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WHATCOM COUNTY
WASHINGTON

IN THE SUPERIOR COURT OF WASHINGTON
FOR WHATCOM COUNTY

PHILLIPS 66 COMPANY, a Delaware
company;

Petitioner,

v.

WHATCOM COUNTY WASHINGTON
and FRIENDS OF THE SAN JUANS, a
Washington nonprofit corporation,

Respondents.

Case No. 19-2-02360-37

PETITIONER'S REPLY BRIEF

In unchallenged findings of fact, the Hearing Examiner found that Phillips 66's Project to construct two tanks will not increase vessel traffic or cause adverse environmental impacts, and that the County imposed Conditions E and F to the MDNS for the Project solely to address community concern related to increased vessel traffic.¹ Nevertheless, the Hearing Examiner significantly modified Conditions E and F on appeal, effectively converting them to new conditions that broadly restrict Phillips 66's ongoing operations, still without any evidence of how the Project causes environmental impacts. Thus, Conditions E and F violate SEPA, fail on their merits, and should be struck from the MNDS entirely.

¹ This brief uses the same abbreviations as Phillips 66's opening brief.

1 **A. FOSJ waived its standing argument by not raising it at the initial hearing.**

2 FOSJ's primary argument is that Phillips 66 cannot challenge the MDNS conditions
3 because Phillips 66 did not appeal the original MDNS to the Hearing Examiner. Respondents'
4 Opening Brief ("Resp.") at 5, 15. But that is an argument about standing. RCW 36.70C.060(d);
5 *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 659–62, 375 P.3d 681 (2016). FOSJ
6 waived all arguments regarding standing and any other procedural issues by failing to raise them
7 at the initial hearing. RCW 36.70C.080(3) ("The defenses of lack of standing ... are waived if
8 not raised by timely motion noted to be heard at the initial hearing, unless the court allows
9 discovery on such issues."); *see also* RCW 36.70C.080(2) (requiring "jurisdictional and
10 procedural issues" to be raised at the initial hearing); *In re Estate of Jepsen*, 184 Wn.2d 376, 382
11 n.6, 358 P.3d 403 (2015) (noting that, under LUPA, "certain defenses based on procedural
12 noncompliance are waived if not timely raised. RCW 36.70C.080(2)–(3).").

13 Neither respondent raised the procedural defenses that they now rely upon at the initial
14 hearing, and the Court has already ruled that Phillips 66 has standing to raise its arguments. *See*
15 Dkt. 16 at 1 ("Phillips 66 has standing to bring this action."). By statute, it is too late to challenge
16 Phillips 66's alleged failure to comply with LUPA's procedural requirements, including filing an
17 appeal to the Hearing Examiner. Only the merits to the MDNS conditions that Phillips 66
18 challenges may be considered.

19 In addition, the Hearing Examiner modified Conditions E and F in a proceeding in which
20 Phillips 66 was a party of record. Dkt. 21 ("Opening Br.") at 5–7. Phillips 66 has standing to
21 challenge any erroneous aspect of the Hearing Examiner's decision. WCC 22.05.160(2).

22 **B. Conditions E and F are invalid because the County imposed the conditions as
23 a result of unfounded community concern and not environmental impacts.**

24 SEPA requires that the County's conditions mitigate an environmental impact caused by
25 the Project; community concern regarding potential impacts is not sufficient. *Levine v. Jefferson*
26 *Cty.*, 116 Wn.2d 575, 580–81, 807 P.2d 363 (1991). Mark Personius, the County's SEPA

1 Responsible Official, testified that the County included Conditions E and F "to specifically
2 address the concerns raised in the comment letters," and he "didn't see a significant increase in
3 vessel traffic that would lead to a likely significant adverse impact on whales." Tr. at 144:15-19.
4 Relying on this testimony, the Hearing Examiner found that "When the County did issue its
5 Revised MDNS, *it added additional Conditions E through G to address public concerns.*" Rec.
6 at 12 (emphasis added). Neither respondent challenged these findings of fact, so they are verities
7 on appeal. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004);
8 *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). That
9 evidence, by itself, is enough for the Court to find Conditions E and F fail on their merits
10 because the County imposed them for a purpose that SEPA forbids.

