRESSURE (“ESSB 5579”), which was signed into law by the Governor on May 9, 2019.  
10 (Exhibit V) A public hearing on ESSB 5579 was held before the House Environment & Energy  
11 Committee on March 19, 2019, where six employees of the Phillips 66 Ferndale Refinery  
12 testified as opposed to this bill. (Exhibit U)

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

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

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

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<sup>6</sup> 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.)



1 law (Exhibit V), 149 days after the March 19, 2019 public hearing (Exhibit U), and 18 days after  
2 ESSB 5579's July 28, 2019 effective date. (Exhibit V)

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

- 11  
12  
13 c. Whatcom County has a duty to withdraw the MDNS, if there is significant  
14 new information on a proposal's probable significant adverse environmental  
15 impacts

16 A lead agency is required to withdraw a DNS if there is significant new information  
17 indicating, or on, a proposal's probable significant adverse environmental impacts. WAC 197-11-  
18 340(3)(a)(ii). After the revised MDNS was issued on August 20, 2019, Jolie Rhinehart submitted  
19 a comment letter on September 23, 2019 re: the Pipeline and Hazardous Materials Safety  
20 Administration (PHMSA) Notice: Hazardous Materials: Washington Crude Oil By Rail-Vapor  
21 Pressure Requirements (PHMSA-2019-0149-4120). (Exhibit T) This comment letter from the  
22 Phillips 66 Ferndale Refinery Manager to the US Department of Transportation clearly shows  
23 the connection between ESSB 5579 and the proposed project:

24  
25 Because SB5579 has forced Phillips 66 to drastically reduce the volume of  
26 Bakken crude oil it can receive via rail, Phillips 66 intends to obtain crude  
27 oil from other sources that can be substituted for low-sulfur Bakken crude  
28 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

1 the Ferndale Refinery at its marine terminal. In addition, although these  
2 foreign crude oils are of similar quality in terms of sulfur content, their  
3 relatively significant distance from the Ferndale Refinery will likely result  
4 in (as compared to Bakken crude oil): increased transportation emissions;  
5 increased vessel traffic in the Salish Sea... (Exhibit T)

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

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

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

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

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

28 The proposed new storage tanks and production of low sulfur marine fuel

1 at the Refinery would not, in itself, increase or decrease the number of  
2 vessel calls at the Refinery or the size and type of vessels. The Project  
3 would only change the type of material carried on vessels that call at the  
4 Marine Terminal. Therefore, Project operations would have no impact on  
5 vessel traffic in the study area...the Project would not change the  
6 Refinery's throughput, and thus would not change the number of vessel  
7 calls at the Marine Terminal or the average number of daily vessel  
8 movements in the northern Salish Sea. (Phillips 66 Exhibit 11)

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

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

19 As noted on its public website, Phillips 66 currently purchases crude oil and condensate  
20 through its North American Supply and Trading business operation.<sup>7</sup> Alaska is a primary source  
21 of crude oil that the Phillips 66 Ferndale Refinery receives via Polar Tankers, which are owned  
22 and operated by ConocoPhillips. These tankers that transport Alaska North slope crude oil to the  
23 Refinery are considered to be “best-of-class tankers” and have even been awarded the prestigious  
24 ECOPRO award from Washington State's Department of Ecology for achieving excellence in  
25 marine safety and environmental stewardship.<sup>8</sup>

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

<sup>7</sup> <https://www.phillips66.com/customers/crude-oil>

<sup>8</sup> <https://www.marinelink.com/news/receives-tankers-ecology331529>

1 records for these tankers. If ConocoPhillips Polar Tankers were to be replaced by tankers that  
2 have lower engineering, safety, quality, and operational standards, and environmental  
3 management systems, the Transportation Study is incorrect in concluding that the Logistics  
4 Flexibility Project operations would have no impact on vessel traffic, or its associated  
5 environmental impacts to the Salish Sea ecosystem.

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

21 Given the new information presented in this brief, Whatcom County has a duty to  
22 withdraw the MDNS for this project, as a lead agency must withdraw and reconsider its DNS  
23 where new information suggests likely significant adverse environmental impacts. WAC 197-11-  
24 340(3)(a)(ii-iii); *Crawford v. City of Shoreline*, 126 Wn. App. 1011 (2005).

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28 <sup>9</sup> <https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Industrial-facilities-permits/Green-Apple>

1  
2 **II. THE REVISED MDNS IS INCONSISTENT WITH THE INTERIM**  
3 **MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF**  
4 **APPLICATIONS AND PERMITS FOR NEW OR EXPANDED**  
5 **FACILITIES IN THE CHERRY POINT UGA.**

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

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

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

1 **VII. CONCLUSION**

2  
3 Friends of the San Juans asks the Hearing Examiner to withdraw Whatcom County’s MDNS  
4 threshold determination for this project under Washington’s Executive Order 18-02, the  
5 County’s substantive SEPA authority, and Whatcom County Code.  
6

7  
8 Respectfully Submitted this 28<sup>th</sup> day of October, 2019.  
9

10 **FRIENDS OF THE SAN JUANS**

11  
12 By: s/ Jennifer Barcelos  
13 Jennifer Barcelos, WSBA #43879  
14 Attorney for Appellant,  
15 Friends of the San Juans  
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**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:

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

s/ Jennifer Barcelos  
Jennifer Barcelos, WSBA #43879  
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