

FILED
2019 DEC 23 PM 4:34

WHATCOM COUNTY
WASHINGTON

BY _____

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

AMENDED LAND USE PETITION

I. INTRODUCTION

1. The Phillips 66 Ferndale Refinery has a longstanding commitment to operate in a safe, efficient, and environmentally conscious manner. The United States Environmental Protection Agency (the "EPA") has repeatedly certified Phillips 66 as one of the most energy efficient refineries in the country. Consistent with its commitment to the environment, Phillips 66 plans to produce a new lower-sulfur fuel for marine shipping vessels so these vessels can comply with new fuel standards imposed by the International Maritime Organization (the "IMO")—a United Nations agency charged with regulating the global shipping industry. The IMO currently allows ocean-going vessels to burn higher-sulfur fuel with a sulfur cap of 3.5 percent (or 35,000 ppm). The new standards that go into effect on January 1, 2020, will set a generally applicable cap on sulfur in marine fuel at 0.5 percent (or 5,000 ppm) for vessels without scrubbers. Because marine shipping vessels account for 90 percent of all sulfur emissions globally, the new IMO

AMENDED LAND
USE PETITION - 1

4811-6843-3839.4

GR-17
ORIGINAL

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WA 98121

1 standards are expected to substantially reduce sulfur emissions globally.

2 2. The project for which the Washington State Environmental Protection Act
3 (“SEPA”) determination is on appeal would allow Phillips 66 to efficiently produce and store
4 lower-sulfur IMO-compliant fuel. In order to efficiently produce the lower-sulfur IMO-compliant
5 fuel, Phillips 66 plans to obtain, store, and segregate lower-sulfur crude for refining. Efficient
6 segregated storage of lower-sulfur crude requires the construction of a new tank. Further,
7 Phillips 66 already produces a variety of finished products, including higher-sulfur marine fuel,
8 low-sulfur diesel, and ultralow-sulfur diesel, and uses existing tanks to keep those products
9 separate during the refining process. A new tank is also needed to allow segregation of lower-
10 sulfur IMO-compliant fuel. The new lower-sulfur IMO-compliant fuel tanks will be constructed
11 approximately half a mile from the Puget Sound, and the land-disturbance permit allowing
12 construction of these two tanks (the “Project”) and the related issuance of a mitigated
13 determination of nonsignificance (the “MDNS”) is the subject of this appeal. The Project does not
14 increase the refining capacity of Phillips 66, but instead creates operational flexibility and enables
15 the logistics needed for the production of lower-sulfur IMO-compliant fuel.

16 3. None of this has anything to do with increased vessel traffic. Phillips 66 already
17 receives crude oil by rail, pipeline, and by vessel at its marine terminal. Phillips 66 currently
18 maximizes receipt of crude via pipeline because it is the most economical, and it receives the
19 balance of its crude over rail and the marine terminal. Aside from refinery throughput and practical
20 logistics associated with docking at the marine terminal, there is no limit to how many vessels may
21 call upon the marine terminal, and Phillips 66 has the ability to receive all its crude over the marine
22 terminal (though it has no plans to do so). The primary argument of the appellant below, the
23 Friends of the San Juans (“FOSJ”), was that the new tanks will cause an increase in marine vessel
24 traffic associated with the Project that is unquantified and unmitigated. They were wrong.

25 4. Significantly, and fatal to their appeal, FOSJ ignored an offset in vessel traffic
26 that the Project will create. Phillips 66 already receives crude oil over its marine terminal and

1 processes it into a variety of finished petroleum products, including the higher-sulfur fuel that
2 marine vessels are allowed to use until January 1, 2020. Because Phillips 66 has a limited amount
3 of total crude it can process (i.e., its “throughput”), and the Project does not modify throughput,
4 the refining of the lower-sulfur crude does not change the volume of crude oil received. This means
5 that the new receipt of lower-sulfur crude will be directly offset by a decreased receipt of other
6 crudes. In short, while the Project will cause some subset of the vessels that call upon the
7 Phillips 66 marine terminal to carry a lower-sulfur type of crude oil, the Project will have no effect
8 on the overall amount of vessel trips.

9 5. Agreeing with Phillips 66, the Whatcom County Hearing Examiner properly
10 found that the Project would not cause increased vessel traffic and would not increase
11 environmental impacts associated with existing vessel traffic. Nevertheless, the Hearing Examiner
12 sustained and modified conditions attached to the MDNS that purport to address impacts
13 associated with vessel traffic. Significantly, and for the first time in this dispute, Whatcom County
14 (the “County”) revealed at the appeal hearing that the basis for issuing MDNS Conditions E and F
15 was public concern and not because of any environmental impact caused by the Project. Even
16 though SEPA prohibits imposing conditions that only address public concern and do not mitigate
17 a project’s environmental impact, the Hearing Examiner revised those conditions over
18 Phillips 66’s objection, and further restricted Phillips 66 refinery operations beyond the scope of
19 the two tanks at issue in the Project.

20 6. Accordingly, Petitioner Phillips 66 brings this action under the Land Use Petition
21 Act, Chapter 36.70C RCW, for judicial review of the County’s final land use decision that imposes
22 conditions mitigating nonexistent impacts, which also restricts refinery operations distinct from
23 the Project.

24 //

25 //

26 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. PARTIES

A. **Petitioner, Petitioner's Attorney, and Petitioner's Standing.**

7. Petitioner Phillips 66 Company, the owner of the Phillips 66 Ferndale Refinery, is a Delaware company that is registered to do business in Washington as a foreign profit corporation. The mailing address for Phillips 66 Company is 2331 Citywest Boulevard, Houston, Texas 77042. The mailing address for the Phillips 66 Ferndale Refinery is 3901 Unick Road, Ferndale, Washington 98248.

8. Petitioner's attorneys are LeAnne Bremer and Andy Murphy of Miller Nash Graham & Dunn LLP, Pier 70, 2801 Alaskan Way, Suite 300, Seattle, Washington 98121.

9. Phillips 66 has standing to bring this petition as the applicant and the owner of property to which the Decision (as defined in Paragraph 11, below) is directed. RCW 36.70C.060(1).

B. **Local Jurisdiction, Decision-Making Body, and Land Use Decision.**

10. Whatcom County is the local jurisdiction that issued the Decision. RCW 36.70C.040(2)(a). A true and correct copy of the Decision is attached hereto as Appendix A. The mailing address for the County is 311 Grand Avenue, Bellingham, Washington 98225. The County's decision-making officer was the pro tem County Hearing Examiner, Rajeev D. Majumdar, whose mailing address is also 311 Grand Avenue, Bellingham, Washington 98225.

11. The Hearing Examiner notified the parties of his initial decision dated November 17, 2019, on November 18, 2019. Phillips 66 submitted a timely request for reconsideration on November 20, 2019, which was granted in part and denied in part in a decision sent to the parties by e-mail on December 2, 2019. The final land use decision at issue in this appeal is the revised Findings of Fact, Conclusions of Law, and Decision dated November 26, 2019, including the order bearing the same date and the initial decision dated November 17, 2019 (collectively the "Decision"). However, under RCW 36.70C.040(4)(a), the Decision was issued on December 5, 2019, because it was e-mailed to the parties on December 2, 2019.

1 conditions, it is currently most economical for Phillips 66 to receive its crude oil over rail and by
2 pipeline, so Phillips 66 currently maximizes receipt of crude through those two options. Prior to
3 2014, when the crude rail facility was constructed, during Trans Mountain Pipeline outages, or due
4 to other circumstances, Phillips 66 has received all of the crude supply via the marine terminal,
5 which is allowed by its various leases and permits.

6 16. After Phillips 66 completes the refinery process, the various products are stored
7 in tanks until they can be shipped out. Phillips 66 ships products by pipeline, rail, trucks, and
8 marine vessels.

9 **B. The new IMO standards will benefit the environment by reducing sulfur emissions**
10 **globally.**

11 17. On January 1, 2020, the IMO will begin enforcing a new global rule imposing a
12 0.5 percent sulfur cap on marine-vessel fuel, which lowers the cap from its current 3.5 percent.
13 Rec. Ex. 6-1, at 1. The IMO will allow vessels to continue using higher-sulfur fuel if the vessels
14 install scrubbers that will capture sulfur emissions. Rec. Ex. 6-3, at 3. This new rule is expected
15 to have a significant beneficial effect on the environment; estimates show that burning marine-
16 vessel fuel generates close to 90 percent of all sulfur emissions globally. Phillips 66 Ex. 8, at 3.

17 **C. The Project on appeal is to construct two new tanks that Phillips 66 needs to**
18 **efficiently produce new lower-sulfur IMO-compliant fuel.**

19 18. The purpose of the Project is to allow Phillips 66 to efficiently produce and
20 provide lower-sulfur IMO-compliant fuel. Rec. Exs. 6-1, at 1; 6-3, at 16. Crude oils can differ in
21 sulfur content and other properties. Refiners take these properties into account when producing
22 finished products. These properties are also considered when storing the crude and the products.
23 It is a benefit for Phillips 66 to segregate the crudes and products based on the different chemical
24 attributes. See Rec. Ex. 6-3, at 3.

25 19. The current tanks installed at Phillips 66 do not allow efficient segregation of crude
26 oil and fuel oil based on sulfur content; Phillips 66 therefore needs two new tanks to efficiently
segregate crude and fuel oil to allow a more efficient production of lower-sulfur IMO-compliant

1 fuel. *Id.* Thus, the Project involves constructing a 300,000-barrel tank to store crude oil before it
2 is refined, and an 80,000-barrel tank to hold lower-sulfur IMO-compliant marine fuel. Rec. Ex. 6-
3 1, at 1. Phillips 66 currently ships all marine fuel over the marine terminal and plans to continue
4 to do so after January 1, 2020. Rec. Ex. 6-3, at 16.

5 20. The new tanks will be built within Phillips 66's existing tank farm, which has been
6 built to provide a secondary containment in the unlikely event that a tank leaks. See Rec. Ex. 6-1,
7 at 1. Phillips 66 has no plans to use the tanks in connection with exporting crude oil to any
8 location. Rec. Ex. 6-3, at 17.

9 **D. The new tanks will not increase vessel traffic.**

10 21. Because the Project does not increase the throughput of the refinery, the production
11 of lower-sulfur IMO-compliant fuel will take the place of the existing production of higher-sulfur
12 fuel, and the tanks will not be used to export crude oil, this project does not increase vessel traffic.
13 Rec. Ex. 6-3, at 16; Rec. Ex. 8. The increased shipment of lower-sulfur crude will be directly
14 offset by reduced shipment of higher-sulfur crude. *Id.* at 16-18. The only exception is the volume
15 used in the one-time filling for the heel of the crude tank, which will be done as part of a larger
16 crude volume shipment. Regardless, experts who evaluated the Project concluded that the
17 construction and operation of the Project would have "no impact" on vessel traffic. Phillips 66
18 Ex. 11, at 15. Those same experts also concluded that the Project would not increase
19 environmental impacts associated with vessel traffic. *Id.* at 16.

20 22. This stands in contrast with the already observed impacts of Washington State
21 SB 5579, which was passed during the 2019 session and went into effect in July 2019. SB 5579
22 restrict the amount of crude that Phillips 66 can receive by rail. When there are restrictions on
23 Phillips 66's ability to receive crude oil by rail or pipeline, Phillips 66's only option is to increase
24 crude received over its marine terminal. Prior to installation of the crude rail facility in 2014, all
25 crude other than delivered via Trans Mountain Pipeline was received via the marine terminal.

26 **E. The Project has been subject to rigorous administrative review that ultimately
resulted in the County's issuing an MDNS for the Project.**

AMENDED LAND
USE PETITION - 7

4811-6843-3839.4

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WA 98121

1
2 23. The first agency to review the Project was the Northwest Clean Air Agency
3 (“NWCAA”), which is in charge of administering the state Clean Air Act as applied to
4 Phillips 66. NWCAA received the first of three checklists that Phillips 66 prepared for the
5 Project. Phillips 66 Ex. 5. Phillips 66 conferred repeatedly with NWCAA about project design
6 details, and NWCAA ultimately approved the Project by issuing Order of Approval to
7 Construct 1322 on August 5, 2019. *See* Phillips 66 Ex. 9. Concurrent with this review, the
8 Washington Department of Ecology (“Ecology”) confirmed that Phillips 66’s existing
9 wastewater treatment plan is adequate to account for impacts associated with the Project and
10 required no further review. Phillips 66 Ex. 10.

