

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-778-5900, TTY 800-833-6384
360-778-5901 Fax



Mark Personius, AICP
Director

WHATCOM COUNTY
PLANNING & DEVELOPMENT SERVICES

AUG 30 2019 *NAS*

SEPA Appeal Form

RECEIVED

NOTE: Fees will be assessed in accordance with the Whatcom County Unified Fee Schedule (UFS) in effect at the time of application submittal. Please contact Planning and Development Services to determine project specific fees. Click [here](#) to see the 2019/2020 UFS.

Per UFS 2843 all permits and applications are subject to a Technology fee. The fee is calculated on the permit/application fees due.

Appeal of: Determination of Significance
 Determination of Non-Significance
 Mitigated Determination of Non-Significance

Appellant:

Name Friends of the San Juans Phone (360) 378-2319
Address PO Box 1344 City Friday Harbor
State WA Zip 98250 Email Jennifer Barcelos: jennifer@sanjuans.org
Property Interest of Appellant The Salish Sea and SRKW Designated Critical Habitat

Property Owner:

Name Phillips 66 Ferndale Refinery c/o Ken Morrill Phone _____
Address 3901 Unick Road City Ferndale
State WA Zip 98248 Email Kenneth.j.morrill@p66.com

Date Determination Became Final: August 20, 2019

Associated SEPA file: SEP 2019 - 00033

Assessor's Parcel Number(s): 390133197340

A Statement is Attached to this Application Containing:

- Why I believe the determination or interpretation is not correct, **and**
- What I believe to be the correct determination or interpretation, **and**
- How the decision adversely affects me or my property

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I/ We certify that all of the above statements and the statements contained in any papers or plans submitted herewith are true to the best of my/our knowledge and belief.

Joseph Bond
Signature of Appellant

8/29/19
Date

Joseph Bond
Signature of Attorney/ Agent

8/29/19
Date

I certify that I know or have satisfactory evidence that Jennifer K Barrios is/are the person(s) who appeared before me, and said person(s) acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in this instrument.

Dated 8/29/2019



Notary Signature: Cliver M Escobar
Printed Name: Cliver M Escobar
Notary Public in and for the State of Washington
Residing at Bellingham WA
My appointment expires: 09/02/2019

I certify that I know or have satisfactory evidence that _____ is/are the person(s) who appeared before me, and said person(s) acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in this instrument.

Dated _____

Notary Signature: _____
Printed Name: _____
Notary Public in and for the State of Washington
Residing at _____
My appointment expires: ____/____/____

For County Use Only:

Appeal Number: APL 2019 - 00011 Appeal Fee: \$ 515.00
Receipt Number: 520100000000024811 Date Received: 8/30/19 - By NAS



Friends of the San Juans
Attachment to the SEPA Appeal Form
REVISED SEPA MDNS SEP2019-00033

AUG 30 2019

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Why I believe the determination or interpretation is not correct:

Friends of the San Juans supports the following changes and additional information in the revised State Environmental Policy Act (SEPA) Mitigated Determination of Nonsignificance SEPA Checklist:

- A. The inclusion of the critically endangered Southern Resident Killer Whales in the SEPA checklist¹ (notwithstanding the fact that the list of threatened and endangered species known to be on or near the site that are included in the revised SEPA checklist is incomplete; as of 2015, Washington State listed 51 species of concern in the Salish Sea²).
- B. Clarification that “The Renewable Diesel project is a separate project from a different project proponent and environmental impacts will be reviewed separately.”³

However, we challenge Whatcom County’s State Environmental Policy Act Mitigated Determination of Nonsignificance (MDNS) for the Phillips 66 Ferndale Refinery’s proposal to construct a new 300,000-barrel crude oil storage tank and a new 80,000-barrel fuel oil storage tank (for the manufacture and transport of a new product line, low sulfur marine diesel fuels) for the following reasons:

- 1) The Phillips 66 Ferndale Refinery did not quantify—and Whatcom County did not require an assessment of—the additional vessel traffic associated with this project.

