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BEFORE THE HEARING EXAMINER
IN AND FOR WHATCOM COUNTY

In re: Administrative Appeal of a Revised SEPA
Mitigated Determination

SEPA-APL 2019-0011
Revised MDNS 2019-0033

Appellant: Friends of the San Juans
Applicant: Phillips 66 Ferndale Refinery

FRIENDS OF THE SAN JUANS'
RESPONSE TO PHILLIPS 66'S REQUEST
FOR RECONSIDERATION

Friends of the San Juans is concerned that Phillips 66 is using an administrative Request for Reconsideration to challenge the substance of the Hearing Examiner's final November 17, 2019 decision in this matter, as well as some of the mitigating conditions required by Whatcom County in the August 20, 2019 Revised SEPA Mitigated Determination of Non-significance (MDNS).

With the exception of Friends' stipulation to Phillips 66's argument regarding a minor factual error in "Condition H" of the Hearing Examiner's November 17, 2019 final decision, Friends asks that the Hearing Examiner uphold the procedural integrity of Whatcom County Code and request that Phillips 66 defer any substantive appeals and arguments to Superior Court. WCC 22.05.160(2), WCC 22.05.020, RCW 36.70C.040.

1 **A. Standard of Review and Venue**

2 Phillips 66 is using the Business Rules of the Whatcom County Hearing Examiner,
3 specifically Business Rule 5.5, to challenge the substance of the Hearing Examiner’s final
4 decision. This rule provides:

5 In cases of final decisions, a request for reconsideration may be filed in writing by
6 an applicant or any opponent of record within three (3) days of the date of decision.
7 ***The request must be based upon error or omission in the content of the decision,***
8 and although the Hearing Examiner is not required to modify his original decision
9 to reflect the comments received thereon, he may initiate such action as is deemed
10 appropriate. Where the Hearing Examiner determines that the grounds cited for
11 reconsideration do not warrant modification of the original notice of decision, he
12 shall provide the requesting party with written notice of his determination prior to
13 the expiration of the time set out herein for the filing of an appeal. (*emphasis added*)

14 Under Business Rule 5.5, Phillips 66’s request “must be based upon error or omission in the
15 context of the decision...”, though Phillips 66 goes far beyond the “error or omission” standard
16 outlined in Rule 5.5. by raising substantive factual and legal arguments. Given the nature of the
17 arguments presented to the Hearing Examiner in Phillips 66’s November 20, 2019 Request for
18 Reconsideration, the proper procedural venue to appeal the substance of the Hearing Examiner’s
19 final decision is Superior Court. WCC 22.05.160(2), WCC 22.05.020.

20 **B. Hearing Examiner Final Decision Condition E**

21 Phillips 66 has expressed concern over the Hearing Examiner’s modification of
22 Condition E to limit usage of the proposed new tanks and to restrict movement of crude oil at the
23 refinery. Revised Condition E has been modified as follows:

24 The two new storage tanks to be permitted under SEPA 2019-00033 shall be
25 utilized only for the separation and storage of low sulfur crude oil intended for
26 production of IMO compliant low sulfur marine fuels and the resultant low sulfur
fuel-oil. To ensure compliance with Ordinance 2019-049, the tanks shall not be
utilized for storage of crude oil ~~to be exported, unrefined, from the marine terminal
for any other purpose except for the refining of that crude oil on site; crude oil shall
not be exported or removed for other purposes.~~

Decision at 19 (emphasis added).

1 As the Hearing Examiner concluded on page 15 of the Decision, “Condition E was
2 thoughtfully and appropriately put forward by the County after it was proffered by the
3 Applicant.” This condition was not only volunteered by the Applicant, but the terms of the
4 condition were not challenged by the Applicant through a timely appeal of the August 20, 2019
5 revised MDNS. Any substantive appeal of the conditions of the August 20, 2019 revised MDNS
6 should have been appealed to the Hearing Examiner by August 30, 2019, within 10 days of
7 Whatcom County’s issuance of that revised MDNS. August 20, 2019 Revised SEPA MDNS at 2.
8 Any substantive appeal of the Hearing Examiner’s final decision should be appealed to Superior
9 Court. WCC 22.05.160(2), WCC 22.05.020, RCW 36.70C.040.