11 24. After Phillips 66 submitted its initial checklist to NWCAA, the County
12 requested a revised checklist that addressed certain questions, so Phillips 66 submitted a revised
13 checklist. Record Exs. 5, 7–3. After conferring with Phillips 66 regarding questions about the
14 checklist, the County issued an MDNS in July 2019 with various mitigating conditions on the
15 Project. Record Exs. 7–1, 8. The County received public comment on the MDNS, and based on
16 those comments withdrew the MDNS and required Phillips 66 to submit a third checklist that
17 responded to additional inquiries from the County and the public. Record Exs. 6-3, 9 at 1-2.
18 After this third round of SEPA review, the County issued a second (and final) MDNS in
19 August 2019 with additional conditions. Rec. Ex. 6-1.

20 25. One condition the County imposed in its second MDNS was that Phillips 66
21 “shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track
22 and report marine fuel oil shipments by vessel” to the County. *Id.* at 4. By law, Phillips 66 must
23 accurately report vessel traffic to Ecology. *See* WAC 173-184-100. While Ecology may not
24 typically independently verify the accuracy of the data reported, Phillips 66 is subject to
25 regulatory penalties if its reporting is inaccurate. *See* WAC 173-184-040. Phillips 66 takes its
26 regulatory obligations very seriously, and it accurately reports vessel traffic to ANTS. *See*

1 Phillips 66 Ex. 11, at 15.

2 **F. FOSJ appealed the MDNS based on vessel traffic associated with the initial fill of**
3 **the tank and other issues for which it did not comment during the permit review**
4 **process.**

4 26. FOSJ submitted two comment letters during the permit review process. The
5 first was submitted on behalf of itself only, and FOSJ also signed another letter submitted on
6 behalf of several environmental groups. Rec. Ex. 9, at 12–14, 44–48. As relevant to this appeal,
7 these letters alleged that the Project would increase vessel traffic and cause impacts to Killer
8 Whales. Neither letter asserted that the County should require independent monitoring and
9 verification of Phillips 66’s reporting to ANTS or that the County must withdraw the MDNS if
10 vessel traffic exceeds the average activity over the past three years.

11 27. Nevertheless, in its appeal of the MDNS, FOSJ raised both of those issues for
12 the first time. Rec. Ex. 1, at 6–7. FOSJ also alleged that the County erred by not quantifying
13 vessel traffic for the initial filling of the crude tank and by not evaluating environmental impacts
14 associated with that purported increase in vessel traffic. *Id.* at 4–6. Last, with regard to a
15 condition on the MDNS that the new tanks “shall not be utilized for storage of crude oil to be
16 exported, unrefined, from the marine terminal,” FOSJ suggested that the prohibition on exports
17 may not apply to shipping unrefined crude to other states. *Id.* at 7.

18 28. Phillips 66 challenged FOSJ’s standing to raise these issues, but the Hearing
19 Examiner ultimately disagreed and found that FOSJ had standing.

20 **G. The County revealed at the appeal hearing that its basis to impose Conditions E**
21 **and F were not to mitigate any environmental impacts, but to address community**
22 **concern.**

22 29. At the appeal hearing, Mark Personius, the Whatcom County SEPA Responsible
23 Official, revealed for the first time that the County’s reason for adding Conditions E and F was
24 based on community concern and a policy reflected in a temporary County moratorium—not
25 because of any increased vessel traffic or other environmental impact caused by the Project. He
26 testified that:

1 We put in those additional conditions in the revised MDNS to specifically address the
2 concerns raised in the comment letters. Still didn't see a significant increase in vessel
3 traffic that would lead to a likely significant adverse impact on the whales. Nevertheless,
4 to address the concerns and the potential, we added the condition for monitoring, the
5 ANTS condition for monitoring and reporting to us to ensure that it stayed within that
6 sort of baseline current range of trips... And the other condition specifically addressed
7 another issue raised about the export using that tank for a purpose other than the IMO
8 fuels requirements. And so – and under the current ordinance in place, that was just a
9 condition to make sure that it wasn't used for the storage of unrefined – or for the export
10 of unrefined crude.²

11 30. Mr. Personius also testified that the Project would not cause any significant
12 adverse environmental impacts, and that none of the evidence provided by FOSJ during the appeal
13 changed his mind about that determination.³

14 **H. The Hearing Examiner found that the Project would not cause environmental
15 impacts, but still revised several conditions in FOSJ's favor.**

16 31. The Hearing Examiner issued an initial decision dated November 17, 2019, which
17 was sent to the parties by e-mail on November 18, 2019. In a rejection of FOSJ's arguments, the
18 Hearing Examiner found that the County properly issued the MDNS because the Project would
19 not cause environmental impacts or harm to the Killer Whales:

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

25 In the case at hand, the County has correctly determined that the permit and MDNS as
26 issued should not present any additional risk or harm to the environment in general or the
27 Killer Whales in particular. The evidence shows that there will be no increased vessel
28 traffic.⁴

29 32. Despite finding the Project would not cause any environmental impacts related to
30 increased vessel traffic, and specifically finding that the Project would not harm Killer Whales,
31 the Hearing Examiner nevertheless revised MDNS Conditions E and F. While the original

32 ² Hearing Transcript at 144:15–145:10.

33 ³ Hearing Transcript at 146:25.

34 ⁴ Findings of Fact, Conclusions of Law, and Decision dated November 17, 2019, at 17.

1 Condition E allowed Phillips 66 to retain the intended operational flexibility by permitting the
2 tanks to be used “primarily” for the refinement of lower-sulfur IMO-compliant fuels, the revised
3 Condition E allows those tanks to be used “only” for those purposes. Additionally, while
4 Condition F allowed the County to perform additional SEPA review if the refinery observed
5 increased vessel traffic over the average from 2017 to 2019, the Hearing Examiner revised the
6 condition to require it—even though the testimony at the appeal hearing established that vessel
7 traffic could and already had increased for reasons wholly unrelated to the Project.

8 33. The Hearing Examiner also found that Phillips 66 voluntarily assumed
9 restrictions regarding how the tanks could not ever be used in connection with exporting unrefined
10 crude oil because Phillips 66 purportedly voluntarily notified the County that the tanks would not
11 be used for exports. The County asked Phillips 66 about exports because Ordinance 2019-049 was
12 in effect, which is a six-month temporary moratorium on County projects used in connection with
13 the export of unrefined crude oil.

14 34. Phillips 66 asked the Hearing Examiner to reconsider his decision to revise
15 Conditions E and F.⁵ The Hearing Examiner denied that request, and then as described above,
16 issued the Decision that Phillips 66 now appeals.

17 IV. STATEMENTS OF ERROR

18 The Decision is in error for the following reasons:

19 35. The Hearing Examiner erred in finding that FOSJ had standing to raise issues
20 regarding tracking vessel trips using ANTS and mandating future SEPA review when they did not
21 comment on those topics before the County issued the revised the MDNS.

22 36. The Hearing Examiner erred in revising and sustaining Conditions E and F because
23 the County imposed those conditions to address public concerns and not to mitigate environmental
24 impacts caused by the Project. Further, the County also relied on a temporary moratorium as the

25 _____
26 ⁵ Phillips 66 also requested that the Hearing Examiner revise another condition to reflect that the refinery fills crude oil tanks with crude oil and not fuel, and the Hearing Examiner granted that request.

1 basis to impose Condition E, and the law does not allow a temporary policy to justify a permanent
2 restriction. Similarly, the Hearing Examiner erred in finding that the County appropriately issued
3 those conditions based on public comment that did not identify environmental impacts caused by
4 the Project, but instead raised public concern and displeasure. Under SEPA and other law, public
5 concern or displeasure are not valid bases to impose conditions on a permit.

6 37. The Hearing Examiner erred in finding that use of the term “primarily” in
7 Condition E was erroneously vague in Condition E because that term is not vague.

8 38. The Hearing Examiner erred in finding that Phillips 66’s responses to County
9 inquiries regarding planned uses for the tanks built under the Project justified prohibiting tank
10 usages, including exporting unrefined crude oil. The record shows that Phillips 66 has no plans to
11 use the tanks to export unrefined crude oil, so any mitigating conditions to address that purported
12 harm address a speculative impact. The Hearing Examiner similarly erred in finding that
13 Phillips 66 proffered or assumed the condition voluntarily and that Phillips 66’s response was
14 driven by community concern and not County Ordinance 2019-049. Phillips 66’s response was
15 required by the County for the County to continue processing the Project permit application. Thus,
16 the Hearing Examiner similarly erred in revising the condition to give it the “intended and apparent
17 purpose and meaning” of Condition E. Responding to County demands for information cannot be
18 mutated into the voluntary assumption of a condition that violates the Dormant Commerce Clause
19 and which also addresses a speculative harm.

20 39. The Hearing Examiner erred in finding that the County appropriately issued
21 Condition F, which relates to a potential impact caused by increased vessel traffic, when the record
22 established that the Project will not have any impact on vessel traffic.

23 40. The Hearing Examiner erred in revising Condition F to require additional SEPA
24 review if vessel traffic increases over an annual average from 2017-2019. The record established
25 that the Project will not have any impact on vessel traffic, but several other non-Project-related
26 factors (including state legislation) can and already have increased vessel traffic. Condition F thus

1 requires environmental review for impacts not caused by the Project. The Hearing Examiner erred
2 by restricting refinery operations beyond the scope of the Project.

3 41. The Hearing Examiner erred in finding that an increase in vessel traffic would
4 increase risks and impacts associated with oil spills. That finding is not supported by evidence in
5 the record and does not account for how the potential impacts of oil spills are already mitigated by
6 Phillips 66's oil-spill contingency plan.

7 42. The Hearing Examiner erred in finding that the Project requires Phillips 66 to
8 completely segregate low-sulfur fuel oil from higher-sulfur fuel oil and crude oil. The Project was
9 intended to provide Phillips 66 with operational flexibility.

10 43. The Hearing Examiner erred in finding that the new IMO standards that go into
11 effect on January 1, 2020, will set a cap on sulfur in marine fuel at 0.5 percent. That finding
12 ignores that higher-sulfur marine fuel will be allowed for vessels installed with scrubbers.

13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


V. RELIEF REQUESTED

Petitioner therefore requests the following relief:

1. Entry of an order correcting the errors in the Decision and striking Conditions E and F;
2. An award of attorney fees and costs;
3. Permission to amend its pleadings to conform to the proof; and
4. Other relief as the Court may award.

DATED this 23rd day of December, 2019.

MILLER NASH GRAHAM & DUNN LLP

By: 
LeAnne Bremer, WSBA No. 19129
Andy Murphy, WSBA No. 46664
MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way, Suite 300
Seattle, WA 98121
Telephone: (206) 624-8300
Fax: (206) 340-9599
E-mail: leanne.bremer@millernash.com
andy.murphy@millernash.com

Attorneys for Petitioners

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

I, Faelynn Carroll, hereby declare under penalty of perjury under the laws of the state of Washington, that on this 23rd day of December, 2019, a copy of the foregoing document was served on the following at the address and via the methods listed below.

Whatcom County Auditor
311 Grand Avenue, Suite 103
Bellingham, WA 98225

Friends of the San Juans
P.O. Box 1344
Friday Harbor, WA 98250

- U.S. First Class Mail
- Personal Service of Process
- Overnight Mail
- Facsimile Transmission
- Email/E-Service:

- U.S. First Class Mail
- Personal Service of Process
- Overnight Mail
- Facsimile Transmission
- Email/E-Service:

Friends of the San Juans
650 Mullis St., Suite 201
Friday Harbor, WA 98250

- U.S. First Class Mail
- Personal Service of Process
- Overnight Mail
- Facsimile Transmission
- Email/E-Service:

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

SIGNED at Seattle, Washington this 23rd day of December, 2019.

s/Faelynn Carroll
Faelynn Carroll, Legal Assistant

Appendix A

APPENDIX A
DECISION

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

Originally Issued: 11/17/19
Revised: 11/26/19

SUMMARY OF APPEAL AND DECISION

Appeal: On August 30, 2019, the Friends of the San Juans filed an Administrative Appeal of a Revised SEPA Mitigated Determination of Nonsignificance made by Whatcom County Planning and Development Services for Phillips 66 Ferndale Refinery's tank replacement project, issued on August 20, 2019. The property is located at 3901 Unick Road, Ferndale WA.

Decision: The SEPA Mitigated Determination of Non-significance is upheld in large part, subject to new modified Conditions of Approval.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence and argument presented at the public hearing held on November 1, 2019.

FINDINGS OF FACT

I.