Both the original MDNS and the revised MDNS include this statement:

Although we cannot predict with any appreciable certainty the number of marine vessels that will call upon the Phillips 66 marine terminal in the future, we can say with complete certainty that the Logistics Flexibility project will not materially affect the number of marine vessels utilizing the Phillips 66 marine terminal in any particular

¹ Revised SEPA Mitigated Determination of Nonsignificance. Whatcom County, SEP2019-00033. Date of Issuance: Aug. 20, 2019. SEPA Environmental Checklist at 8.

² Zier, J., and Gaydos, J.K., 2016. The growing number of species of concern in the Salish Sea suggests ecosystem decay is outpacing recovery. Vancouver: British Columbia: Proceedings of the 2016 Salish Sea Ecosystem Conference at 17: <https://pdfs.semanticscholar.org/c6af/39dcbdfce5b0845cdeb4bb318ea839c6f15c.pdf> Accessed August 23, 2019.

³ See *supra* note 1, at 2.

future period. This is because the Logistics Flexibility project will not increase refinery throughput capacity.⁴

However, the following information about the additional vessel traffic required to initially fill the new crude oil storage tank was included with the original MDNS but omitted from the revised MDNS:

Refinery operations will essentially continue in the same manner – and quantity – as they did preceding implementation of the project (we say in this paragraph’s first sentence not “materially affect” because while the project will marginally increase storage capacity, the “increase” in filling up the increased storage capacity is a one-time increase and is essentially noise with n the overall material input and output movements throughout any given time period – i.e., the refinery throughput is not increased and, therefore, after the first time the new tanks are filled the feedstock input and product output remains consistent with operations prior to project implementation).⁵

In addition, the revised MDNS clearly states that low sulfur crude oil will be delivered at the marine terminal:

The low sulfur crude and low sulfur fuel oil products will be transported over water via the marine terminal.⁶

The revised MDNS implies that in order to manufacture the new low sulfur marine fuels from low sulfur crude oil, while maintaining the current refinery throughput capacity, the refinery will need to increase the input of low sulfur crude oil.

The revised MDNS does not address or quantify any increase in vessel traffic required to initially fill the new crude oil storage tank. The revised MDNS provides no explanation as to how the refinery will manufacture the new product line, low sulfur marine fuels, without increasing the feedstock input of low sulfur crude oil at the marine terminal. Will additional low sulfur crude oil be required in lieu of the high sulfur crude oil received from the Puget Sound Pipeline? The revised MDNS does not address or quantify any increase in vessel traffic that would be required to increase the feedstock input of low sulfur crude oil.

2) The Phillips 66 Ferndale Refinery did not quantify—and Whatcom County did not require an assessment of—the project-related vessel traffic’s potential adverse impacts. As a result,

⁴ See *supra* note 1, at 21; see also Email from Kenneth J. Morrill, Senior Project Engineer, Phillips 66 Ferndale Refinery, to Mark Personius, Director, Whatcom County Planning & Development Services Department (July 3, 2019, 3:23 PM PDT) (Attached to SEPA Mitigated Determination of Nonsignificance. Whatcom County, SEP2019-00033. Date of Issuance: July 19, 2019).

⁵ *Id.*

⁶ See *supra* note 1, at 16.

Whatcom County allowed the Phillips 66 Ferndale Refinery to omit any disclosure of the potential impacts from project-related vessel traffic.

The revised MDNS does address the habitat of the Southern Resident Killer Whales (presumably the Designated Critical Habitat for Southern Resident Killer Whales⁷):

According to the SEPA checklist prepared by the applicant, there is no material increase in marine vessel traffic expected as a consequence of the proposed project. Therefore, there are no likely significant adverse impacts to the habitat of endangered southern resident killer whales...⁸

However, the revised MDNS did not address any of the potential adverse impacts to Southern Resident Killer Whales, other than habitat impacts, from the proposed project's additional marine vessel traffic.

