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BEFORE THE HEARING EXAMINER  
IN AND FOR WHATCOM COUNTY

In re:

APL2019-00011

SEP2019-00033  
APN: 390133 197340 0000  
Appellant: Friends of the San Juans  
Property Owner: Phillips 66 Ferndale Refinery

PHILLIPS 66'S REQUEST FOR  
RECONSIDERATION

Applicant Phillips 66 Ferndale Refinery ("Phillips 66") requests the Hearing Examiner reconsider the decision dated November 17, 2019, in which he upheld the MDNS associated with Phillips 66's project to construct two tanks (the "Project"), but also modified several mitigating conditions. The revised MDNS conditions go beyond mitigating impacts the Project causes and therefore lack legal support. The conditions are also phrased in such a way that they will unduly burden Phillips 66's refinery operations. Phillips 66 asks the Hearing Examiner to clarify and revise Conditions E, F, and H so they conform to the Hearing Examiner's authority, and do not unnecessarily restrict Phillips 66 operations.

**A. Standard of Review and Timing**

Phillips 66's request is governed by the Business Rules of the Whatcom County Hearing Examiner. 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

1 to reflect the comments received thereon, he may initiate such action as is deemed  
2 appropriate. Where the Hearing Examiner determines that the grounds cited for  
3 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.

4 Under Business Rule 5.5, this request is timely. The Hearing Examiner's office notified the  
5 parties of its decision on Monday, November 18, 2019. This request has been submitted within  
6 three days of the date of the Decision.

7 **B. Conditions may not be imposed to mitigate impacts the Project does not create.**

8 Mitigating conditions imposed under SEPA may relate only to "specific, adverse  
9 environmental impacts" caused by the project under review. WAC 197-11-660. Indeed,  
10 Washington law provides that "governmental action under SEPA may be 'conditioned or  
11 denied *only on the basis of specific, proven significant environmental impacts*.'" *Levine v.*  
12 *Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991) (italics in original, citing RCW  
13 43.21C.060). Further, under United States Supreme Court precedent, mitigating conditions must  
14 comply with the nexus and rough proportionality limits that apply whenever a local government  
15 imposes conditions on development applications. *Honesty in Env'tl. Analysis & Legislation*  
16 *(HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 533, 979 P.2d 864  
17 (1999). The "nexus rule permits only those conditions necessary to mitigate a specific adverse  
18 impact of a proposal." *Id.* (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct.  
19 3141, 97 L.Ed.2d 677 (1987)). The rough proportionality requirement limits mitigation measures  
20 "to those which are roughly proportional to the impact they are designed to mitigate." *HEAL*,  
21 96 Wn. App at 533 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d  
22 304 (1994)). Consistent with this precedent, the Supreme Court of Washington has held that  
23 imposing mitigating conditions in response to community concern alone, without evidence of  
24 adverse environmental impacts caused by the project, violated SEPA. *Levine*, 116 Wn.2d at 580-  
25 82.  
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1 **C. Condition E**

2 The Hearing Examiner modified Condition E to limit usage of the new tanks and to  
3 restrict movement of crude oil at the refinery. Revised Condition E now states:

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

10 Decision at 19 (emphasis added). In ordering this condition, the Hearing Examiner has relied  
11 upon an interim ordinance imposing a six-month moratorium as the basis to impose lifetime  
12 restrictions on the tanks. *See* Ordinance 2019-049 at 4 (providing that the ordinance "shall be  
13 effective for not longer than six months" but may be renewed for additional six-month periods).  
14 Further, Ordinance 2019-049 restricts the export of "unrefined fossil fuel" and not other fossil  
15 fuel products, *see id.* (emphasis in original), but Condition E restricts movement of all "crude  
16 oil." Last, Condition E does not specify that its restrictions apply only to the two tanks built  
17 under the Project and could instead be misunderstood to apply to the entire Phillips 66 refinery.  
18 By potentially restricting refinery operations beyond the Project, and relying upon legal authority  
19 that does not align with the duration or scope of the condition's restrictions, revised Condition E  
20 violates SEPA, the nexus rule, and the proportionality requirement.