PRELIMINARY INFORMATION

Applicant: Philips 66 Ferndale Refinery c/o Ken Morrill

Property Address: 3901 Unick Road

Assessor's Parcel Number(s): 390133 197349

Zoning: HII

Comprehensive Plan: Major/Port Industrial UGA

Environmental Impact Statement: Not required pursuant to RCW 43.21C *et al.*

Non-exhaustive list of Authorizing Codes, Policies, Plans, and Programs referenced in argument, exhibits or decision.

Whatcom County Ordinance 2019-049.
Washington Administrative Code (WAC) Chapters 173-60, 173-182, 197-11
State Environmental Policy Act (SEPA)
Revised Code of Washington [RCW] Chapter 36.70
Whatcom County Comprehensive Plan
Whatcom County Code, Title 2, Chapter 2.33 – Permit Review Procedures
Whatcom County Code Chapter 12.08, Development Standards
Whatcom County Code Chapter 15, Building Code/Fire Code
Whatcom County Environmental Policy Administration Chapter 16.08
Whatcom County Code Chapter 16.16, Environment - Critical Areas
Whatcom County Code, Title 14, Use of Natural Resources
Whatcom County Code, Title 17, Flood Damage Prevention Code
Whatcom County Code Title 20, Official Whatcom County Zoning Ordinance
Whatcom County Code Title 22, Land Use and Development Procedures
Whatcom County Code Title 23, Shoreline Management Program
Whatcom County Code Title 24, Health Regulations

Legal Notices: Notice of Hearing, Posted- October 17, 2019
Notice of Hearing, Published- October 17, 2019
H.E.'s Notice of Hearing, Mailed- October 15, 2019

Hearing Date: November 1, 2019

Parties of Record:

Jennifer Barcelos, Attorney representing Friends of the San Juans
Royce Buckingham, Attorney representing Whatcom County
Andy Murphy, Attorney representing Philips 66
Mark Personius, Director of Whatcom County Planning & Development
Ryan Walters, witness for Friends of the San Juans

Dr. Tim Ragen, witness for Friends of the San Juans

Dr. David Bain, witness for Friends of the San Juans

Dr. Martin Haulena, witness for Friends of the San Juans

Lovel Prat, witness for Friends of the San Juans

Todd Barnreiter, witness for Phillips 66

Ken Morrill, witness for Phillips 66

Exhibits:

- 1 SEPA Administrative Appeal Form, SEPA-APL2019-0011, with attachments
 - 1-1 Admin Appeal & Customer Receipt, August 30, 2019, with Comments
 - 1-2 Notice of Appearance, Letter from Andy Murphy on behalf of Phillips 66 Ferndale Refinery in the Appeal of Revised SEPA MDNS SEP2019-0033
 - 1-3 Hearing Examiner Routing Memorandum, dated September 11, 2019
- 2 Letter dated September 10, 2019 from Andy Murphy and LeAnne Bremer, Miller Nash/Graham & Dunn, Attorneys at Law re: Notice of Appearance on behalf of Phillips 66 Ferndale Refinery in the Appeal of Revised SEPA MDNS SEP2019-0033
- 3 Land Disturbance and Clearing Application, LDP2019-0033: Applicant: Phillips 66 Ferndale Refinery, Ken Morrill, with Customer Receipt, dated 4/12/19 w/ attachments:
 - 3-1 Submittal Information
 - 3-2 Fee Responsibility
 - 3-3 Agent Authorization
 - 3-4 Civil Site Plans, Review Approval, dated June 6, 2019, stamped Critical Areas Approved, August 29, 2019
 - 3-5 Engineering Services Haul Road Agreement: Logistics Flexibility Project, dated June 12 & 13, 2019, with attached Hauling Operations Questionnaire, 6/07/19, with 4 aerial haul route Site to Pit maps & Alt Axton maps
- 4 Planning & Development Form: Case Activities for LDP2019-0033, June 26, 2019 with attachments:
 - 4-1 Engineering Division: Hauling Operations Questionnaire: Logistics Flexibility Project, date completed 6/7/19, with 4 aerial Google Maps: Import Haul Route Site to Pit Import, Export Return, and Alt Axton Haul Route Map with Haul Route Site to Pit & Pit to Site
 - 4-2 Engineering Division: Hauling Operations Questionnaire: dated 6/7/19: Revised to Show Alternate Export Landfill Sites, with 4 Google Maps: Import Haul Route

Site to Pit Import, Haul Route Export Return; Axton Haul ALT Route Map and Haul Route Site to Pit & Pit to Site

- 4-3 Engineering Division Hauling Operations Questionnaire, date stamped 5/28/19 with 2 Google Maps: Import Haul Route Site to Pit Import and Haul Route Export Return
- 5 Land Disturbance Permit: Notice of Additional Requirements [NOAR], dated May 9, 2019 re: LDP2019-0033 sent to Phillips 66 Ferndale Refinery by PDS Natural Resource Staff
- 6 Revised SEPA Distribution List, SEP2019-0033, issued August 20, 2019, with attachments:
 - 6-1 Revised SEPA Mitigated Determination of Non-significance [MDNS] issued August 20, 2019, with Revised Mitigating Conditions
 - 6-2 Revised MDNS Legal Notice, published August 20, 2019
 - 6-3 SEPA Environmental Checklist, revised (2) August 15, 2019, with attached Vicinity Map of Subject Area, June 2019
- 7 SEPA Distribution List, SEP2019-0033, issued July 19, 2019, with Project Description, signed by Responsible Official, Planning Director, Mark Personius, with attachments:
 - 7-1 SEP2019-0033 MDNS Mitigating Conditions
 - 7-2 SEPA MDNS Legal Notice, published July 19, 2019
 - 7-3 Revised SEPA Environmental Checklist, Rev [1] May 15, 2019, with attached Email from Kenneth Morrill, Sr. Project Engineer to Mark Personius, dated July 3, 2019 re: future impacts to Phillips 66 marine terminal operations and Vicinity Map of Subject Area, dated June 2019
- 8 Packet of Staff Correspondence emails: beginning May 28 ending August 30, 2019, with attached Phillips 66 Ferndale: Logistics Flexibility Traffic Control Plan [with red highlighted notes in front & back of Google Map]
- 9 SEPA Comments Received by Planning Staff, beginning with Thomas Brissenden email to Kenneth Morrill, dated August 8, 2019 re: comment letters requesting SEPA Checklist Modifications. The final letter to Thomas Brissenden, dated June 6, 2019 from State of Washington: Department of Archaeology & Historic Preservation re: Archaeology Survey Requested for Equipment/Staging/Fill Area; IDP for Tank Installation
- 10 Emails from Applicants and Opponents to Hearing Examiner's Office re: Scheduling details and receipt of Planning's entire record
- 11 Legal Notice of Public Hearing for SEPA-Appeal, published October 17, 2019
- 12 Posting Notices, posted on October 17, 2019

- 13 County's Witness List for APL2019-0011, prepared by Royce Buckingham, Civil Deputy Prosecuting Attorney for Planning Department, dated October 15, 2019
- 14 County's Exhibit List for APL2019-0011, prepared by Royce Buckingham, Civil Deputy Prosecuting Attorney for Planning Department, dated October 15, 2019
- 15 Friends of the San Juans' Preliminary Witness and Exhibit Lists, prepared by Jennifer Barcelos, Attorney for Appellant, dated October 21, 2019
- 16 Phillips 66 Ferndale Refinery's Witness and Exhibit List, prepared by Andy Murphy, Attorney for Applicant, dated October 21, 2019
- 17 Three-ring Binder: Friends of the San Juans, Exhibits for SEPA-APL2019-0011: Revised MDNS 2019-00033: Phillips 66 Revised SEPA MDNS, submitted by Jennifer Barcelos, Attorney for the Appellant, dated October 23rd, 2019
 - Table of Contents
 - 17:1 Witness List:
 - A. Lovel Pratt, Marine Protection Program Director, Friends of the San Juans;
 - B. Dr. David Bain, Vice President of Board of Directors, Orca Conservancy;
 - C. Dr. Martin Haulena, Head Veterinarian, Vancouver Aquarium;
 - D. Dr. Tim Ragen, Former Executive Director, U.S. Marine Mammal Comm
 - E. Dr. Kurt Russo, Sr. Strategist, Lummi Sovereignty & Treaty Protection Office;
 - F. Ryan Walters, Planning & Community Development Dir., Samish Indian Nation
 - G. Richard Grout, Retired Planning Director, San Juan County
 - 17.2 Exhibit List:
 - A. Revised SEPA Mitigated Determination Non-significance, Phillips 66 Ferndale Refinery Logistics Flexibility Project (August 20, 2019) with Project Description, Revised Mitigating Conditions, SEPA Environmental Checklist
 - B. SEPA Mitigated Determination of Non-significance, Original MDNS (07-19-19)
 - With Project Description & SEPA Environmental Checklist
 - C. Public Comments received by Whatcom County re: SEP2019-00033, 2019
 - D. Whatcom County Adopted Ordinance 2019-049; Imposing Interim Moratorium on Acceptance & Processing of Applications & Permits for New or Expanded Facilities in Cherry Point UGA
 - E. NOAA Fisheries Northwest Region, Designated Critical Habitat for Resident Killer Whales, November, 2016
 - F. Endangered and Threatened Wildlife & Plants: Endangered Status for Southern Resident Killer Whales, 70 C.F.R. 222 2005
 - G. National Marine Fisheries Service: Recovery Plan for Southern Resident Killer Whales [Orcinus orca], National Marine Fisheries Service NW Region, Seattle, 2008
 - H. Veirs S, Veirs V. Wood JD, Ship noise extends to frequencies used for

- echolocation by endangered killer whales, 2016
- I. R.C. Lacy, R. Williams, E. Ashe, K.C.Balcomb III, et al : Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans, Scientific Reports, 2017
 - J. Ferrara, G.A., T.M. Mongillo, L.M.Barre, Reducing disturbance from vessels to Southern Resident killer whales: Assessing the effectiveness of 2011 federal regulations in advancing recovery goals, NOAA Tech. Memo, NMFS-OPR-58 at 76, 2017
 - K. Fisheries & Oceans Canada, Necropsy results: Southern Resident Killer Whale J34, July 22, 2019
 - L. National Marine Fisheries Service, Southern Resident Killer Whales [Orcinus orca] 5-Year Review: Summary and Evaluation, 2016
 - M. NOAA, Species in the spotlight: Priority actions, Southern Resident killer whale DPS, Orcinus orca, 2016-2020, 2016
 - N. National Academies of Sciences, Engineering & Medicine, Approaches to Understanding Cumulative Effects of Stressors on Marine Mammals, 2017
 - O. Esler et al., Timelines & mechanisms of wildlife population recovery: Topical Studies in Oceanography Vol 147, January 2018
 - P. National Academies of Sciences: Approaches to Understanding Cumulative Effects of Stressors on Marine Mammals, 2017
 - Q. Moore et al., A New Framework for Assessing Effects of Anthropogenic Sound on Marine Mammals in Rapidly Changing Arctic, 2012
 - R. Gaydos JK, Thixton S, Donatuto J., Evaluating Threats in Multinational Marine Ecosystems: Coast Salish First Nations & Tribal Perspective, 2015
 - S. Schwacke, Lori H., et al., Health of Common Bottlenose Dolphins In Barataria Bay, Louisiana, Following Deepwater Horizon Oil Spill, 2013
 - T. Rhinehart, Jolie, Letter to Phillips 66 Ferndale Refinery Manager to US Dept. of Transportation re: PHMSA-2019—0149, September 23, 2019
 - U. House Environment Energy Committee, Public Hearing ESSB 5579 Meeting Notes, March 19, 2019
 - V. Engrossed Substitute Senate Bill 5579, Crude Oil by Rail—Vapor Pressure, Effective Date: July 28, 2019
 - W. EXECUTIVE ORDER 18-02, Southern Resident Killer Whale Recovery and Task Force, March 14, 2018
 - X. Southern Resident Orcs Task Force, Report and Recommendations, November 16, 2018
 - Y. Pratt, Lovel et al., Justification and Problem Statements Supporting the Need to Implement the Southern Resident Killer Whale Task Force Recommendation 27, August 6, 2019
 - Z. Scheid, Brian, S&P Global Platts, Phillips 66 cuts crude-by-rail shipments to Ferndale refinery due to state law: letter, October 2, 2019
18. Friends of the San Juans Pre-Hearing Brief, prepared by Jennifer Barcelos, Attorney for Appellant, dated October 28, 2019, with attached Declaration of Service

