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**04/24/2020 14:02:34**  
**WHATCOM COUNTY**  
**WASHINGTON**

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR WHATCOM COUNTY

PHILLIPS 66 COMPANY, a Delaware  
company,

Plaintiff,

vs.

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

Respondents.

No. 19-2-02360-37

FRIENDS OF THE SAN JUANS'  
OPENING BRIEF

**I. INTRODUCTION**

The Phillips 66 Ferndale Refinery (Phillips 66) did not timely appeal the SEPA Official's Revised Mitigated Determination of Nonsignificance (MDNS). The unchallenged MDNS conditions E and F cannot be appealed now. The Whatcom County Hearing Examiner exercised his authority and reasonable judgment when he modified conditions E and F in the MDNS. The Hearing Examiner's decision was supported by the evidence presented in the record and during the hearing.

**II. PROCEDURAL TIMELINE**

- On August 16, 2019, Phillips 66 submitted a State Environmental Policy Act (SEPA) checklist for the construction of a 300,000-barrel crude oil storage tank and an 80,000-

1 barrel fuel storage tank. Rec. at 138 – 159.

- 2 - On July 19, 2019, Mark Personius of Whatcom County Planning issued a Mitigated  
Determination of Non-Significance (MDNS). Rec. at 160 – 163.
- 3 - On August 20, 2019, Mark Personius issued a revised MDNS with conditions E and F.  
Rec. at 131 – 135.
- 4 - On August 30, 2019, an appeal of the revised MDNS was filed by Friends of the San  
Juans (FSJ). Rec. at 66 – 77.
- 5 - On August 30, 2019, the appeal period for the revised MDNS expired.<sup>1</sup> Phillips 66 did  
6 not appeal.
- 7 - On November 17, 2019, the Whatcom County Hearing Examiner issued a decision  
upholding the MDNS with conditions E and F. Rec. at 22 – 41.
- 8 - On November 20, 2019, Phillips 66 filed a motion for reconsideration. Rec. at 42 – 49.
- 9 - On November 26, 2019, the Hearing Examiner issued a revised decision upholding the  
MDNS with conditions E and F. Rec. at 1 – 26.

## 10 **FACTS**

11 The Phillips 66 Ferndale Refinery (Phillips 66) applied to Whatcom County for permits  
12 to install a new 300,000-barrel external floating roof crude oil storage tank and an 80,000-barrel  
13 external floating roof fuel oil storage tank in a tank farm located within the Refinery. The stated  
14 purpose of the proposed project (Project) is to manufacture low-sulfur marine fuels in  
15 compliance with 2020 regulatory requirements from the International Maritime Association  
16 (IMO). This proposed project requires Phillips 66 to be able to segregate low-sulfur fuel oil (and  
17 the low-sulfur crude oil used in its production) from higher sulfur fuel oil and crude oil. The  
18 project would introduce a new product line; IMO 2020-compliant fuels.

19 In filling out the required State Environmental Policy Act (SEPA) checklist, Phillips 66  
20 did not quantify the amount or types of vessel traffic associated with this project, and thus  
21 Whatcom County was unable to assess the potential impacts of Project-related vessel traffic on  
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25 <sup>1</sup> The Revised MDNS legal notice states “WHATCOM COUNTY GIVES PUBLIC NOTICE THAT THE  
26 FOLLOWING REVISED SEPA THRESHOLD OF MITIGATED DETERMINATION OF NON-SIGNIFICANCE  
(MDNS) HAS BEEN ISSUED TODAY SUBJECT TO THE 10 DAY APPEAL PERIOD CONCLUDING ON  
AUGUST 30, 2019.” Rec. at 136.

1 the Salish Sea ecosystem, including potential impacts to the region’s critically endangered  
2 Southern Resident Killer Whales (Southern Residents).

3 The plight of this iconic species has become so important that, in March 2018, Governor  
4 Jay Inslee issued an Executive Order establishing the Southern Resident Killer Whale Recovery  
5 and Task Force (Task Force) to “identify, prioritize, and support the implementation of a longer  
6 term action plan needed for the recovery of Southern Residents and necessary to secure a healthy  
7 and sustained population for the future.” Rec. at 1017.

8 The November 2018 Task Force Report identifies the threat that oil spills, in particular,  
9 play in the overall vulnerability of the Southern Resident population.<sup>2</sup>

10 In addition to the threats related to the disturbance and noise from vessels, major oil spills  
11 represent a persistent, low-probability/high-impact risk to Southern Residents. The  
12 population’s vulnerability to oil spills is magnified because so few females are of  
13 reproductive age in the population and pods often aggregate off the San Juan Islands near  
14 portions of the transboundary shipping lanes that show greater relative oil spill risk than  
15 much of the Salish Sea. Rec. at 1049.