3) At any time, a SEPA Responsible Official could withdraw an MDNS based on new information or misinformation.⁹ However, 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 prove to be untrue. The revised MDNS states:

Vessel trips to/from the marine terminal that cumulatively exceed the range of average annual marine fuel oil activity in the 2017-2019 period (as identified in the ANTS) may be subject to additional SEPA review.¹⁰

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.

4) 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. The revised MDNS states (and see also [WAC 173-184-100](#) Advance notice of transfer):

⁷ See NOAA Fisheries, Northwest Region. Nov., 2006. Designated Critical Habitat for Southern Resident Killer Whales,

https://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/killer_whales/SRKW-CH-Map.jpg (last visited July 25, 2019).

⁸ Revised SEPA Mitigated Determination of Nonsignificance. Whatcom County, SEP2019-00033. Date of Issuance: Aug. 20, 2019 at 4.

⁹ WASH. ADMIN. CODE § 197-11-340 (1995).

¹⁰ See *supra* note 8, at 4.

To ensure there is no significant increase in marine vessel traffic resulting from the proposed project and, therefore, no likely significant adverse impacts to the habitat of endangered southern resident killer whales, the applicant shall monitor and report annually to PDS on the vessel trip activity at the marine terminal for inbound and outbound transport of inputs/outputs for processing marine fuel oils. The applicant shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track and report marine fuel shipments by vessel.¹¹

In response to our question asking Ecology if it verifies the ANTS data received, Ecology staff stated:

We do inspect a number of transfers, however we do not as a practice do regular verification of ANT entries. If we were aware of entity not complying with the ANT requirements we would take corrective action.¹²

5) Friends of the San Juans appreciates the following requirement that is included in the revised MDNS:

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.¹³

However, this requirement does not explicitly prohibit the transport of crude oil to other U.S.-based destinations. The use of the word “export” could be interpreted narrowly as transport to a foreign country. The transport of crude to anywhere in the U.S. outside the Salish Sea would have the same potential for adverse impacts to the Salish Sea and Southern Resident Killer Whales as would the export of crude oil to a foreign country.

What I believe to be the correct determination or interpretation

Whatcom County should reconsider the MDNS threshold determination and:

1. Require the Phillips 66 Ferndale Refinery to quantify the project-related vessel traffic required to initially fill the new crude oil storage tank and any project-related vessel traffic required to increase the feedstock input of low sulfur crude oil at the marine terminal for the manufacture of the new product, low sulfur marine fuel oil.

¹¹ *Id.*

¹² Email from Rob Dengel, Statewide Resources Section Manager, Washington Department of Ecology Spill Prevention, Preparedness & Response Program, to Lovel Pratt, Marine Protection Program Director, Friends of the San Juans (Aug. 23, 2019, 10:54 AM PDT) (on file with Lovel Pratt).

¹³ See *supra* note 8, at 4.

2. Require the Phillips 66 Ferndale Refinery to evaluate the project-related vessel traffic's potential adverse impacts, including oil spill risk, and specifically the potential adverse impacts to the critically endangered Southern Resident Killer Whales and their Designated Critical Habitat, the Salish Sea ecosystem, and neighboring communities.
3. Revise the MDNS with language clearly stating Whatcom County's intent to withdraw the MDNS and conduct additional SEPA review should vessel trips to/from the marine terminal exceed the average activity from the 2017-2019 period.
4. Require the vessel traffic at the Phillips 66 Ferndale Refinery's marine terminal to be independently monitored and verify the ANTS data that the Phillips 66 Ferndale Refinery submits to the Department of Ecology.