19. Phillips 66 Ferndale Refinery's Hearing Brief, prepared by Andy Murphy, Attorney for the Applicant, dated October 28, 2019
20. Emails from Royce Buckingham, Applicant's Attorney, Appellant's Attorney to Carole, Oct 21 to Oct 29 re: briefing schedule & Hearing Examiner Business Rules, Resolution 86-41
21. Three-ring Binder: Phillips 66 Ferndale Refinery's Preliminary Exhibits, prepared by Miller Nash/Graham & Dunn LLP, Attorneys At Law
 - Exhibit 1: 4 Colored photos: (1) Proposed 800X152 Clean Fuel Oil tank-east of existing 3000X1 Crude Tank, (2) Existing Site-Project area inside of tank dike wall. Project will expand secondary containment volume. (3) Proposed 3000X2 Crude tank- south of existing 6000X1 Crude Tank, (4) Existing Site-Project area inside and outside of tank dike wall. Project will expand secondary containment volume.
 - Exhibit 2: Phillips 66 site photo showing New 300MBBL Crude Tank and New 80MBBL HFO Tank
 - Exhibit 3: Washington State Department of Ecology Letter, dated May 22, 2015 to Rich Harbison, Refinery Manager re: Congratulations, granting final approval to Phillips 66 Refinery Integrated Contingency Plan, with enclosure of Plan Review Checklist, Plan Approval Certificate
 - Exhibit 4: Whatcom County Planning & Development Services, Pre-Application Meeting Packet
 - Exhibit 5: SEPA Environmental Checklist, submitted by Ken Morrill, March 8, 2019
 - Exhibit 6: Email from Amy Keenan to Kenneth Morrill, dated March 8, 2019 re: Additional Pre-application Questions
 - Exhibit 7: WC P&DS Purpose of the Pre-Application Meeting, prepared by Amy Keenan, March 28, 2019
 - Exhibit 8: IMO 2020: The Big Shipping Shake-Up, published on June 12, 2019 by Ashley Viens, 10/18/2019 [Page 1 of 16]
 - Exhibit 9: Northwest Clean Air Agency, Mount Vernon, WA: NW Clean Air Agency hereby issues on August 5, 2019, Order of Approval to Construct [OAC] 1322: Signed by Dan Mahar, Air Quality Engineer & Agata McIntyre, P.E. Engineering Manager; Project Summary: Construct and operate a 300,000 barrel crude oil storage tank and a 80,000 barrel fuel oil storage tank with associated piping tie-ins to the refinery.
 - Exhibit 10: Email from David Schmidtz, Environmental Specialist, HSE Dept, Phillips 66, to WA Dept. of Ecology, dated August 14, 2019 re: construction question related to potential Construction Stormwater General Permit with option of draining to the Primary Treatment Section of the Wastewater Treatment Plant with response from Noel Tamboer & Liem Nguyen, August 27, 2019 and sent to Ken Morrill, August 27, 2019 re: Logistics Flexibility Project NPDES compliance memo, as "good news from Dept of Ecology for

the Phillip 66 project not to have stormwater runoff to cause a violation of the water quality standards

Exhibit 11: Transportation Study for Ferndale Refinery Logistics Flexibility Project No. 0525764, prepared by ERM-West, Inc. dated October 4, 2019

- Exhibit 22 Dr. Timothy Rague's Resume, speaker for Friends of the San Juans
- Exhibit 23 Lovel Prat's Resume, speaker for Friends of the San Juans
- Exhibit 24 David Bain's Resume, Speaker for Friends of the San Juans
- Exhibit 25 Martin Haulena's Resume, Speaker for Friends of the San Juans

II.

The Applicant, The Phillips 66 Ferndale Refinery ("Applicant") has applied to Whatcom County for permits to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the Refinery. The stated purpose is to provide additional operating flexibility to manufacture low-sulfur marine fuels in compliance with regulatory requirements from the International Maritime Association, which go into effect in 2020. This proposed project requires the Refinery to be able to completely segregate low-sulfur fuel oil (and the low-sulfur crude oil used in its production) from higher sulfur fuel oil and crude oil.

On or about July 19, 2019, the County issued a SEPA Mitigated Determination of Nonsignificance (MDNS) (Ex. #7). Following public comment and feedback, the County issued a Revised MDNS (Ex. #6) on or about August 20, 2019.

The Appellant is appealing the Revised MDNS on five grounds of either vagueness in language or requirements, or failure to require accountability in verification, associated with the project:

1. The Applicant did not quantify, and Whatcom County did not require an assessment of, the additional vessel traffic associated with this project.
2. The Applicant did not quantify, and Whatcom County did not require an assessment of, the project-related vessel traffic's potential adverse impacts.

3. The revised MDNS uses languages that conveys uncertainty as to whether Whatcom County would withdraw MDNS if the Applicant's stipulations in the SEPA checklist prove to be untrue.
4. The MDNS relies on self-reporting to verify the SEPA Checklist and 'Department of Ecology Advanced Notice of Transfer System' ("ANTS") compliance.
5. The MDNS language regarding Ordinance 2019-049 is too vague.

Overall, the Appellant highlighted concern about the assessment of the volume of large commercial shipping traffic on the surrounding waterways. The Appellant asks that the County:

1. Require the Applicant to quantify project-related vessel traffic;
2. Require the applicant to evaluate the project-related vessel traffic's adverse impacts;
3. Revise the MDNS to make it more clearly understood that the County would withdraw the MDNS and conduct additional SEPA review should vessel traffic increase substantially; and
4. Require the Applicant's vessel traffic and ANTS data to be independently monitored.

The Appellant made clear that it is appealing the Revised MDNS "in order to protect the Salish Sea, the critically endangered Southern Resident Killer Whales, and the Southern Resident Killer Whales' Designated Critical Habitat," all of which they have a longstanding documented interest in (Exhibit 1).

All parties appear to agree that the goal of the Applicant's project, which is to produce lower sulfur fuel-oil, is a positive and desired development for the environment and the community.

III.

The Applicant plans to produce a new product: lower-sulfur fuel-oil for marine shipping vessels so these vessels can comply with new fuel standards imposed by the International Maritime Organization ("IMO"), a United Nations agency charged with regulating the global shipping industry. The IMO currently allows ocean-going vessels to burn higher sulfur fuel-oil with a sulfur cap of 3.5 percent (or 35,000 ppm). The new standards that go into effect on January 1, 2020 will set a cap on sulfur in marine fuel at 0.5 percent (or 5,000 ppm). Because

marine shipping vessels account for 90 percent of all sulfur emissions globally, the new IMO standards are expected to substantially reduce sulfur emissions globally.

To achieve this, the Applicant has applied to Whatcom County for permits to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the Refinery. In order to efficiently produce the lower sulfur IMO compliant fuel, the Applicant plans to obtain, initially store and process lower sulfur crude oil. Segregating the necessary storage of lower sulfur crude from higher sulfur crude oil requires the construction of a new tank. A new tank is also needed to segregate the to-be-produced lower sulfur IMO compliant fuel-oil from other fuels. The two new tanks related to the production of the new lower sulfur IMO compliant fuel-oil would be constructed approximately one-half of a mile from the Salish Sea. The Project does not increase the refining capacity of the Applicant, but instead creates operational flexibility and enables the new production of lower sulfur IMO compliant fuel.

IV.

As of July 1, 2019, there are only 73 living Southern Resident Killer Whales (also referred to herein as "Killer Whales" with the understanding that the reference is to a specific endangered population) in existence on the planet, and they reside in the vicinity of the shipping lanes used to traffic oil and oil products to the Applicant's refinery. Southern Resident Killer Whales are listed as Endangered under the Federal Endangered Species Act (Exhibit 17.2-F), 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. Large commercial ships, like those that transport oil in and out of the Applicant's Refinery, impact the Killer Whales' ability to communicate and successfully hunt (using echolocation) for scarce prey (Exhibit 17.2-H). Other vessel traffic impacts include direct vessel strikes, hearing loss, behavioral changes, and oil spill impacts. 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" (Exhibit 17.2-I).

The plight of this species has become a policy focus of our State, such that in March 2018, an Executive Order was issued establishing the Southern Resident Killer Whale Recovery

and Task Force (“Task Force”) to “identify, prioritize, and support the implementation of a longer term action plan needed for the recovery of Southern Residents and necessary to secure a healthy and sustained population for the future.” The resultant November 2018 Southern Resident Orca Task Force Report identifies the threat that oil spills, in particular, play in the overall vulnerability of the Killer Whale population (Exhibit 17.2-X). “In addition to the threats related to the disturbance and noise from vessels, major oil spills represent a persistent, low-probability/high-impact risk to Southern Residents. The population’s vulnerability to oil spills is magnified because so few females of reproductive age are in the population and pods often aggregate off the San Juan Islands near portions of the international shipping lanes that show greater relative oil spill risk than much of the Salish Sea” (Exhibit 17.2-X at 29).

The testimony put on by the Appellant and the extensive documentation contained in Exhibit 17, demonstrates that Killer Whales are complicated and sophisticated living beings with culture and society, a precarious place in the Salish Sea and on the edge of potential extinction.

V.

The Applicant receives crude oil by rail, pipeline, and by vessel at its marine terminal. The Applicant maximizes receipt of crude over rail and pipeline because that is most economical, and it receives the balance of its crude over the marine terminal. By law, the Applicant must accurately report marine vessel traffic to the Department of Ecology. *See* WAC 173-184-100. The Department of Ecology does not routinely verify the accuracy of every entry reported, but the Applicant is subject to regulatory penalties if its reporting is inaccurate. *See* WAC 173-184-040.

The Applicant has a limited amount of total crude it can process on a daily basis, and issuing the permits for the tanks would not modify those limits. The refining of the lower sulfur crude oil necessarily reduces the amount of higher sulfur crude oil that can be processed in a given year.

Aside from, for safety reasons, filling the initial “heel” of the low sulfur crude oil tank, which takes up the lower 10% of the tank, it is not expected that issuing the permit and the MDNS determination would increase the amount of crude oil imported to the facility. However, if there were in fact an increase in traffic the risk of oil spills would increase, and such spills as

well as the noise and pollution generated from increased ship traffic can be a harm to not only Killer Whales, but other sea and land life, the economy, and recreational and commercial use of the waterways.

There was testimony that the heel could be filled with the initial fill of the tank with a single ship. The Applicant has proffered that it would voluntarily assume a specific condition to the MDNS of arranging for the vessel that initially fills the new crude oil tank to be large enough to fill the entire crude tank, including the heel.

VI.

Prior to the original issuance of the MDNS (Ex. 7), the County did inquire and seek quantitative information regarding any potential increase in vessel traffic from Appellant and in regards to the use of the project tanks in regards to export (Ex. 5; Ex. 7-3; Ex. 8, E-mails of Personius and Morrill, on 6/27/19, 7/3/19, and 7/8/19; Ex. 21-6). After issuing that original MDNS (Ex. 7), the County received community feedback from a number of sources including from the Appellant (Ex. 9). Overwhelmingly, the submitted public comment involved concern for the effects of the project on Killer Whales and the project's vessel traffic. These concerns were reflected in the Appellant's comments as well.

As a result of that feedback, the County withdrew the MDNS, and requested the Applicant to respond to the concerns raised in the public comment (Ex. 8, E-mail of Personius on 8/2/19). The Applicant met with the County to discuss the comments and the revisions wanted by the County. Applicant's agent Morrill proffered in writing to the County a number of things to address public comments and concerns including that "We will not use the new tanks to export unrefined fossil fuels" (Ex. 8, E-mail of Morrill on 8/6/19). After meeting with the Appellant, the County required significant updates to the SEPA Checklist on 8/8/19, informed the Appellant that the project would not go forward until the SEPA checklist information was provided, and received the updated checklist on 8/15/19 (Ex. 8, E-mails of Personius and Morrill, on 8/12/19 and 8/15/19; Ex. 9 at 1; Ex. 6-3, Revised Checklist).

When the County did issue its Revised MDNS, it added additional Conditions E through G to address public concerns.

VII.

All witnesses were found to be credible. There is no finding that any witness or party

attempted to perjure themselves in any of the exhibits submitted or the testimony given.

VIII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

The proper notices have been given. This matter was properly heard with a required public hearing.

The Appellant is appealing the Revised MDNS on five grounds of either vagueness in language or requirements, or failure to require accountability in verification, associated with the project. It is appropriate for government agencies to be specific and direct in both language and requirements.

II.