16 This Project requires hauling over 12 million gallons of crude oil<sup>3</sup> via marine vessel just  
17 to fill the 300,000-barrel crude oil storage tank *a single time*. FSJ appealed Whatcom County’s  
18 issuance of a revised MDNS on the grounds that Phillips 66 must provide adequate data on  
19 Project-related vessel traffic and evaluate potential impacts to Southern Residents.

20 On appeal, the Whatcom County Hearing Examiner modified some of the conditions of  
21 the MDNS, including Condition E and Condition F, to clarify language and requirements that

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22 <sup>2</sup> See also Exhibit 17. 2. F.: “Due to its proximity to Alaska’s crude oil supply, Puget Sound is one of the leading  
23 petroleum refining centers in the U.S. with about 15 billion gallons of crude oil and refined petroleum products  
24 transported through it annually (Puget Sound Action Team, 2005). In marine mammals, acute exposure to petroleum  
25 products can cause changes in behavior and reduced activity, inflammation of mucous membranes, lung congestion,  
26 pneumonia, liver disorders and neurological damage (Geraci and St. Aubin, 1990). The Exxon Valdez oil spill was  
identified as a potential source of mortality for resident and transient killer whales in Prince William Sound, Alaska  
(Dahlheim and Matkin, 1994) and has raised concerns about potential implications for Southern Residents,  
particularly if the entire population is together in the vicinity of a spill.” Rec. at 1185.

<sup>3</sup> “Using the calculation that 1 barrel equals 42 U.S. gallons, 300,000 barrels of crude oil = 12,600,000 gallons of  
crude oil.” Rec. at 1185.

1 give Whatcom County the ability to monitor marine vessel traffic to ensure that the Project does  
2 not impact the critically endangered Southern Residents.

3 Post-decision, Phillips 66 requested Reconsideration to challenge the Hearing Examiner’s  
4 final November 17, 2019 decision, as well as attempting to retroactively challenge mitigating  
5 conditions E and F from Whatcom County’s August 20, 2019 Revised MDNS.

6 In response, the Hearing Examiner issued an Order on Motion for Reconsideration on  
7 November 26, 2019, which further clarified and upheld, his November 17, 2019 decision with  
8 regard to MDNS conditions E and F. The Hearing Examiner noted that the law “does not permit  
9 a party to use a request for reconsideration to raise new and substantive issues of law and fact or  
10 to argue on the merits of the original or revised conditions of the MDNS.” Rec. at 51.

11 Phillips 66 then appealed the Hearing Examiner’s decision to Superior Court.

### 12 13 **III. STANDARD OF REVIEW**

14 Phillips 66 has the burden of meeting one of the six LUPA standards under RCW  
15 36.70C.130(1). Phillips 66 primarily challenges the Hearing Examiner’s decision under  
16 RCW 36.70C.130(1)(b), which provides: “The land use decision is an erroneous interpretation of  
17 the law, after allowing for such deference as is due the construction of a law by a local  
18 jurisdiction with expertise.” Standard (b) presents questions of law that this court reviews *de*  
19 *novo*, giving deference to local specialized knowledge and expertise. *Quality Rock Prod., Inc. v.*  
20 *Thurston Cty.*, 139 Wash. App. 125, 133, 159 P.3d 1, 5 (2007). Phillips 66 also alleges errors  
21 under subsections c-f.

22 Contrary to Phillips 66’s assertion, Whatcom County is the prevailing party (and co-  
23 signer on this brief).<sup>4</sup> Whatcom County’s MDNS was entirely upheld by the Hearing Examiner.

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<sup>4</sup> See, generally, page 8, paragraph 1 of Petitioner’s Opening Brief for this assertion and the standard.

1 Thus, the facts are viewed in the light most favorable to Whatcom County, which seeks to affirm  
2 the Hearing Examiner’s revised decision.

3  
4 **IV. ARGUMENT**

5 **A. Phillips 66 Did Not Timely Appeal Revised MDNS conditions E and F.**

6 The Revised SEPA MDNS was issued by the SEPA Official August 20, 2019. Rec. at  
7 131. It contained conditions E and F, which were later upheld (and clarified) by the Hearing  
8 Examiner. The appeal period for these conditions expired ten days after issuance, on August 30,  
9 2019, and Phillips 66 did not appeal. WCC 16.08.165, 16.08.170.<sup>5</sup> Because Phillips 66 did not  
10 appeal, they cannot challenge the revised MDNS conditions now. Even if Phillips 66 were to  
11 successfully challenge the Hearing Examiner’s modifications of E and F, the original MDNS  
12 conditions E and F would remain.