21 Additionally, Whatcom County SEPA Responsible Official Mark Personius testified at  
22 the hearing that Condition E was added to the MDNS in response to community concern.  
23 Community concern without evidence of an environmental impact is an improper basis to  
24 impose mitigation under SEPA. *Levine*, 116 Wn.2d at 580; *see also Maranatha Min., Inc. v.*  
25 *Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("Community displeasure cannot be the  
26 basis of a permit denial."). Accordingly, Condition E lacks support.

Condition E is also phrased to restrict refinery operations in a way that does not relate to  
an environmental impact the Project causes. While Phillips 66 intends to use the tanks primarily

1 for production of IMO-compliant lower-sulfur marine fuels, intermediate fuel components, and  
2 crude oil storage, there are occasionally circumstances where refinery operations demand that the  
3 tanks be available to store other crude oil intermediates, which are products generated at the  
4 refinery that require further refining. For example, Phillips 66 needs this flexibility when storing  
5 unfinished products due to a unit outage or turnaround, which is a temporary shutdown of a  
6 processing unit to perform inspections, testing, or repairs. The refinery recently had a planned  
7 turnaround for a Diesel Hydrotreater, during which Phillips 66 needed to store a crude oil  
8 intermediate known as distillate until the Hydrotreater could come back online and thereby allow  
9 Phillips 66 to complete refinement of the distillate. Indeed, after the Hydrotreater unit was  
10 restarted, Phillips 66 was able to "re-process" the stored distillate. It is standard industry  
11 operation for "crude oil intermediates" or "unfinished products" to be intermingled and "re-  
12 processed" or refined so that refineries can create final products that meet necessary  
13 specifications. Condition E's restriction that the tanks be used "only for separation and storage of  
14 low-sulfur crude oil" prevents Phillips 66 from the operational flexibility that the new tanks can  
15 and should provide. After all, mitigating conditions must be "reasonable," RCW 43.21C.060, and  
16 it is unreasonable to permanently restrict tank operations when it does not resolve an  
17 environmental impact the Project causes.

18 To meet what Phillips 66 perceives as the Hearing Examiner and County's objective to  
19 restrict usage of the tanks so as to comply with the policy reflected in Ordinance 2019-049<sup>1</sup>  
20 while also allowing Phillips 66 the flexibility it requires to operate, Phillips 66 proposes the  
21 following modified Condition E.

22 The 300,000 barrel external floating roof crude oil storage tank to be permitted  
23 under SEPA 2019-00033 shall be utilized only for the storage of unrefined crude  
24 oil and crude oil intermediates for the express purpose of refining on site; no  
unrefined crude oil or crude oil intermediates stored in the new crude oil storage

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26 <sup>1</sup> Phillips 66 does not concede that Ordinance 2019-049 is appropriate or legal.

1 tank shall be exported from the site. The 80,000 barrel external floating roof fuel  
2 oil tank to be permitted under SEPA 2019-00033 shall be utilized only for the  
3 storage of marine fuels, and lower sulfur intermediate marine fuel blending  
4 components needed for operational flexibility after the IMO standards go into effect  
5 on January 1, 2020. To ensure compliance with Ordinance 2019-049, the 300,000  
6 barrel tank shall not be utilized for storage of unrefined crude oil or crude  
7 intermediates for any other purpose except for the refining of that crude oil on site.  
8 Unrefined crude oil stored in the new tanks shall not be exported or removed from  
9 the refinery for other purposes.

10 This modified condition would specify that its restrictions apply only to the Project (as opposed  
11 to existing improvements on Phillips 66's property), as required by law, while also preserving  
12 necessary operational flexibility and prohibiting usage of the tanks to export unrefined fossil fuel  
13 products.

14 **D. Condition F**

15 The Hearing Examiner modified Condition F in such a way that it restricts vessel traffic  
16 at Phillips 66's marine terminal, and the restrictions go beyond traffic associated with the Project.

17 As revised by the Hearing Examiner, Condition F reads as follows:

18 According to the SEPA checklist prepared by the applicant, there is no material  
19 increase in marine vessel traffic expected as a consequence of the proposed project.  
20 Therefore, there are no likely significant adverse impacts to the habitat of the  
21 southern resident killer whale. To ensure there is no significant increase in marine  
22 vessel traffic resulting from the proposed project and; therefore, no likely  
23 significant adverse impacts to the habitat of endangered southern resident killer  
24 whales, the applicant shall monitor and report annually to PDS on the vessel trip  
25 activity at the marine terminal for inbound and outbound transport of inputs/outputs  
26 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 oil shipments by vessel. If vessel  
trips to/from the marine terminal cumulatively exceed the highest of the average  
annual marine fuel oil vessel activity identified in any calendar year from 2017 to  
2019 (as identified in ANTS) this project shall be subject to additional SEPA  
review. As part of their annual reporting to PDS, the applicant shall arrange for  
PDS to receive the ANTS data.