10 In addition, Friends is concerned by the Applicant’s decision to raise new facts in the
11 Request for Reconsideration. Under Business Rule 5.5 of the Whatcom County Hearing
12 Examiner, which sets forth the standard for requests for reconsideration, there is no provision for
13 the Applicant to make changes to the initial application or SEPA Checklist. The Applicant did
14 not include any information in the SEPA Checklist regarding the use of the proposed new
15 storage tanks “to store other crude oil intermediates” and/or “unfinished products” and/or the use
16 of these storage tanks for “the operational flexibility that the new tanks can and should provide.”
17 The proposed project has been newly described by the Applicant:

18 While Phillips 66 intends to use the tanks primarily for production of IMO-compliant
19 lower-sulfur marine fuels, intermediate fuel components, and crude oil storage, there are
20 occasionally circumstances where refinery operations demand that the tanks be available
21 to store other crude oil intermediates, which are products generated at the refinery that
22 require further refining.

23 Phillips 66 Request for Reconsideration at 3-4 (emphasis added).

24 Although the word “flexibility” was used in the Applicant’s SEPA Checklist to describe
25 the project, it was only used to specifically reference “the additional operating flexibility needed
26 to comply with the pending International Maritime Organization (IMO) regulatory
requirements.” August 20, 2019 Revised MDNS Project Description at 1.

1 The SEPA Checklist descriptions of the new storage tanks do not qualify their use with
2 words such as “primarily” or other qualifiers: “The additional crude storage tank is needed to
3 segregate the lower sulfur crude for processing and the additional fuel oil tank is needed to
4 segregate the low sulfur fuel oil product to maintain quality standards meet the new fuel
5 specifications.” SEPA Checklist #11 at 3. If the Applicant had included this type of qualifying
6 language and expanded scope of the proposed project in the SEPA Checklist, the substance of
7 Friends’ public comments, appeal, exhibits, pre-hearing brief, and expert witness testimony
8 would have addressed these points with additional information, documentation, and legal
9 analysis.

10 Finally, Friends’ concern related to Ordinance 2019-049 is specific to the use of the word
11 “export” as opposed to “shipment.” Friends requests that Whatcom County require the
12 Applicant’s mitigating conditions be articulated in such a way as to be consistent with the plain
13 language of Ordinance 2019-049, which addresses the “shipment of unrefined fossil fuels” and
14 not the “export of unrefined fossil fuels.”

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16 **C. Hearing Examiner Final Decision Condition F**

17 The Hearing Examiner’s modified Condition F seeks—justifiably—to modify language
18 in the revised MDNS that was unreasonably vague. In addition, the Hearing Examiner modified
19 Condition F with additional language that ensures Whatcom County’s ability to monitor marine
20 vessel traffic associated with the project, which is necessary to ensure that the project does not
21 cause significant and adverse impacts to the critically endangered Southern Resident Killer
22 Whales’ designated critical habitat. If the information presented by the Applicant in the SEPA
23 Checklist is accurate—and there is, in fact, no material increase in cumulative vessel traffic
24 because of this project—Phillips 66 will not be impacted by the Hearing Examiner’s
25 modifications to this condition because additional SEPA review of the project would not be
26 triggered.

1 The County, in the revised MDNS, concluded that there would be “no likely significant
2 adverse impacts to the habitat of the southern resident killer whale,” based on relied upon facts
3 presented by the Applicant in the SEPA Checklist and through other correspondence during the
4 application process.¹ If these facts have changed or were misrepresented, the impacts to the
5 Southern Resident Killer Whales and their designated critical habitat also potentially changes
6 and should be reevaluated by the County. If there is a material increase in vessel traffic related to
7 the use of the new storage tanks, which increases storage and associated operational capacity at
8 the refinery by 9.6%, Phillips 66 should have to submit that data to the County and allow the
9 County, under its SEPA authority, to adequately evaluate how the full range of uses of the new
10 storage tanks and all associated increases in vessel traffic could potentially impact the Southern
11 Resident Killer Whales and their designated critical habitat.²