Standing

The Applicant argues that the Appellant does not have standing on some of its reasons for appeal. To have standing to raise issues in this appeal, the Applicant argues that SEPA requires that the Appellant raise those issues during the comment process, and that the Appellant never mentioned ANTS, the issue of independent verification of data, or the performance of additional SEPA review. The scope of an administrative or judicial SEPA appeal is limited to the issues raised in the comments. "In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." Boehm v. City of Vancouver, 111 Wn. App. 711, 722, 47 P.3d 137 (2002) (quoting King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993)).

The Appellant has standing. The Hearing Examiner finds that there is in fact "more than simply a hint or a slight reference to the issue in the record" to their concerns. The Appellant participated in the comment periods and filed a timely appeal. The nature of the comments may not have been technical or scientific, with the type of understanding an expert in refinery and shipping processes might possess, but they demonstrated concern and attention to a subject matter as any lay person would be expected to in regards to shipping traffic and its density.

Likewise, the very nature of appealing an MDNS inherently contemplates potential further review.

Standard of Review

The County's decision to issue a MDNS for the Project is subject to review under the clearly erroneous standard, and the Appellant bears the burden of proof. Moss v. City of Bellingham, 109 Wn. App. 6, 13, 31 P.3d 703 (2001) (citing RCW 36.70C.130(1)(d)). The County's MDNS determination is clearly erroneous only if the Hearing Examiner is "left with the definite and firm conviction that a mistake has been committed." *Id.* For a "MDNS to survive judicial scrutiny, the record must demonstrate that environmental factors were adequately considered in a manner sufficient to establish *prima facie* compliance with SEPA, and that the decision to issue a MDNS was based on information sufficient to evaluate the proposal's environmental impact." Anderson v. Pierce Cty., 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (internal quotations omitted). The County's decision to issue a MDNS "must be accorded substantial weight." *Id.* (citing RCW 43.21C.090).

III.

Three grounds which were a primary concern of the Appellant were that of quantification, or lack thereof, of both the vessel traffic required to fill the tank or in general; and the self-reporting requirements of any future quantification through ANTS.

A portion of this issue has been mooted by the Applicant voluntarily proffering to assume a specific condition to the MDNS of arranging for the vessel that initially fills the new crude oil tank to be large enough to fill the entire crude tank, including the heel.

The remainder of the issue regarding potentially increased ship traffic remains at hand. Unfortunately, the documentation associated with the issuance of an MDNS did not outline all of the steps or data taken by the county to get quantification data. The evidence, however, makes it clear that the County in fact repeatedly and responsibly asked for quantification data from the Applicant at least as early as May 9, 2019. In response to public comments, the County sought additional data and input as to the amount of vessel traffic. The County also appropriately used the public comment to pull the MDNS and reissue a revised MDNS with additional requirements regarding: 1.) assurance that the tanks were only being used for the purposes of producing low

sulfur fuel and would not become a hub for crude-oil export, through new “Condition E.”; and 2.) traffic and utilization of the ANTS system to track vessel traffic, through new “Condition F.”

Condition E

In regards to the appropriateness of Condition E, there are several issues. Condition E appears to have been put in place due to public comment (e.g. Ex. 9 at E-mail of 8/2/19 joined by several environmental groups) and issuance of Whatcom County Ordinance 2019-049, which is a law imposing an interim moratorium on the acceptance and processing of applications and permits for new or expanded facilities in the Cherry Point UGA, the primary purpose of which would be the shipment of unrefined fossil fuels not to be processed at Cherry Point. This law was passed on July 9, 2019.

The Appellant argues that the Condition is too vague and that export could be construed to mean only commerce with foreign nations. The applicant argues that application of a prohibition of export domestically would be a violation of the Dormant Commerce Clause. The Hearing Examiner disagrees with both perspectives to some degree and cannot draw either conclusion being asserted. The applicant did not timely appeal the MDNS and its condition E, which is clearly a prohibition on export of crude oil and was clearly put forward by the applicant themselves which was documented as early as 8/6/19. When Morrill stated “We will not use the new tanks to export unrefined fossil fuels” it was clearly a voluntary statement that he intended the County to rely on and for which to address the public comments and concerns over this issue of using the tank as a waypoint or shipping point for crude oil, as opposed to storing it for refinement into low sulfur fuel-oil as the applicant has stated is the purpose. In the context of his communication with Personius and the public comments, “export” can have no other meaning than the removal of crude oil for transfer to another facility or ship rather than being held for refinement on site.

Condition E was thoughtfully and appropriately put forward by the County after it was proffered by the Applicant. It is not a violation of DOMA because it is a voluntary condition and representation put forward by the Applicant in response and to address public concern, and to dissuade the County from requiring additional study. That condition put in place by the County was appropriate and it was commendable of the Applicant to represent that to the County and concerned community members. The offer by the applicant appears to be driven by response to

community concerns and not concern over Whatcom County Ordinance 2019-049 which was temporary in nature.

The language used in the second paragraph of that condition E, however, was erroneously vague, as it stated that its use shall be “primarily” for separation and storage of low-sulfur crude oil and doesn’t clarify the holding of low-sulfur fuel-oil or what makes up “primary” usage, and what would *in fact* be a violation of the condition. Additionally, the condition will be clarified to give the intended and apparent purpose and meaning.

Condition F

In regards to the appropriateness of self-reporting and Condition F which was not appealed by the applicant, it is important for safety, environmental, recreational, and economic reasons that the County ensure there is no increased traffic from the issuance of a permit. However, given no evidence of any wrong doing in reporting on the part of the applicant, the ANTS system that is already in place and the potential civil penalties for false reporting are a sufficient and reasonable safeguard to protect the general environment, the economy, Killer Whales, as well as human recreational and commercial usage from the risks associated with increased vessel traffic that could result from an increased capacity to take on additional deliveries from the ocean. . The issuance of these conditions by the County were not erroneous and indeed were appropriate.

The language used in the second paragraph of that condition F, however, was erroneously vague, as it set no standard, quantifiable or otherwise, as to what excess of the “range of average annual marine fuel oil vessel activity” would *in fact* trigger additional SEPA review.

The applicant shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track and report marine fuel oil shipments by vessel. Vessel trips to/from the marine terminal that cumulatively exceed the range of average annual marine fuel oil vessel activity identified in the 2017-2019 period (as identified in ANTS) may be subject to additional SEPA review. (Ex. 6, Condition F)

As a consequence, that condition will be revised by the Hearing Examiner. Additionally, it was unclear to the Hearing Examiner if ANTS data was part of the reporting data required to be given to PDS annually and that too shall be clarified.

IV.

Another concern raised by the Appellant regarded the study, or lack thereof, of the potential adverse impacts related to vessel traffic, especially those impacts to the Killer Whales.

See the discussion in §III above regarding the County's requests for information and requests for additional information after receiving public comment, it is by and large applicable to this issue. The County responsibly made inquiries, pulled the original MDNS, made additional inquiries, and issued a revised MDNS only after receiving amended materials including a revised SEPA checklist.

Killer Whales are unquestionably, in the eyes of Washington State's body politic, a vital component of our environment, economy, and way of life. They are the focus of Federal and State Laws protecting them, administrative task forces seeking to aid their existence, and are virtually synonymous with the identity of the Salish Sea and the appurtenant activities and communities that intertwine with it. Their presence in our culture, art, laws, and indeed litigation brought by citizens concerned for their wellbeing, reflects their importance to our society. The extensive body of evidence presented clearly demonstrates to the Hearing Examiner that were they to become extinct, we as humans would suffer an unacceptable loss at many levels, including the effect on our economy, environment, and way of life.

"Under SEPA, evaluation of a proposal's environmental impact requires examination of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." Chuckanut Conservancy v. Washington State Dept. of Natural Resources, 156 Wn. App. 274, 285, 232 P.3d 1154 ((*citing* Norway Hill, 87 Wn.2d at 277, 552 P.2d 674 (*quoting* Narrowsview Preserv. Ass'n v. Tacoma, 84 Wn.2d 416, 423, 526 P.2d 897 (1974))). Applying both factors to the Project shows the County properly issued the MDNS. The MDNS and associated permit will not increase vessel traffic, so the project will not "cause adverse environmental effects in excess of those created by existing uses 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.

In the case at hand, the County has correctly determined that the permit and MDNS as

issued should not present any additional risk or harm to the environment in general or the Killer Whales in particular. The evidence shows that there will be no increased vessel traffic. Only "significant" impacts would require additional study under SEPA, and because there is no increase in significant adverse environmental impacts associated with the Project, the MDNS is proper. RCW 43.21C.031; WAC 197-11-350.

Further, the County appropriately ensured that public concerns about oil spill risks were addressed by Condition G.

V.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

VI.

The proposed MDNS and its underlying permit for the tank replacement project are upheld to the extent they are not erroneous. No issue was raised over the underlying permit. Subject to the Conditions attached hereto, including voluntary stipulations by the Applicant, the MDNS will meet all appropriate criteria and any errors for vagueness will have been revised, and therefore the MDNS is approved as revised and the underlying permit approved as well. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

This appeal brought forward valid and reasonable concerns on the part of the Appellant, and has resulted in revised MDNS conditions. It is appropriate for government agencies to be specific and direct in both language and requirements. General conditions E., and F. were revised, and general condition H. added. It is noted that the applicant also responded admirably to community concerns by offering up conditions voluntarily to meet those concerns even if not required to do so under the law, and doing additional study not demanded by the County.

Had the County produced a more thorough Staff Report with documentation of the process detailing their efforts to address the concerns raised by the community this appeal may have been avoided. Documentation presentation aside, the County did, however, use appropriate judgment and effort in using the community feedback to revise the MDNS to address the issues raised by the community. The revisions made are of a refining nature to correct erroneous portions of otherwise good judgment and policy decisions.

The MDNS and the contingent land disturbance permit are approved for the construction of Phillips 66 Ferndale Refinery's tank replacement project. The property is located at 3901 Unick Road, Ferndale WA on Assessor's Parcel No. 390133 197349. The

approval is granted subject to the following required revised conditions, and any other conditions already put in place by the County:

General Conditions:

- a. The applicant estimates up to 3,750 truckloads of material (110,000 cu yards) shall be removed from the site in order to construct the tanks. A traffic control plan must be submitted prior to construction of the tanks.
- b. Maximum permissible environmental noise shall meet requirements of WAC 173-60. In accordance with WAC 173-60-080 a variance will be required prior to construction outside of normal construction hours or if construction noise will exceed thresholds in WAC 173-60.
- c. General inadvertent discovery: Should archaeological resources (e.g. shell midden, faunal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic Preservation (Gretchen Kaehler, Local Government Archaeologist 360-586-3088) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-312-2257; Tamela Smart, Deputy THPO 360-312-2253) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.
- d. Human skeletal remains: If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further disturbance to those remains. The area of the find will be secured and protected from further disturbance. The finding of human skeletal remains will be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains will not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains.
- e. The two new storage tanks to be permitted under SEPA 2019-00033 shall be utilized only for the separation and storage of low sulfur crude oil intended for production of IMO compliant low sulfur marine fuels and the resultant low sulfur fuel-oil. The tanks shall not

be utilized for storage of crude oil 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.

- f. 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, their environment, the economy, human usage, or other negative environmental effects, 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 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.

- g. Prior to final commercial building permit inspection and authorized use of the two new storage tanks, the applicant shall provide documentation that the Department of Ecology has verified compliance of the operator's oil spill contingency plan with the requirements of Chapter 173-182 WAC.
- h. 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 crude oil to the crude oil tank.

NOTICE OF POTENTIAL REVOCATION AND PENALTIES

This MDNS is subject to all of the above-stated conditions. Failure to comply with them may cause for its revocation. Complaints regarding a violation of the conditions of this MDNS should be filed with Whatcom County Planning and Development Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing. Violations of this title shall constitute Class I civil infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

ORIGINALLY ENTERED 17th day of November 2019, pursuant to authority granted under the Laws of the State of Washington and Whatcom County, and REVISED on 26th Day of November, 2019.



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

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

BACKGROUND AND REVIEW ON RECONSIDERATION

The hearing examiner notified the parties of its decision on the 18th day of November 2019, the first business day after issuing its decision on the 17th. On or about the 21st 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 23rd 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 18th, 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 26th day of November 2019, pursuant to authority granted under the Laws of the State of Washington and Whatcom County.



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

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: On August 30, 2019, the Friends of the San Juans filed an Administrative Appeal of a Revised SEPA Mitigated Determination of Nonsignificance made by Whatcom County Planning and Development Services for Phillips 66 Ferndale Refinery's tank replacement project, issued on August 20, 2019. The property is located at 3901 Unick Road, Ferndale WA.