How the decision adversely affects me or my property

Friends of the San Juans is appealing this MDNS in order to protect the Salish Sea, the critically endangered Southern Resident Killer Whales,¹⁴ and the Southern Resident Killer Whales' Designated Critical Habitat.¹⁵

Friends of the San Juans represents over 2,000 members and works with diverse stakeholders, including citizens, committees, tribal and governmental agencies, and other non-profit organizations in the transboundary region of the Salish Sea to protect and restore the San Juan Islands and the Salish Sea for people and nature—since 1979. Friends of the San Juans works to protect and recover the 113 endangered species in the Salish Sea, with the most iconic being the Southern Resident Killer Whales. In 2001, Friends of the San Juans was an original co-competitor for the federal listing of the Southern Resident Killer Whales under the Endangered Species Act. The protection and recovery of the Southern Residents continues to be one of our top priorities.

Marine terminal projects that increase vessel traffic in the Salish Sea negatively impact natural resources.¹⁶ Southern Resident Killer Whales are listed as Endangered under the Federal Endangered Species Act, 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.¹⁷

¹⁴ Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 50 C.F.R. § 224 2005.

¹⁵ See *supra* note 7.

¹⁶ See Gaydos JK, Thixton S, Donatuto J (2015) Evaluating Threats in Multinational Marine Ecosystems: A Coast Salish First Nations and Tribal Perspective, <https://doi.org/10.1371/journal.pone.0144861> (last visited Aug. 28, 2019).

¹⁷ See National Marine Fisheries Service. Recovery Plan for Southern Resident Killer Whales (*Orcinus orca*) (National Marine Fisheries Service Northwest Region, Seattle, 2008), <https://repository.library.noaa.gov/view/noaa/15975> (last visited Aug. 28, 2019).

Large commercial ships impact the Southern Residents' ability to communicate and successfully hunt (using echolocation) for scarce prey.¹⁸ 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." While limited prey availability is the most important factor affecting Southern Residents, the amount of increase in prey required for their population to sustain and thrive is not feasibly achievable. However, the population viability analysis further states, "Reducing acoustic disturbance by 50% combined with increasing Chinook by 15% would allow the population to reach 2.3% growth."¹⁹ Other vessel traffic impacts include direct vessel strikes,²⁰ hearing loss, and behavioral changes.²¹

Southern Resident Killer Whales were listed as Endangered under the Endangered Species Act, in part, because of concerns about potential oil spill impacts.²² A report from the National Marine Fisheries Service states, "Their small population size and social structure also puts them at risk for a catastrophic event, such as an oil spill, that could impact the entire population."²³

¹⁸ See Veirs S, Veirs V, Wood JD. 2016. Ship noise extends to frequencies used for echolocation by endangered killer whales, <https://doi.org/10.7717/peerj.1657> (last visited Aug. 28, 2019).

¹⁹ See R. C. Lacy, R. Williams, E. Ashe, K. C. Balcomb III, L. J. Brent, C. W. Clark, D. P. Croft, D. Giles, M. MacDuffee and P. C. Pacquet, Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans, *Sci Rep.*, 2017 at 1.

²⁰ See Ferrara, G.A., T.M. Mongillo, L.M. Barre. 2017. Reducing disturbance from vessels to Southern Resident killer whales: Assessing the effectiveness of the 2011 federal regulations in advancing recovery goals. NOAA Tech. Memo. NMFS-OPR-58 at 76 and *see also* Fisheries and Oceans Canada, Necropsy results: Southern Resident Killer Whale J34, July 22, 2019, <https://www.pac.dfo-mpo.gc.ca/fm-gp/species-especies/mammals-mammiferes/j34-eng.html> (last visited July 25, 2019).

²¹ See Holt, M.M. 2008. Sound exposure and Southern Resident killer whales (*Orcinus orca*): A review of current knowledge and data gaps. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-89 at 59, https://www.nwfsc.noaa.gov/assets/25/666_03042008_154832_OrcaSoundExposureTM89Final.pdf (last visited Aug. 28, 2019).

²² See *supra* note 14.

²³ National Marine Fisheries Service. *Southern Resident Killer Whales (Orcinus orca) 5-Year Review: Summary and Evaluation*, http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/marine_mammals/kw-review-2016.pdf (last visited Aug. 28, 2019).