12 Given the information disclosed by the Applicant in the Request for Reconsideration, and
13 if the intended use of the two new storage tanks is for storing “other crude intermediates” and
14 other non-project related “operational flexibility”—in addition to their stated use for the
15 manufacture of IMO compliant fuels—and given the fact that the Applicant is challenging the
16 Hearing Examiner’s final decision that modifies the MDNS condition regarding vessel traffic
17 monitoring that could trigger additional SEPA review, Friends is concerned that the Logistics
18 Flexibility Project was misrepresented in the SEPA Checklist and could effectively increase the
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21 ¹ Friends of the San Juans does not concede that there are no significant adverse impacts from this proposed project
22 to the habitat of the Southern Resident Killer Whale. Potential project-related impacts to the Southern Resident
23 Killer Whales have not been identified or addressed in this SEPA review to date.

24 ² The Transportation Study for Ferndale Refinery Logistics Flexibility Project (Phillips 66 Exhibit 11) calculates the
25 increased storage capacity as increasing “by nearly 10 percent, from 3,969,000 bbl to 4,329,000 bbl.” The 360,000
26 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 operating capacity of the Phillips 66 Ferndale Refinery without adequate environmental review.
2 For these reasons, we strongly urge the Hearing Examiner to withhold the clarifying language
3 used to modify Condition F.

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5 **D. Hearing Examiner Final Decision Condition H**

6 Friends agrees with the request for revision raised by Phillips 66 regarding Condition H,
7 which currently provides that, "The applicant shall arrange for the vessel that initially fills the
8 new crude oil tank to be large enough to fill the entire crude tank including the heel, and in fact
9 fill the entire crude oil tank including the heel on its initial import of fuel to the crude oil tank."
10 Decision at 20 (emphasis added).

11 Phillips 66 asked, and Friends supports the request, that the Hearing Examiner revise
12 Condition H to replace the word "fuel" with the phrase "crude oil" so that it reads: "...the entire
13 crude oil tank including the heel on its initial import of crude oil to the crude oil tank." This was
14 likely a minor factual mistake on the part of the Hearing Examiner and we believe that this is the
15 only issue appropriately raised by Phillips 66 under Business Rule 5.5 in this matter.

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17 * * *

18 The Business Rules of the Whatcom County Hearing Examiner do not permit Phillips 66
19 to use an administrative request for reconsideration to raise new and substantive issues of law
20 and fact or to argue on the merits of the original or revised conditions of the MDNS. Any issues
21 raised under Business Rule 5.5 "must be based upon error or omission in the content of the
22 decision..." Given the nature of the arguments presented to the Hearing Examiner in Phillips
23 66's November 20, 2019 Request for Reconsideration, the proper procedural venue to appeal the
24 substance of the Hearing Examiner's final decision is Superior Court. WCC 22.05.160(2), WCC
25 22.05.020.
26

1 Respectfully Submitted this 23rd day of November, 2019.
2

3 FRIENDS OF THE SAN JUANS
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5 By: s/ Jennifer Barcelos
6 Jennifer Barcelos, WSBA #43879
7 Attorney for Appellant,
8 Friends of the San Juans
9 jennifer@sanjuans.org
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1 **DECLARATION OF SERVICE**

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3 I, Jennifer Barcelos, declare under penalty of perjury and the laws of the State of
4 Washington that, on November 23, 2019, I caused the foregoing response to be served on the
5 persons listed below by email:

6
7 The Honorable Rajeev Majumdar
8 Whatcom County Hearing Examiner
9 c/o Carole Magner
CMagner@co.whatcom.wa.us
hearingexamineroffice@co.whatcom.wa.us

10
11 Royce Buckingham
12 Civil Deputy Prosecuting Attorney
13 Whatcom County
RBucking@co.whatcom.wa.us

14
15 Andy Murphy
16 LeAnne Bremer
17 Attorneys for Phillips 66
Miller Nash Graham & Dunn LLP
Andy.Murphy@MillerNash.com

18
19 Mark Personius
20 Director, Planning & Development Services
21 Whatcom County
MPersoni@co.whatcom.wa.us

22 DATED and certified this 23rd day of November 2019, in Eastsound, Washington.

23
24 s/ Jennifer Barcelos
25 Jennifer Barcelos, WSBA #43879
26 Attorney for Appellant,
Friends of the San Juans