Decision: The SEPA Mitigated Determination of Non-significance is upheld in large part, subject to new modified Conditions of Approval.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence and argument presented at the public hearing held on November 1, 2019.

FINDINGS OF FACT

I.

PRELIMINARY INFORMATION

Applicant: Phillips 66 Ferndale Refinery c/o Ken Morrill
Property Address: 3901 Unick Road
Assessor's Parcel Number(s): 390133 197349
Zoning: HII
Comprehensive Plan: Major/Port Industrial UGA

Environmental Impact Statement: Not required pursuant to RCW 43.21C *et al.*

Non-exhaustive list of Authorizing Codes, Policies, Plans, and Programs referenced in argument, exhibits or decision.

Whatcom County Ordinance 2019-049,
Washington Administrative Code (WAC) Chapters 173-60, 173-182, 197-11
State Environmental Policy Act (SEPA)
Revised Code of Washington [RCW] Chapter 36.70
Whatcom County Comprehensive Plan
Whatcom County Code, Title 2, Chapter 2.33 – Permit Review Procedures
Whatcom County Code Chapter 12.08, Development Standards
Whatcom County Code Chapter 15, Building Code/Fire Code
Whatcom County Environmental Policy Administration Chapter 16.08
Whatcom County Code Chapter 16.16, Environment - Critical Areas
Whatcom County Code, Title 14, Use of Natural Resources
Whatcom County Code, Title 17, Flood Damage Prevention Code
Whatcom County Code Title 20, Official Whatcom County Zoning Ordinance
Whatcom County Code Title 22, Land Use and Development Procedures
Whatcom County Code Title 23, Shoreline Management Program
Whatcom County Code Title 24, Health Regulations

Legal Notices: Notice of Hearing, Posted- October 17, 2019
Notice of Hearing, Published- October 17, 2019
H.E.'s Notice of Hearing, Mailed- October 15, 2019

Hearing Date: November 1, 2019

Parties of Record:

Jennifer Barcelos, Attorney representing Friends of the San Juans
Royce Buckingham, Attorney representing Whatcom County
Andy Murphy, Attorney representing Phillips 66
Mark Personius, Director of Whatcom County Planning & Development
Ryan Walters, witness for Friends of the San Juans
Dr. Tim Ragen, witness for Friends of the San Juans

Dr. David Bain, witness for Friends of the San Juans

Dr. Martin Haulena, witness for Friends of the San Juans

Lovel Prat, witness for Friends of the San Juans

Todd Barnreiter, witness for Phillips 66

Ken Morrill, witness for Phillips 66

Exhibits:

1. SEPA Administrative Appeal Form, SEPA-APL2019-0011, with attachments
 - 1-1 Admin Appeal & Customer Receipt, August 30, 2019, with Comments
 - 1-2 Notice of Appearance, Letter from Andy Murphy on behalf of Phillips 66 Ferndale Refinery in the Appeal of Revised SEPA MDNS SEP2019-0033
 - 1-3 Hearing Examiner Routing Memorandum, dated September 11, 2019
2. Letter dated September 10, 2019 from Andy Murphy and LeAnne Bremer, Miller Nash/Graham & Dunn, Attorneys at Law re: Notice of Appearance on behalf of Phillips 66 Ferndale Refinery in the Appeal of Revised SEPA MDNS SEP2019-0033
3. Land Disturbance and Clearing Application, LDP2019-0033: Applicant: Phillips 66 Ferndale Refinery, Ken Morrill, with Customer Receipt, dated 4/12/19 w/ attachments:
 - 3-1 Submittal Information
 - 3-2 Fee Responsibility
 - 3-3 Agent Authorization
 - 3-4 Civil Site Plans, Review Approval, dated June 6, 2019, stamped Critical Areas Approved, August 29, 2019
 - 3-5 Engineering Services Haul Road Agreement: Logistics Flexibility Project, dated June 12 & 13, 2019, with attached Hauling Operations Questionnaire, 6/07/19, with 4 aerial haul route Site to Pit maps & Alt Axton maps
4. Planning & Development Form: Case Activities for LDP2019-0033, June 26, 2019 with attachments:
 - 4-1 Engineering Division: Hauling Operations Questionnaire: Logistics Flexibility Project, date completed 6/7/19, with 4 aerial Google Maps: Import Haul Route Site to Pit Import, Export Return, and Alt Axton Haul Route Map with Haul Route Site to Pit & Pit to Site
 - 4-2 Engineering Division: Hauling Operations Questionnaire: dated 6/7/19: Revised to Show Alternate Export Landfill Sites, with 4 Google Maps: Import Haul Route Site to Pit Import, Haul Route Export Return; Axton Haul ALT Route Map and Haul Route Site to Pit & Pit to Site

- 4-3 Engineering Division Hauling Operations Questionnaire, date stamped 5/28/19 with 2 Google Maps: Import Haul Route Site to Pit Import and Haul Route Export Return
- 5 Land Disturbance Permit: Notice of Additional Requirements [NOAR], dated May 9, 2019 re: LDP2019-0033 sent to Phillips 66 Ferndale Refinery by PDS Natural Resource Staff
- 6 Revised SEPA Distribution List, SEP2019-0033, issued August 20, 2019, with attachments:
 - 6-1 Revised SEPA Mitigated Determination of Non-significance [MDNS] issued August 20, 2019, with Revised Mitigating Conditions
 - 6-2 Revised MDNS Legal Notice, published August 20, 2019
 - 6-3 SEPA Environmental Checklist, revised (2) August 15, 2019, with attached Vicinity Map of Subject Area, June 2019
- 7 SEPA Distribution List, SEP2019-0033, issued July 19, 2019, with Project Description, signed by Responsible Official, Planning Director, Mark Personius, with attachments:
 - 7-1 SEP2019-0033 MDNS Mitigating Conditions
 - 7-2 SEPA MDNS Legal Notice, published July 19, 2019
 - 7-3 Revised SEPA Environmental Checklist, Rev [1] May 15, 2019, with attached Email from Kenneth Morrill, Sr. Project Engineer to Mark Personius, dated July 3, 2019 re: future impacts to Phillips 66 marine terminal operations and Vicinity Map of Subject Area, dated June 2019
- 8 Packet of Staff Correspondence emails: beginning May 28 ending August 30, 2019, with attached Phillips 66 Ferndale: Logistics Flexibility Traffic Control Plan [with red highlighted notes in front & back of Google Map]
- 9 SEPA Comments Received by Planning Staff, beginning with Thomas Brissenden email to Kenneth Morrill, dated August 8, 2019 re: comment letters requesting SEPA Checklist Modifications. The final letter to Thomas Brissenden, dated June 6, 2019 from State of Washington: Department of Archaeology & Historic Preservation re: Archaeology Survey Requested for Equipment/Staging/Fill Area; IDP for Tank Installation
- 10 Emails from Applicants and Opponents to Hearing Examiner's Office re: Scheduling details and receipt of Planning's entire record
- 11 Legal Notice of Public Hearing for SEPA-Appeal, published October 17, 2019
- 12 Posting Notices, posted on October 17, 2019
- 13 County's Witness List for APL2019-0011, prepared by Royce Buckingham, Civil Deputy Prosecuting Attorney for Planning Department, dated October 15, 2019

- 14 County's Exhibit List for APL2019-0011, prepared by Royce Buckingham, Civil Deputy Prosecuting Attorney for Planning Department, dated October 15, 2019
- 15 Friends of the San Juans' Preliminary Witness and Exhibit Lists, prepared by Jennifer Barcelos, Attorney for Appellant, dated October 21, 2019
- 16 Phillips 66 Ferndale Refinery's Witness and Exhibit List, prepared by Andy Murphy, Attorney for Applicant, dated October 21, 2019
- 17 Three-ring Binder: Friends of the San Juans, Exhibits for SEPA-APL2019-0011; Revised MDNS 2019-00033: Phillips 66 Revised SEPA MDNS, submitted by Jennifer Barcelos, Attorney for the Appellant, dated October 23rd, 2019
 - Table of Contents
 - 17.1 Witness List:
 - A. Lovel Pratt, Marine Protection Program Director, Friends of the San Juans;
 - B. Dr. David Bain, Vice President of Board of Directors, Orca Conservancy;
 - C. Dr. Martin Haulena, Head Veterinarian, Vancouver Aquarium;
 - D. Dr. Tim Ragen, Former Executive Director, U.S. Marine Mammal Comm
 - E. Dr. Kurt Russo, Sr. Strategist, Lummi Sovereignty & Treaty Protection Office;
 - F. Ryan Walters, Planning & Community Development Dir., Samish Indian Nation
 - G. Richard Grout, Retired Planning Director, San Juan County
 - 17.2 Exhibit List:
 - A. Revised SEPA Mitigated Determination Non-significance, Phillips 66 Ferndale Refinery Logistics Flexibility Project (August 20, 2019) with Project Description, Revised Mitigating Conditions, SEPA Environmental Checklist
 - B. SEPA Mitigated Determination of Non-significance, Original MDNS (07-19-19)
 - With Project Description & SEPA Environmental Checklist
 - C. Public Comments received by Whatcom County re: SEP2019-00033, 2019
 - D. Whatcom County Adopted Ordinance 2019-049; Imposing Interim Meratorium on Acceptance & Processing of Applications & Permits for New or Expanded Facilities in Cherry Point UGA
 - E. NOAA Fisheries Northwest Region, Designated Critical Habitat for Resident Killer Whales, November, 2016
 - F. Endangered and Threatened Wildlife & Plants: Endangered Status for Southern Resident Killer Whales, 70 C.F.R. 222 2005
 - G. National Marine Fisheries Service: Recovery Plan for Southern Resident Killer Whales [Orcinus orca], National Marine Fisheries Service NW Region, Seattle, 2008
 - H. Veirs S, Veirs V, Wood JD, Ship noise extends to frequencies used for echolocation by endangered killer whales, 2016
 - I. R.C. Lacy, R. Williams, E. Ashe, K.C. Balcomb III, et al : Evaluating anthropogenic threats to endangered killer whales to inform effective

- recovery plans, Scientific Reports, 2017
- J. Ferrara, G.A., T.M. Mongillo, L.M. Barre, Reducing disturbance from vessels to Southern Resident killer whales: Assessing the effectiveness of 2011 federal regulations in advancing recovery goals, NOAA Tech. Memo, NMFS-OPR-58 at 76, 2017
 - K. Fisheries & Oceans Canada, Necropsy results: Southern Resident Killer Whale J34, July 22, 2019
 - L. National Marine Fisheries Service, Southern Resident Killer Whales [Orcinus orca] 5-Year Review: Summary and Evaluation, 2016
 - M. NOAA, Species in the spotlight: Priority actions, Southern Resident killer whale DPS, Orcinus orca, 2016-2020, 2016
 - N. National Academies of Sciences, Engineering & Medicine, Approaches to Understanding Cumulative Effects of Stressors on Marine Mammals, 2017
 - O. Esler et al., Timelines & mechanisms of wildlife population recovery: Topical Studies in Oceanography Vol 147, January 2018
 - P. National Academies of Sciences: Approaches to Understanding Cumulative Effects of Stressors on Marine Mammals, 2017
 - Q. Moore et al., A New Framework for Assessing Effects of Anthropogenic Sound on Marine Mammals in Rapidly Changing Arctic, 2012
 - R. Gaydos JK, Thixton S, Donatuto J., Evaluating Threats in Multinational Marine Ecosystems: Coast Salish First Nations & Tribal Perspective, 2015
 - S. Schwacke, Lori H., et al., Health of Common Bottlenose Dolphins In Barataria Bay, Louisiana, Following Deepwater Horizon Oil Spill, 2013
 - T. Rhinehart, Jolie, Letter to Phillips 66 Ferndale Refinery Manager to US Dept. of Transportation re: PHMSA-2019-0149, September 23, 2019
 - U. House Environment Energy Committee, Public Hearing ESSB 5579 Meeting Notes, March 19, 2019
 - V. Engrossed Substitute Senate Bill 5579, Crude Oil by Rail—Vapor Pressure, Effective Date: July 28, 2019
 - W. EXECUTIVE ORDER 18-02, Southern Resident Killer Whale Recovery and Task Force, March 14, 2018
 - X. Southern Resident Orcs Task Force, Report and Recommendations, November 16, 2018
 - Y. Pratt, Lovel et al., Justification and Problem Statements Supporting the Need to Implement the Southern Resident Killer Whale Task Force Recommendation 27, August 6, 2019
 - Z. Scheid, Brian, S&P Global Platts, Phillips 66 cuts crude-by-rail shipments to Ferndale refinery due to state law: letter, October 2, 2019
- 18. Friends of the San Juans Pre-Hearing Brief, prepared by Jennifer Barcelos, Attorney for Appellant, dated October 28, 2019, with attached Declaration of Service
 - 19. Phillips 66 Ferndale Refinery's Hearing Brief, prepared by Andy Murphy, Attorney for the Applicant, dated October 28, 2019