11 FOSJ argues the evidence it presented regarding increased vessel traffic shows the
12 Hearing Examiner's conditions are supported by the record. Resp. at 5. But the Hearing
13 Examiner heard that evidence and rejected it. After reviewing all the evidence FOSJ relies upon,
14 the Hearing Examiner found the Project would not cause environmental impacts:

15 The MDNS and associated permit will not increase vessel traffic, so *the project will*
16 *not "cause adverse environmental effects in excess of those created by existing uses*
17 *in the area."* Additionally, evidence already in the record and the expert analysis
regarding the impact on vessel traffic, show that *the Project will not increase*
environmental impacts associated with existing vessel traffic.

18 In the case at hand, the County has correctly determined that *the permit and MDNS*
19 *as issued should not present any additional risk or harm to the environment in*
20 *general or the Killer Whales in particular. The evidence shows that there will be no*
increased vessel traffic.

21 Rec. at 17–18 (emphasis added). While FOSJ offered abundant irrelevant evidence regarding
22 environmental impacts the Project did not cause, the Record demonstrates that the County
23 imposed Conditions E and F "specifically" to address community concern, and the Hearing
24 Examiner agreed. The conditions must be struck.

1 **C. The Hearing Examiner's revisions to Conditions E and F violate SEPA**
2 **because they do not mitigate any environmental impacts the Project causes.**

3 Even though he properly concluded the Project would not cause environmental impacts,
4 the Hearing Examiner revised Conditions E and F to make them more burdensome to Phillips 66.
5 Opening Br. at 5–7 (comparing original conditions to revised conditions). Specifically, Condition
6 E strictly limits the tanks' usage to produce only one kind of product, completely disregarding
7 how tanks are utilized for operational flexibility. Tr. at 69:15–61:14; Rec. at 44–45. Condition F
8 requires monitoring of Phillips 66's vessel traffic and mandates additional SEPA review if vessel
9 traffic increases for any reason, even though vessel traffic fluctuates for reasons wholly unrelated
10 to the Project. *See* Tr. at 61:19–64:13, 77:16–78:17; *see also* Rec. at 154–55.

11 FOSJ argues monitoring is necessary to verify Phillips 66 will not increase vessel traffic
12 in the future. Resp. at 9–10. But SEPA prohibits imposing *any* mitigating conditions, including
13 monitoring, because the Project does not cause environmental impacts. *See Levine*, 116 Wn.2d
14 at 580 ("governmental action under SEPA may be 'conditioned or denied *only on the basis of*
15 *specific, proven significant environmental impacts.*"); *see also* WAC 197-11-660(1)(d).

16 Rather than identify an impact the Project causes, FOSJ defends the revised conditions by
17 asserting the Hearing Examiner "clarified the language of Conditions E and F in order to evince
18 the County's intent and purpose of the original conditions." Resp. at 10. But the County and the
19 Hearing Examiner both violated SEPA when they imposed conditions to address the *potential* for
20 impacts that increased vessel traffic *might* cause in the future. The conditions address speculative
21 impacts and thus violate SEPA. *Levine*, 116 Wn.2d at 580; *Boehm v. City of Vancouver*, 111 Wn.
22 App. 711, 714, 47 P.3d 137 (2002); WAC 197-11-060(4)(a).

23 FOSJ also cited the unpublished *Millennium Bulk Terminals-Longview, LLC, & Cowlitz*
24 *et al. v. State of Washington, Department of Ecology, & Washington Environmental Council, et*
25 *al.*, 52215-2-II, 2020 WL 1651475 (Wash. Ct. App. Mar. 17, 2020), in arguing that the Hearing
26 Examiner reasonably revised the conditions. Resp. at 9. But the project in *Millennium* caused

1 environmental impacts that were so significant that an Environmental Impact Statement ("EIS")
2 was warranted. *Id.* at *1. Here, the Project causes no environmental impacts, and no EIS was
3 required. Moreover, the issue in *Millennium* was whether the Shorelines Hearings Board could
4 evaluate impacts caused by both planned phases for a project when the applicant sought permits
5 for only the first phase. *Id.* The court held the EIS properly evaluated impacts caused by the
6 entire project. *Id.* at *8. Here, the Project does not involve phased review and the Hearing
7 Examiner properly determined that the entire project will not cause environmental impacts. Rec.
8 at 17. *Millennium* has no bearing on this matter.

