

## WHATCOM COUNTY HEARING EXAMINER

*In re: Administrative Appeal of a Revised  
SEPA Mitigated Determination*

Appeal by Friends of the San Juans

No. SEPA-APL 2019-0011  
Revised MDNS 2019-0033

ORDER ON MOTION FOR  
RECONSIDERATION

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### **BACKGROUND AND REVIEW ON RECONSIDERATION**

The hearing examiner notified the parties of its decision on the 18<sup>th</sup> day of November 2019, the first business day after issuing its decision on the 17<sup>th</sup>. On or about the 21<sup>st</sup> day of November, 2019 the applicant made motion for reconsideration pursuant to §5.5 of the Business Rules of the Whatcom County Hearing Examiner. On or about the 23<sup>rd</sup> day of November 2019 the appellant filed a response.

Business Rule 5.5 sets forth the standards for requests for reconsideration, and provides the following:

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

Under Business Rule 5.5, this request is timely. The Hearing Examiner's office notified the parties of its decision on Monday, November 18<sup>th</sup>, 2019, which is the appropriate date for a calculation. This request has been submitted within three days of the notification date of the Decision, which is the earliest possible date the parties could have known of the decision.

The applicant asked for revisions or reconsideration on Conditions E, F, and H. Under Business Rule 5.5, the request for reconsideration “must be based upon error or omission in the context of the decision...”, and does not invite the introduction of new facts or legal arguments

into the record. The reconsideration rule does not permit a party to use an administrative request for reconsideration to raise new and substantive issues of law and fact or to argue on the merits of the original or revised conditions of the MDNS. The hearing examiner will ignore all new facts or legal arguments as to the underlying matter as nullities, and focus on issues of actual error or omission.

**Condition H**

Condition H as issued provided that, "The applicant shall arrange for the vessel that initially fills the new crude oil tank to be large enough to fill the entire crude tank including the heel, and in fact fill the entire crude oil tank including the heel on its initial import of *fuel* to the crude oil tank." (emphasis added). Fuel is the output of the refinery process that yields IMO-compliant fuel, not the input. The applicant had voluntarily offered to address the initial filling of the crude tank with crude oil, but the Hearing Examiner erroneously drafted the word "fuel" instead of crude oil. Condition H will be revised to correct for the error.

**Condition E**

The Hearing Examiner did not rely upon an interim ordinance imposing a six-month moratorium as a basis for the condition. The applicant, however, did appear to rely on the standards outlined in that ordinance when it was voluntarily proffered by the Applicant to the County as a voluntary condition. The facts on the record show that the representation put forward by the Applicant was in response and to address public concern, and to dissuade the County from requiring additional study and grant an expedited process.

The substance of Condition E, which has not changed from its original imposition in the Revised MDNS, was not challenged by the applicant through a timely appeal of the August 20, 2019 revised MDNS. Any substantive appeal of the conditions of the August 20, 2019 revised MDNS should have been appealed to the Hearing Examiner by August 30, 2019, within 10 days of Whatcom County's issuance of that revised MDNS.

The language of Condition E was modified by the Hearing Examiner only to the extent that it was necessary to correct language that was erroneously vague and to give the intended and apparent meaning based on the factual record. The fact finding and condition shall be further revised to prevent confusion and remove any misleading commentary.

**Condition F**

This condition as clearly put in place by the County for appropriate purposes within their purview, including but not limited “[t]o ensure there is... no likely significant adverse impacts to the habitat of endangered southern resident killer whales...”

The substance of Condition F, which has not changed from its original imposition in the Revised MDNS, was not challenged by the applicant through a timely appeal of the August 20, 2019 revised MDNS. Any substantive appeal of the conditions of the August 20, 2019 revised MDNS should have been appealed to the Hearing Examiner by August 30, 2019, within 10 days of Whatcom County’s issuance of that revised MDNS.

The language of Condition F was modified by the Hearing Examiner only to the extent that it was necessary to correct language that was erroneously vague and to give the appropriate purpose and meaning based on the factual record. The fact finding, conclusions of law, and condition shall be further revised to prevent confusion and remove any misleading commentary.

**ORDER**

With regards to the facts and law argued and contained in the record, and the applicable portions of the arguments made by the parties as to omissions and errors, the Hearing Examiner revises the original Findings of Fact, Conclusions of Law, and Decision as modified and filed this same date.

ENTERED this 26<sup>th</sup> day of November 2019, pursuant to authority granted under the Laws of the State of Washington and Whatcom County.



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Rajeev D. Majumdar,  
Whatcom County Hearing Examiner *Pro Tem*