13 Likewise, Phillips 66’s arguments that the MDNS conditions must be entirely deleted  
14 because they are (1) based solely on public comment, and (2) that there is no evidence of actual  
15 environmental impacts were not preserved for appeal.

16  
17 **B. Conditions E and F are not Based Solely on “Public Displeasure.”**

18 Whatcom County based the conditions on specific potential adverse impacts that FSJ  
19 identified, in hundreds of pages of comments and reports, including reports which showed that  
20 increased vessel traffic could impact Southern Residents. Rec. at 209-262. The County also met

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23 <sup>5</sup> See, RCW 43.21C.075 (4) If a person aggrieved by an agency action has the right to judicial appeal and if an  
agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such  
agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

24 (5) Some statutes and ordinances contain time periods for challenging governmental actions which are subject to  
25 review under this chapter...

26 (a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be  
commenced within such time period... (Emphases added.)

1 with the Applicant to discuss the comments before issuing the revised MDNS. Rec. at 196. The  
2 basis of the revised MDNS was not solely public displeasure.

3 The Hearing Examiner listened to hours of additional testimony before modifying  
4 Condition E and Condition F to clarify and to give the conditions “the intended and apparent  
5 purpose and meaning.” Rec. at 16. The Hearing Examiner’s ruling documented findings related  
6 to SEPA and found that the project should be monitored to ensure that the lack of impact  
7 promised by Phillips 66 would be maintained. Rec. at 14-18. The Hearing Examiner did not base  
8 his modifications solely on public displeasure and Phillips 66’s argument that conditions E and F  
9 are “based solely upon public displeasure” fails.

10  
11 **C. The Hearing Examiner Properly Found that FSJ Had Standing to Raise  
Project-Related Vessel Traffic Issues on Appeal.**

12 Administrative or judicial SEPA appeals are limited to the issues raised in the comments.  
13 A properly raised issue before an administrative agency must have more than “a hint or a slight  
14 reference to the issue in the record.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47  
15 P.3d 137 (2002), quoting *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648,670,  
16 860 P.2d 1024 (1993).

17 FSJ has standing in this case because, as the Hearing Examiner found, there is "more than  
18 simply a hint or a slight reference to the issue in the record." Rec. at 13. Not only did FSJ  
19 participate in the comment period, but FSJ also filed a timely appeal. *Id.* FSJ raised the issue of  
20 Project-related vessel traffic in its July 26th, 2019 letter—commenting on the impact of vessel  
21 traffic to the critically endangered Southern Residents. Even though the letter did not specifically  
22 mention ANTS data, the letter was specifically about potential Project-related vessel traffic  
23 impacts. As the Hearing Examiner concluded, the nature of the comments need not be technical  
24 or scientific. Rec. 13; *Yakima County Clean Air Authority v. Glascam Builders, Inc*, 85 Wash.2d  
25 255, 258, 534 P.2d 33 (1975) (concluding that environmental considerations do not need to be  
26 precisely quantified). FSJ was not required to detail *how* the county should redress the vessel-

1 traffic increases. It is the County’s responsibility and discretion to impose necessary restrictions  
2 or conditions that address the issue. Based on properly raised concerns in comments, the County  
3 is able “to apply its expertise, exercise its discretion, and correct its errors,” as it has done in the  
4 present case. *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wash. 2d  
5 648, 669, 860 P.2d 1024, 1035 (1993). FSJ properly raised specific comments relating to vessel  
6 traffic during the commenting period. Thus, the issue is preserved on appeal, and FSJ has  
7 standing in this case.

8  
9 **D. The Hearing Examiner Properly Revised Conditions E and F.**

10 **1. The Hearing Examiner is the final decisionmaker and has authority to modify**  
11 **conditions.**

12 The Whatcom County code makes the hearing examiner the final decision maker in SEPA  
13 appeals.

14 WCC 2.11.210 Final decisions.

15 In accordance with the provisions of Chapter 22.05 WCC, the hearing examiner shall  
16 conduct open record hearings and prepare a record thereof, and make a final decision  
17 upon the following matters:

18 K. Appeals from SEPA determinations of significance, determinations of  
19 nonsignificance, and mitigated determinations of nonsignificance.

20 As final decisionmaker, the Hearing Examiner has inherent authority to modify conditions.

21 MDNS mitigation measures are also considered conditions of the permit—in this case a  
22 Land Disturbance Permit (LDP).