9 **D. The County may not impose conditions to mitigate potential future impacts.**

10 Furthermore, FOSJ's argument that the Hearing Examiner could modify Conditions E and
11 F to address "potential future impacts" flies in the face of SEPA. Resp. at 8. The purpose of
12 SEPA's threshold determination process is to determine if a "proposal is likely to have a
13 *probable* significant adverse environmental impact," and then evaluate whether those impacts
14 can be mitigated. WAC 197-11-330(1)(b) (emphasis added); *see also* WAC 197-11-060(4)(a)
15 (directing agencies to consider "impacts that are likely, not merely speculative."). If there are "no
16 probable significant adverse environmental impacts" from a proposal, then there are no impacts
17 to mitigate. WAC 197-11-340(1). SEPA allows mitigation for "probable" impacts, but not for
18 impacts "that merely have a possibility of occurring, but are remote or speculative." WAC 197-
19 11-782. There is no authority allowing mitigating conditions on an MDNS for potential future
20 impacts for good reason. Allowing such conditions invites litigation over speculative impacts.

21 In arguing otherwise, FOSJ cites *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338,
22 552 P.2d 184 (1976). Resp. at 8. The issue in *Cheney* was whether an EIS for an urban arterial
23 construction project adequately disclosed the environmental impacts from the potential future
24 development of an abutting private parcel. *Id.* at 344. The Supreme Court found the future
25 development was too remote and speculative to require study in an EIS. *Id.* at 346. Nothing in
26 *Cheney* enables the County to impose conditions for impacts that are not proven to be probable.

1 FOSJ also cited *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408,
2 225 P.3d 448 (2010). Resp. at 9. In *Lanzce*, a city issued a MDNS for a development, but the
3 hearing examiner found the project required an EIS. *Id.* at 414–15. The relevant issue in *Lanzce*
4 was whether the hearing examiner showed proper deference to the city's SEPA responsible
5 official's decision to issue an MDNS. *Id.* at 423. The Court of Appeals upheld the hearing
6 examiner's decision. *Id.* at 424. That case is a far cry from this dispute. In *Lanzce*, the hearing
7 examiner relied upon evidence that showed the project would cause an impact before reversing
8 an MDNS. *Id.* Here, the Hearing Examiner found the Project would not cause any impacts and
9 upheld the MDNS. Aside from referencing SEPA, *Lanzce* is irrelevant.

10 **E. Condition F violates SEPA by imposing broad restrictions on Phillips 66.**

11 Condition F, as revised, subjects Phillips 66 to additional SEPA review if its vessel traffic
12 increases for any reason, even if totally unrelated to the Project. Opening Br. at 6–7. FOSJ
13 acknowledges that "If vessel traffic increases, additional review would be triggered." Resp. at 10.
14 But FOSJ ignores the complexity of Phillips 66's operations, and how changes in the market or
15 the law—events that have no relation to the Project—can and do cause fluctuations in vessel
16 traffic. Tr. at 61:19–64:13; Rec. at 154–55. For example, the record shows that state legislation
17 (SB 5579) restricted rail traffic to the refinery, which yielded a corresponding increase in vessel
18 traffic. Tr. at 63:23–67:14. That observed increase in vessel traffic had nothing to do with the
19 Project. Tr. at 64:14–19. Nor could it, as the Project has not begun. However, under revised
20 Condition F, that increase in traffic would subject Phillips 66 to additional SEPA review. FOSJ
21 even cited that unrelated increase in traffic as support for Condition F. Resp. at 12–13.

22 This Project to construct two tanks does not enable the County to restrict all of Phillips
23 66's operations. *See Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound*
24 *Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 534, 979 P.2d 864 (1999) (recognizing
25 mitigating conditions must be "roughly proportional to the impact they are designed to
26 mitigate."). Because Condition F restricts far more than the (nonexistent) impacts caused by the

1 Project and functionally regulates the entire Phillips 66 operation, it must be stricken. *See* WAC
2 197-11-660(1)(d) ("Responsibility for implementing mitigation measures may be imposed upon
3 an applicant *only to the extent attributable to the identified adverse impacts* of its proposal.").

4 **F. Condition E violates the Dormant Commerce Clause by restricting exports.**

5 Beyond violating SEPA, Condition E violates the Dormant Commerce Clause of the
6 United States Constitution, and FOSJ's only response is that "This is not a DCC issue." Resp.
7 at 12. It is. Condition E requires local processing of crude oil, prohibits Phillips 66 from
8 exporting crude oil, and prohibits out-of-state buyers from receiving crude from Phillips 66.²
9 Rec. at 44. Condition E thus violates the Dormant Commerce Clause because it "directly
10 regulates or discriminates against interstate commerce" and "its effect is to favor in-state
11 economic interests over out-of-state interests." *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608,
12 614 (9th Cir. 2018). Laws like Condition E that require businesses to perform commercial acts in
13 a home state are "virtually per se illegal." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82,
14 100, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984).