Decision at 19 (emphasis added).

Condition F is legally invalid because it mitigates an environmental impact the Project  
does not cause. The condition itself states that the Project will not cause impacts to the habitat of  
killer whales, and the Hearing Examiner correctly ruled that "evidence already in the record and

1 the expert analysis regarding the impact on vessel traffic, show that the Project will not increase  
2 environmental impacts associated with existing vessel traffic." Decision at 17; *see also id.* ("The  
3 evidence shows that there will be no increased vessel traffic."). And as with Condition E, Mr.  
4 Personius testified the County added Condition F to the MDNS not because of an environmental  
5 impact the Project caused, but instead to quell concerns raised in public comments—a legally  
6 invalid basis to impose mitigating conditions. Because the Project does not create environmental  
7 impacts associated with vessel traffic, and Condition F mitigates purported impacts caused by  
8 vessel traffic, Condition F lacks legal support. Phillips 66 asks the Hearing Examiner to  
9 reconsider imposing the condition.

10 Furthermore, the condition goes well beyond the Project and imposes an undue restriction  
11 on refinery operations. Evidence at the hearing established that vessel traffic can fluctuate for a  
12 variety of reasons that do not include the Project. Indeed, the evidence showed that the State  
13 Legislature's restrictions on shipments by rail have already caused increased vessel traffic that is  
14 unrelated to the Project and will continue to cause future increases in vessel traffic.<sup>2</sup> That  
15 legislatively induced increase in marine vessel traffic alone could cause vessel traffic to exceed  
16 the averages from 2017 to 2019 and thereby trigger additional SEPA review under revised  
17 Condition F. But that review would have nothing to do with the Project yet be mandated by the  
18 Project's conditions. There is no nexus between the condition and Project impacts. The condition  
19 erroneously presupposes that any increase in future vessel traffic would be caused by the Project.  
20 While the entire condition should be struck, at a bare minimum, Condition F should be revised to  
21 clarify that its restrictions apply only to traffic associated with the tanks constructed under the  
22 Project. Going beyond that would violate the nexus rule, the proportionality requirement, and  
23 SEPA because the mitigation would apply to operations beyond the Project. The County cannot  
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26 <sup>2</sup> *See* Testimony of Todd Barnreiter regarding SB 5579.

1 use the construction of two tanks that do not increase vessel traffic as a backdoor to restrict  
2 vessel traffic in the future.

3 **E. Condition H**

4 The Hearing Examiner imposed a condition similar to one that Phillips 66 voluntarily  
5 offered to address the initial filling of the crude tank that the Project describes, but the Hearing  
6 Examiner modified the condition to require an impossible act. Condition H provides that, "The  
7 applicant shall arrange for the vessel that initially fills the new crude oil tank to be large enough  
8 to fill the entire crude tank including the heel, and in fact fill the entire crude oil tank including  
9 the heel on its initial import of fuel to the crude oil tank." Decision at 20 (emphasis added). Fuel  
10 is the output of the refinery process that yields IMO-compliant fuel, not the input. Said another  
11 way, Phillips 66 will not import fuel to fill the crude oil tank, but will instead refine crude oil  
12 into fuel. Phillips 66 asks the Hearing Examiner to revise Condition H to specify that it requires  
13 filling "the entire crude oil tank including the heel on its initial import of crude oil to the crude  
14 oil tank."

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2 SEPA does not allow the County to use environmental review for the construction of two  
3 tanks as the basis to impose broad restrictions across the refinery or to mitigate purported  
4 environmental impacts the Project does not cause. Phillips 66 respectfully asks the Hearing  
5 Examiner to reconsider the conditions imposed in the Decision and clarify the Decision to align  
6 with the boundaries the law imposes on SEPA review.

7  
8 DATED this 20<sup>th</sup> day of November, 2019.

9  
10 MILLER NASH GRAHAM & DUNN LLP

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