20. Emails from Royce Buckingham, Applicant's Attorney, Appellant's Attorney to Carole, Oct 21 to Oct 29 re: briefing schedule & Hearing Examiner Business Rules, Resolution 86-41
21. Three-ring Binder: Phillips 66 Ferndale Refinery's Preliminary Exhibits, prepared by Miller Nash/Graham & Dunn LLP, Attorneys At Law
- Exhibit 1: 4 Colored photos: (1) Proposed 800X152 Clean Fuel Oil tank-east of existing 3000X1 Crude Tank, (2) Existing Site-Project area inside of tank dike wall. Project will expand secondary containment volume. (3) Proposed 3000X2 Crude tank- south of existing 6000X1 Crude Tank, (4) Existing Site-Project area inside and outside of tank dike wall. Project will expand secondary containment volume.
- Exhibit 2: Phillips 66 site photo showing New 300MBBL Crude Tank and New 80MBBL HFO Tank
- Exhibit 3: Washington State Department of Ecology Letter, dated May 22, 2015 to Rich Harbison, Refinery Manager re: Congratulations, granting final approval to Phillips 66 Refinery Integrated Contingency Plan, with enclosure of Plan Review Checklist, Plan Approval Certificate
- Exhibit 4: Whatcom County Planning & Development Services, Pre-Application Meeting Packet
- Exhibit 5: SEPA Environmental Checklist, submitted by Ken Morrill, March 8, 2019
- Exhibit 6: Email from Amy Keenan to Kenneth Morrill, dated March 8, 2019 re: Additional Pre-application Questions
- Exhibit 7: WC P&DS Purpose of the Pre-Application Meeting, prepared by Amy Keenan, March 28, 2019
- Exhibit 8: IMO 2020: The Big Shipping Shake-Up, published on June 12, 2019 by Ashley Viens, 10/18/2019 [Page 1 of 16]
- Exhibit 9: Northwest Clean Air Agency, Mount Vernon, WA: NW Clean Air Agency hereby issues on August 5, 2019, Order of Approval to Construct [OAC] 1322: Signed by Dan Mahar, Air Quality Engineer & Agata McIntyre, P.E. Engineering Manager; Project Summary: Construct and operate a 300,000 barrel crude oil storage tank and a 80,000 barrel fuel oil storage tank with associated piping tie-ins to the refinery.
- Exhibit 10: Email from David Schmitz, Environmental Specialist, HSE Dept, Phillips 66, to WA Dept. of Ecology, dated August 14, 2019 re: construction question related to potential Construction Stormwater General Permit with option of draining to the Primary Treatment Section of the Wastewater Treatment Plant with response from Noel Tamboer & Liem Nguyen, August 27, 2019 and sent to Ken Morrill, August 27, 2019 re: Logistics Flexibility Project NPDES compliance memo, as "good news from Dept of Ecology for the Phillip 66 project not to have stormwater runoff to cause a violation of the water quality standards

Exhibit 11: Transportation Study for Ferndale Refinery Logistics Flexibility Project No. 0525764, prepared by ERM-West, Inc. dated October 4, 2019

- Exhibit 22 Dr. Timothy Rague's Resume, speaker for Friends of the San Juans
- Exhibit 23 Lovel Prat's Resume, speaker for Friends of the San Juans
- Exhibit 24 David Bain's Resume, Speaker for Friends of the San Juans
- Exhibit 25 Martin Haulena's Resume, Speaker for Friends of the San Juans

II.

The Applicant, The Phillips 66 Ferndale Refinery ("Applicant") has applied to Whatcom County for permits to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the Refinery. The stated purpose is to provide additional operating flexibility to manufacture low-sulfur marine fuels in compliance with regulatory requirements from the International Maritime Association, which go into effect in 2020. This proposed project requires the Refinery to be able to completely segregate low-sulfur fuel oil (and the low-sulfur crude oil used in its production) from higher sulfur fuel oil and crude oil.

On or about July 19, 2019, the County issued a SEPA Mitigated Determination of Nonsignificance (MDNS) (Ex. #7). Following public comment and feedback, the County issued a Revised MDNS (Ex. #6) on or about August 20, 2019.

The Appellant is appealing the Revised MDNS on five grounds of either vagueness in language or requirements, or failure to require accountability in verification, associated with the project:

1. The Applicant did not quantify, and Whatcom County did not require an assessment of, the additional vessel traffic associated with this project.
2. The Applicant did not quantify, and Whatcom County did not require an assessment of, the project-related vessel traffic's potential adverse impacts.
3. The revised MDNS uses languages that conveys uncertainty as to whether Whatcom County would withdraw MDNS if the Applicant's stipulations in the SEPA checklist prove to be untrue.

4. The MDNS relies on self-reporting to verify the SEPA Checklist and 'Department of Ecology Advanced Notice of Transfer System' ("ANTS") compliance.
5. The MDNS language regarding Ordinance 2019-049 is too vague.

Overall, the Appellant highlighted concern about the assessment of the volume of large commercial shipping traffic on the surrounding waterways. The Appellant asks that the County:

1. Require the Applicant to quantify project-related vessel traffic;
2. Require the applicant to evaluate the project-related vessel traffic's adverse impacts;
3. Revise the MDNS to make it more clearly understood that the County would withdraw the MDNS and conduct additional SEPA review should vessel traffic increase substantially; and
4. Require the Applicant's vessel traffic and ANTS data to be independently monitored.

The Appellant made clear that it is appealing the Revised MDNS "in order to protect the Salish Sea, the critically endangered Southern Resident Killer Whales, and the Southern Resident Killer Whales' Designated Critical Habitat," all of which they have a longstanding documented interest in (Exhibit 1).

All parties appear to agree that the goal of the Applicant's project, which is to produce lower sulfur fuel-oil, is a positive and desired development for the environment and the community.

III.

The Applicant plans to produce a new product: lower-sulfur fuel-oil for marine shipping vessels so these vessels can comply with new fuel standards imposed by the International Maritime Organization ("IMO"), a United Nations agency charged with regulating the global shipping industry. The IMO currently allows ocean-going vessels to burn higher sulfur fuel-oil with a sulfur cap of 3.5 percent (or 35,000 ppm). The new standards that go into effect on January 1, 2020 will set a cap on sulfur in marine fuel at 0.5 percent (or 5,000 ppm). Because marine shipping vessels account for 90 percent of all sulfur emissions globally, the new IMO standards are expected to substantially reduce sulfur emissions globally.

To achieve this the Applicant has applied to Whatcom County for permits to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel external floating roof fuel oil storage tank in a tank farm located within the Refinery. In order to efficiently

produce the lower sulfur IMO compliant fuel, the Applicant plans to obtain, initially store and process lower sulfur crude oil. Segregating the necessary storage of lower sulfur crude from higher sulfur crude oil requires the construction of a new tank. A new tank is also needed to segregate the to-be-produced lower sulfur IMO compliant fuel-oil from other fuels. The two new tanks related to the production of the new lower sulfur IMO compliant fuel-oil would be constructed approximately one-half of a mile from the Salish Sea. The Project does not increase the refining capacity of the Applicant, but instead creates operational flexibility and enables the new production of lower sulfur IMO compliant fuel.

IV.

As of July 1, 2019, there are only 73 living Southern Resident Killer Whales (also referred to herein as "Killer Whales" with the understanding that the reference is to a specific endangered population) in existence on the planet, and they reside in the vicinity of the shipping lanes used to traffic oil and oil products to the Applicant's refinery. Southern Resident Killer Whales are listed as Endangered under the Federal Endangered Species Act (Exhibit 17.2-F), 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. Large commercial ships, like those that transport oil in and out of the Applicant's Refinery, impact the Killer Whales' ability to communicate and successfully hunt (using echolocation) for scarce prey (Exhibit 17.2-H). Other vessel traffic impacts include direct vessel strikes, hearing loss, behavioral changes, and oil spill impacts. 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" (Exhibit 17.2-D).

The plight of this species has become a policy focus of our State, such that in March 2018, an Executive Order was issued establishing the Southern Resident Killer Whale Recovery and Task Force ("Task Force") to "identify, prioritize, and support the implementation of a longer term action plan needed for the recovery of Southern Residents and necessary to secure a healthy and sustained population for the future." The resultant November 2018 Southern Resident Orca Task Force Report identifies the threat that oil spills, in particular, play in the overall vulnerability of the Killer Whale population (Exhibit 17.2-X). "In addition to the threats

related to the disturbance and noise from vessels, major oil spills represent a persistent, low-probability/high-impact risk to Southern Residents. The population's vulnerability to oil spills is magnified because so few females of reproductive age are in the population and pods often aggregate off the San Juan Islands near portions of the international shipping lanes that show greater relative oil spill risk than much of the Salish Sea" (Exhibit 17.2-X at 29).

The testimony put on by the Appellant and the extensive documentation contained in Exhibit 17, demonstrates that Killer Whales are complicated and sophisticated living beings with culture and society, a precarious place in the Salish Sea and on the edge of potential extinction.

V.

The Applicant receives crude oil by rail, pipeline, and by vessel at its marine terminal. The Applicant maximizes receipt of crude over rail and pipeline because that is most economical, and it receives the balance of its crude over the marine terminal. By law, the Applicant must accurately report marine vessel traffic to the Department of Ecology. See WAC 173-184-100. The Department of Ecology does not routinely verify the accuracy of every entry reported, but the Applicant is subject to regulatory penalties if its reporting is inaccurate. See WAC 173-184-040.

The Applicant has a limited amount of total crude it can process on a daily basis, and issuing the permits for the tanks would not modify those limits. The refining of the lower sulfur crude oil necessarily reduces the amount of higher sulfur crude oil that can be processed in a given year.

Aside from, for safety reasons, filling the initial "heel" of the low sulfur crude oil tank, which takes up the lower 10% of the tank, it is not expected that issuing the permit and the MDNS determination would increase the amount of crude oil imported to the facility. There was testimony that the heel could be filled with the initial fill of the tank with a single ship. The Applicant has proffered that it would voluntarily assume a specific condition to the MDNS of arranging for the vessel that initially fills the new crude oil tank to be large enough to fill the entire crude tank, including the heel.

VI.

Prior to the original issuance of the MDNS (Ex. 7), the County did inquire and seek quantitative information regarding any potential increase in vessel traffic from Appellant and in

regards to the use of the project tanks in regards to export (Ex. 5; Ex. 7-3; Ex. 8, E-mails of Personius and Morrill, on 6/27/19, 7/3/19, and 7/8/19; Ex. 21-6). After issuing that original MDNS (Ex. 7), the County received community feedback from a number of sources including from the Appellant (Ex. 9). Overwhelmingly, the submitted public comment involved concern for the effects of the project on Killer Whales and the project's vessel traffic. These concerns were reflected in the Appellant's comments as well.

As a result of that feedback, the County withdrew the MDNS, and requested the Applicant to respond to the concerns raised in the public comment (Ex. 8, E-mail of Personius on 8/2/19). The Applicant met with the County to discuss the comments and the revisions wanted by the County. Applicant's agent Morrill proffered in writing to the County a number of things to address public comments and concerns including that "We will not use the new tanks to export unrefined fossil fuels" (Ex. 8, E-mail of Morrill on 8/6/19). After meeting with the Appellant, the County required significant updates to the SEPA Checklist on 8/8/19, informed the Appellant that the project would not go forward until the SEPA checklist information was provided, and received the updated checklist on 8/15/19 (Ex. 8, E-mails of Personius and Morrill, on 8/12/19 and 8/15/19; Ex. 9 at 1; Ex. 6-3, Revised Checklist).

When the County did issue its Revised MDNS, it added additional Conditions E through G to address public concerns.

VII.

All witnesses were found to be credible. There is no finding that any witness or party attempted to perjure themselves in any of the exhibits submitted or the testimony given.

VIII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

The proper notices have been given. This matter was properly heard with a required public hearing.

The Appellant is appealing the Revised MDNS on five grounds of either vagueness in

language or requirements, or failure to require accountability in verification, associated with the project. It is appropriate for government agencies to be specific and direct in both language and requirements.

II.