15 **G. The Hearing Examiner lacked jurisdiction to revise Conditions E and F.**

16 Because Conditions E and F should be struck entirely, the Court need not reach this issue,
17 but the Hearing Examiner lacked jurisdiction to revise the conditions in the first place. Opening
18 Br. at 10–11. Courts strictly construe the limits of a hearing examiner's jurisdiction. For example,
19 in *In re King Cty. Hr'g Examiner*, 135 Wn. App 312, 319–22, 144 P.3d 345 (2006), a hearing
20 examiner denied an appeal of an EIS but added conditions. The Court of Appeals held the
21 hearing examiner lacked jurisdiction to take that action because the King County Code allowed
22 him to grant an appeal with conditions, but not deny an appeal with conditions. *Id.* Then in *King*
23 *Cty. Dep't of Dev. & Env'tl. Servs. v. King Cty.*, 167 Wn. App. 561, 576, 273 P.3d 490
24 (2012), *rev'd*, 177 Wn.2d 636, 305 P.3d 240 (2013), a case cited by FOSJ, the Court of Appeals

25
26 ² Condition E, if sustained, is a permanent restriction on Phillips 66 operations that cannot stand even though
Phillips 66 has no plans to export unrefined crude oil.

1 applied the same code chapter in upholding the granting of an appeal with conditions. The court
2 held that the hearing examiner had jurisdiction to modify conditions because the code provided
3 the hearing examiner with a nonexclusive list of conditions that the examiner could impose. *Id.*
4 (citing KCC 20.24.100). The legal principle arising from these cases is that a hearing examiner
5 cannot rely on "inherent authority" as FOSJ asserts, Resp. at 7, but must obtain their power from
6 specific code language.

7 FOSJ cites no authority in the Whatcom County Code that empowers the Hearing
8 Examiner to modify MDNS conditions for the Project. Instead, FOSJ cites WCC 2.11.210, which
9 empowers the Hearing Examiner to conduct hearings, make a record, and a final decision on
10 SEPA appeals. Resp. at 7. FOSJ also cited WCC 16.08.100(G), which allows enforcement of
11 mitigation measures incorporated in an MDNS. Resp. at 7. Neither section empowers the
12 Hearing Examiner to modify conditions. FOSJ also cited WCC 22.05.110, which provides that
13 "[t]he *director or designee's* final decision on all Type I or II applications ... may be granted
14 subject to conditions, modifications, or restrictions that are necessary to comply with all
15 applicable codes." Resp. at 8. This section pertains to Mr. Personius, the County's director of
16 planning and development services, not the Hearing Examiner. Tr. at 9:23–24.

17 As FOSJ concedes, the Project is a Type I application. Resp. at 7. There is no language
18 allowing the Hearing Examiner to modify conditions on a Type I permit, but the code does
19 empower the Hearing Examiner to "grant *Type III* applications *subject to conditions,*
20 *modifications or restrictions[.]*" WCC 22.05.110(2)(a) (emphasis added). Under standard rules of
21 statutory construction, the decision to empower the Hearing Examiner to impose conditions on
22 Type III applications but not Type I applications like the Project is intentional. *See Bour v.*
23 *Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). Whatcom County does not allow its
24 Hearing Examiner to modify conditions for Type I permits in the same fashion as Type III
25 permits. Because the Project is Type I, the Hearing Examiner did not have jurisdiction to revise
26 Conditions E and F.

1 **H. FOSJ lacked standing to raise issues related to ANTS because it did not raise**
2 **those issues during the administrative public comment period.**

3 The Hearing Examiner further erred by finding FOSJ had standing to raise issues it did
4 not comment upon during the administrative process. Opening Br. at 9–10. FOSJ asserts its
5 comments regarding increased vessel traffic was enough to establish its standing. Resp. at 6–7.
6 But FOSJ fails to cite to anything in the record that shows it raised "more than simply a hint or a
7 slight reference" to ANTS during the public comment period. *Boehm*, 111 Wn. App. at 723.
8 Indeed, FOSJ's reference to vessel traffic only hints at ANTS or additional SEPA review if
9 vessel traffic exceeded the average of the last three years. *See* Rec. at 218–23, 253–57. FOSJ did
10 not raise issues related to ANTS or additional SEPA review in its comments during the permit
11 review process, so it lacked standing to raise those issues on appeal. WAC 197-11-545; *see*
12 *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

13 **I. FOSJ is not entitled to favorable inferences because it did not prevail.**

14 While Phillips 66 need not rely on favorable inferences to prevail on this appeal, it is
15 entitled to them anyway. FOSJ certainly did not prevail before the Hearing Examiner. FOSJ
16 asked for the MDNS to be withdrawn. Rec. at 291. Phillips 66 asked for the MDNS to be
17 sustained and for FOSJ's appeal to be dismissed. Rec. at 1211. FOSJ did not receive the relief it
18 requested and Phillips 66 did. *See* Rec. at 18–19. That renders Phillips 66 the prevailing party, so
19 the Court should draw reasonable inferences of the record in the light most favorable to Phillips
20 66. *See Cingular Wireless, LLC v. Thurston Cty.*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

21 Even if Whatcom County was the prevailing party below, drawing inferences in its favor
22 would need to be consistent with the Hearing Examiner's findings that rejected FOSJ's appeal,
23 including that the Project would not increase vessel traffic and would not cause environmental
24 impacts. Rec. at 18. When viewing the record in the County's favor, Conditions E and F still fail.

25 **J. Findings of Fact regarding oil spills and sulfur scrubbers are erroneous.**

26 Finally, in response to the evidence that shows the Project will not increase harm
associated with oil spills because Phillips 66's existing oil spill plan already mitigates that harm,

1 *see* Opening Br. at 14, FOSJ quibbled with the title of the plan. Resp. at 14. Regardless of how it
2 is titled, the plan works. *See* Rec. at 1246. The Hearing Examiner's finding that an increase in
3 vessel traffic increases the risk of oil spills lacks support in the record and should be stricken.

4 Similarly, the Hearing Examiner was imprecise when he described the sulfur cap for
5 marine vessel fuels because he did not account for vessels fitted with scrubbers. Opening Br.
6 at 14–15. Revising his order to conform with all the evidence submitted, and not just Phillips
7 66's application as FOSJ requests, is appropriate. *See* Resp. at 14; Rec. at 1318.

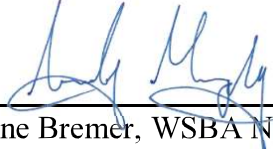
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9 In summary, FOSJ waived its arguments regarding Phillips 66's standing to challenge
10 Conditions E and F, and the merits of Conditions E and F fail because the County imposed them
11 to soothe community concerns and not to mitigate any Project impact. Without Project impacts,
12 the County cannot impose *any* conditions on the Project. Moreover, the Hearing Examiner
13 lacked jurisdiction to modify the conditions because Whatcom County did not vest him with that
14 power. He nevertheless significantly modified Conditions E and F to permanently restrict
15 Phillips 66 operations beyond the Project and restrict exports, which is unconstitutional. Phillips
16 66 respectfully requests the Court to strike Conditions E and F from the MDNS.

17 DATED this 15th day of May, 2020.

18 MILLER NASH GRAHAM & DUNN LLP

19
20 By: _____


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1 **DECLARATION OF SERVICE**

2 I, Brie Geffre, hereby declare under penalty of perjury under the laws of the state of
3 Washington, that on this 15th day of May, 2020, a copy of the foregoing document was served on
4 the following at the address and via the methods listed below.

5
6 Whatcom County Prosecuting Attorney
7 Royce S. Buckingham, Civil Deputy
8 Prosecutor
9 311 Grand Avenue, Suite 201
10 Bellingham, WA 98225

Friends of the San Juans
Jennifer Barcelos, WSBA #43879
P.O. Box 1344
Friday Harbor, WA 98250

- 9 U.S. First Class Mail
10 Personal Service of Process
11 Overnight Mail
12 Facsimile Transmission
13 Email/E-Service:
14 RBucking@co.whatcom.wa.us
15 AWebb@co.whatcom.wa.us

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 Personal Service of Process
 Overnight Mail
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22 Overnight Mail
23 Facsimile Transmission
24 Email/E-Service: salexan701@aol.com

25 *I declare under penalty of perjury under the laws of the state of Washington that the*
26 *foregoing is true and correct.*

SIGNED at Seattle, Washington this 15th day of January, 2020.

s/Brie Geffre
Brie Geffre, Legal Assistant