Standing

The Applicant argues that the Appellant does not have standing on some of its reasons for appeal. To have standing to raise issues in this appeal, the Applicant argues that SEPA requires that the Appellant raise those issues during the comment process, and that the Appellant never mentioned ANTS, the issue of independent verification of data, or the performance of additional SEPA review. The scope of an administrative or judicial SEPA appeal is limited to the issues raised in the comments. "In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." Boehm v. City of Vancouver, 111 Wn. App. 711, 722, 47 P.3d 137 (2002) (quoting King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993)).

The Appellant has standing. The Hearing Examiner finds that there is in fact "more than simply a hint or a slight reference to the issue in the record" to their concerns. The Appellant participated in the comment periods and filed a timely appeal. The nature of the comments may not have been technical or scientific, with the type of understanding an expert in refinery and shipping processes might possess, but they demonstrated concern and attention to a subject matter as any lay person would be expected to in regards to shipping traffic and its density. Likewise, the very nature of appealing an MDNS inherently contemplates potential further review.

Standard of Review

The County's decision to issue a MDNS for the Project is subject to review under the clearly erroneous standard, and the Appellant bears the burden of proof. Moss v. City of Bellingham, 109 Wn. App. 6, 13, 31 P.3d 703 (2001) (citing RCW 36.70C.130(1)(d)). The County's MDNS determination is clearly erroneous only if the Hearing Examiner is "left with the definite and firm conviction that a mistake has been committed." *Id.* For a "MDNS to survive judicial scrutiny, the record must demonstrate that environmental factors were adequately

considered in a manner sufficient to establish *prima facie* compliance with SEPA, and that the decision to issue a MDNS was based on information sufficient to evaluate the proposal's environmental impact." Anderson v. Pierce Cty., 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (internal quotations omitted). The County's decision to issue a MDNS "must be accorded substantial weight." *Id.* (citing RCW 43.21C.090).

III.

Three grounds which were a primary concern of the Appellant were that of quantification, or lack thereof, of both the vessel traffic required to fill the tank or in general; and the self-reporting requirements of any future quantification through ANTS.

A portion of this issue has been mooted by the Applicant voluntarily proffering to assume a specific condition to the MDNS of arranging for the vessel that initially fills the new crude oil tank to be large enough to fill the entire crude tank, including the heel.

The remainder of the issue regarding potentially increased ship traffic remains at hand. Unfortunately, the documentation associated with the issuance of an MDNS did not outline all of the steps or data taken by the county to get quantification data. The evidence, however, makes it clear that the County in fact repeatedly and responsibly asked for quantification data from the Applicant at least as early as May 9, 2019. In response to public comments, the County sought additional data and input as to the amount of vessel traffic. The County also appropriately used the public comment to pull the MDNS and reissue a revised MDNS with additional requirements regarding: 1.) assurance that the tanks were only being used for the purposes of producing low sulfur fuel and would not become a hub for crude-oil export, through new "Condition E."; and 2.) traffic and utilization of the ANTS system to track vessel traffic, through new "Condition F."

Condition E

In regards to the appropriateness of Condition E, there are several issues. Condition E appears to have been put in place due to public comment (e.g. Ex. 9 at E-mail of 8/2/19 joined by several environmental groups) and issuance of Whatcom County Ordinance 2019-049, which is a law imposing an interim moratorium on the acceptance and processing of applications and permits for new or expanded facilities in the Cherry Point UGA, the primary purpose of which would be the shipment of unrefined fossil fuels not to be processed at Cherry Point. This law was passed on July 9, 2019.

The Appellant argues that the Condition is too vague and that export could be construed to mean only commerce with foreign nations. The applicant argues that application of a prohibition of export domestically would be a violation of the Dormant Commerce Clause. The Hearing Examiner disagrees with both perspectives to some degree and cannot draw either conclusion being asserted. The applicant did not timely appeal the MDNS and its condition E, which is clearly a prohibition on export of crude oil and was clearly put forward by the applicant themselves which was documented as early as 8/6/19. When Morrill stated "We will not use the new tanks to export unrefined fossil fuels" it was clearly a voluntary statement that he intended the County to rely on and for which to address the public comments and concerns over this issue of using the tank as a waypoint or shipping point for crude oil, as opposed to storing it for refinement into low sulfur fuel-oil as the applicant has stated is the purpose. In the context of his communication with Personius and the public comments, "export" can have no other meaning than the removal of crude oil for transfer to another facility or ship rather than being held for refinement on site.

Condition E was thoughtfully and appropriately put forward by the County after it was proffered by the Applicant. It is not a violation of DOMA because it is a voluntary condition and representation put forward by the Applicant in response and to address public concern, and to dissuade the County from requiring additional study. That condition put in place by the County was appropriate and it was commendable of the Applicant to represent that to the County and concerned community members.

The language used in the second paragraph of that condition E, however, was erroneously vague, as it stated that its use shall be "primarily" for separation and storage of low-sulfur crude oil and doesn't clarify the holding of low-sulfur fuel-oil or what makes up "primary" usage, and what would *in fact* be a violation of the condition. Additionally, the condition will be clarified to give the intended and apparent meaning.

Condition F

In regards to the appropriateness of self-reporting and Condition F, the ANTS system that is already in place and the potential civil penalties for false reporting are a sufficient and reasonable safeguard, given no evidence of any wrong doing in reporting on the part of the Applicant. None of these actions were erroneous and indeed were appropriate.

The language used in the second paragraph of that condition F, however, was erroneously vague, as it set no standard, quantifiable or otherwise, as to what excess of the "range of average annual marine fuel oil vessel activity" would *in fact* trigger additional SEPA review.

The applicant shall utilize the Department of Ecology Advanced Notice of Transfer System (ANTS) to track and report marine fuel oil shipments by vessel. Vessel trips to/from the marine terminal that cumulatively exceed the range of average annual marine fuel oil vessel activity identified in the 2017-2019 period (as identified in ANTS) may be subject to additional SEPA review. (Ex. 6, Condition F)

As a consequence, that condition will be revised by the Hearing Examiner. Additionally, it was unclear to the Hearing Examiner if ANTS data was part of the reporting data required to be given to PDS annually and that too shall be clarified.

IV.

Another concern raised by the Appellant regarded the study, or lack thereof, of the potential adverse impacts related to vessel traffic, especially those impacts to the Killer Whales.

See the discussion in §III above regarding the County's requests for information and requests for additional information after receiving public comment, it is by and large applicable to this issue. The County responsibly made inquiries, pulled the original MDNS, made additional inquiries, and issued a revised MDNS only after receiving amended materials including a revised SEPA checklist.

Killer Whales are unquestionably, in the eyes of Washington State's body politic, a vital component of our environment, economy, and way of life. They are the focus of Federal and State Laws protecting them, administrative task forces seeking to aid their existence, and are virtually synonymous with the identity of the Salish Sea and the appurtenant activities and communities that intertwine with it. Their presence in our culture, art, laws, and indeed litigation brought by citizens concerned for their wellbeing, reflects their importance to our society. The extensive body of evidence presented clearly demonstrates to the Hearing Examiner that were they to become extinct, we as humans would suffer an unacceptable loss at many levels, including the effect on our economy, environment, and way of life.

"Under SEPA, evaluation of a proposal's environmental impact requires examination of at least two relevant factors: (1) the extent to which the action will cause adverse environmental

effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." Chuckanut Conservancy v. Washington State Dept. of Natural Resources, 156 Wn. App. 274, 285, 292 P.3d 1154 ((*citing* Norway Hill, 87 Wn.2d at 277, 552 P.2d 674 (*quoting* Narrowsview Preserv. Ass'n v. Tacoma, 84 Wn.2d 416, 423, 526 P.2d 897 (1974))). Applying both factors to the Project shows the County properly issued the MDNS. The MDNS and associated permit will not increase vessel traffic, so the project will not "cause adverse environmental effects in excess of those created by existing uses 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.

In the case at hand, the County has correctly determined that the permit and MDNS as issued should not present any additional risk or harm to the environment in general or the Killer Whales in particular. The evidence shows that there will be no increased vessel traffic. Only "significant" impacts would require additional study under SEPA, and because there is no increase in significant adverse environmental impacts associated with the Project, the MDNS is proper. RCW 43.21C.031; WAC 197-11-350.

Further, the County appropriately ensured that public concerns about oil spill risks were addressed by Condition G.

V.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

VI.

The proposed MDNS and its underlying permit for the tank replacement project are upheld to the extent they are not erroneous. No issue was raised over the underlying permit. Subject to the Conditions attached hereto, including voluntary stipulations by the Applicant, the MDNS will meet all appropriate criteria and any errors for vagueness will have been revised, and therefore the MDNS is approved as revised and the underlying permit approved as well. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

This appeal brought forward valid and reasonable concerns on the part of the Appellant, and has resulted in revised MDNS conditions. It is appropriate for government agencies to be specific and direct in both language and requirements. General conditions E., and F. were revised, and general condition H. added. It is noted that the applicant also responded admirably to community concerns by offering up conditions voluntarily to meet those concerns, and doing additional study not demanded by the County.

Had the County produced a more thorough Staff Report with documentation of the process detailing their efforts to address the concerns raised by the community this appeal may have been avoided. Documentation presentation aside, the County did, however, use appropriate judgment and effort in using the community feedback to revise the MDNS to address the issues raised by the community. The revisions made are of a refining nature to correct erroneous portions of otherwise good judgment and policy decisions.

The MDNS and the contingent land disturbance permit are approved for the construction of Phillips 66 Ferndale Refinery's tank replacement project. The property is located at 3901 Unick Road, Ferndale WA on Assessor's Parcel No. 390133 197349. The approval is granted subject to the following required revised conditions, and any other conditions already put in place by the County:

General Conditions:

- a. The applicant estimates up to 3,750 truckloads of material (110,000 cu yards) shall be removed from the site in order to construct the tanks. A traffic control plan must be submitted prior to construction of the tanks.
- b. Maximum permissible environmental noise shall meet requirements of WAC 173-60. In accordance with WAC 173-60-080 a variance will be required prior to construction outside of normal construction hours or if construction noise will exceed thresholds in WAC 173-60.
- c. General inadvertent discovery: Should archaeological resources (e.g. shell midden, faunal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic Preservation (Gretchen Kaehler, Local Government Archaeologist 360-586-3088) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-312-2257; Tamela Smart, Deputy THPO 360-312-2253) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.
- d. Human skeletal remains: If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further

disturbance to those remains. The area of the find will be secured and protected from further disturbance. The finding of human skeletal remains will be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains will not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains.

- e. The two new storage tanks to be permitted under SEPA 2019-00033 shall be utilized only for the separation and storage of low sulfur crude oil intended for 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 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.
- f. 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 the southern resident killer whale. 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 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.

- g. Prior to final commercial building permit inspection and authorized use of the two new storage tanks, the applicant shall provide documentation that the Department of Ecology has verified compliance of the operator's oil spill contingency plan with the requirements of Chapter 173-182 WAC.

- h. 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.

NOTICE OF POTENTIAL REVOCATION AND PENALTIES

This MDNS is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation. Complaints regarding a violation of the conditions of this MDNS should be filed with Whatcom County Planning and Development Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing. Violations of this title shall constitute Class I civil infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.eedepublishing.com/WA/WhatcomCounty>.

ENTERED this 17th day of November 2019, pursuant to authority granted under the Laws of the State of Washington and Whatcom County.



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

FILED
COUNTY CLERK
2019 DEC 23 PM 1:34
WHATCOM COUNTY
WASHINGTON
BY _____

Superior Court ----- Whatcom County ----- Washington State

Phillips 66 Comany, a Delaware company;

19-2-02360-37

vs.

GR-17 Declaration

Whatcom County Washington and Friends
of The San Juans, a Washington nonprofit
corporation,

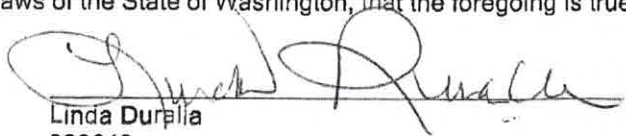
I DECLARE THAT:

1. I am over the age of 18 years, competent to be a witness, and not a party to this action.
2. I received, by electronic means, a document for filing in the above captioned case.
3. I have examined said document, found it clear and discernible, and attached this Declaration thereto.
4. I received said document on: 12/23/2019
5. The name of said document was: Amended Land Use Peition
6. The number of pages in said document, including this Declaration, was: 61

I declare under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

Signed on 12/23/2019

4th Corner Network, Inc.
110 Prospect St.
Bellingham, WA 98225
360-671-2455


Linda Durpilia
339643

ORIGINAL