23 WCC 16.08.100 Mitigated DNS

24 G. Mitigation measures incorporated in the MDNS shall be deemed conditions of  
25 approval of the permit decision and may be enforced in the same manner as any term  
26 or condition of the permit, or enforced in any manner specifically prescribed by the  
27 county.

28 An LPD is a Type 1 permit.<sup>6</sup> Final decisions for Type 1 permits may modify conditions.

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36 <sup>6</sup> WCC 22.05.020 Project permit processing table.

1 WCC 22.05.110 Final decisions.

2 (1) The director or designee’s final decision on all Type I or II applications shall be in the  
3 form of a written determination or permit. The determination or permit may be granted  
4 subject to conditions, modifications, or restrictions that are necessary to comply with all  
5 applicable codes. (Emphasis added.)

6 Further, since SEPA requires that decision makers consider “more than the narrow,  
7 limited environmental impact of the current proposal,” the Hearing Examiner appropriately  
8 modified the conditions to monitor potential future impacts. *See Cheney v. City of Mountlake*  
9 *Terrace*, 87 Wash.2d 338, 344, 552 P.2d 184 (1976). Note that monitoring and prevention of  
10 potential future impacts is an obvious primary function of mitigation conditions. Phillips 66  
11 equates “potential” impacts with “speculative” impacts and then dismisses them. Clearly, vessel  
12 traffic is a potential impact, not speculative. Monitoring is reasonable and minimally onerous,<sup>7</sup>  
13 and the only mitigation required is further SEPA review. Rec. at 16.

14 The appellate court has addressed the Hearing Examiner’s authority to condition projects  
15 in *King Cty. Dep’t of Dev. & Env’tl. Servs. v. King Cty.*, 167 Wash. App. 561, 574, 273 P.3d 490,  
16 497 (2012), rev’d on other grounds, 177 Wash. 2d 636, 305 P.3d 240 (2013). In that case, the  
17 hearing examiner *approved* a permit with three conditions. *Id.* The court upheld this authority.  
18 *Id.* The court explicitly distinguished Phillips 66’s cited case, *In re King Cty. Hearing Exam’r.* —  
19 *Id.* at 576. In that case, the Hearing Examiner *denied* the application with conditions. *In re King*  
20 *Cty. Hearing Exam’r*, 135 Wash. App. 312, 320, 144 P.3d 345, 349 (2006). In our case, the  
21 Hearing Examiner *approved* the Applicant’s permit with conditions. (“The approval is granted  
22 subject to the following required revised conditions, and any other conditions already put in  
23 place by the County.”). Rec. at 18–19.

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25  
26 <sup>7</sup> This is especially true because the monitoring is already being done. It simply needs to be reported to the County.



1           Additionally, the Hearing Examiner here imposed reasonable conditions—one of which  
2 the Applicant voluntarily offered. (“[T]he applicant also responded admirably to community  
3 concerns by offering up conditions voluntarily to meet those concerns even if not required to do  
4 so under the law.”) Rec. at 18.

5           Also consider *Lanzce, infra*, where the Court of Appeals held that the Hearing Examiner  
6 “properly considered the impact of added traffic” although the MDNS analysis failed to consider  
7 it. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wash. App. 408, 423, 225 P.3d 448,  
8 456 (2010). In that case, the Hearing Examiner concluded that more information was “relevant in  
9 determining the cumulative impact on the community.” *Id.* The court upheld the Hearing  
10 Examiner’s decision, as “an appropriate consideration and an appropriate conclusion.” *Id.*

11           The Hearing Examiner had authority to modify the conditions.

12       **2.       The Hearing Examiner reasonably revised Condition E and Condition F to ensure**  
13 **ongoing monitoring for potential vessel traffic increases.**

14           A permit may be conditioned to mitigate specific adverse environmental impacts. Wash.  
15 Rev. Code Ann. § 43.21C.060 (West); Wash. Admin. Code 197-11-660 (“[M]itigation measures  
16 shall be related to specific, adverse environmental impacts . . .”). SEPA requires only “that the  
17 responsible official identify the impact, not *prove* the impact.” *City of Fed. Way v. Town &*  
18 *Country Real Estate, LLC*, 161 Wash. App. 17, 56, 252 P.3d 382, 402 (2011), *as corrected* (May  
19 10, 2011).

20           Consider *Millennium Bulk Terminals-Longview, LLC., v. State of Washington,*  
21 *Department of Ecology*, No. 52215-2-II, 2020 WL 1651475, at \*10 (Wash. Ct. App. Mar. 17,  
22 2020) (unpublished opinion), in which the court ruled that the Hearing Examiner properly found  
23 that, based on the EIS *and* the evidence presented at the hearing, significant adverse impacts  
24 would result from the respondent’s proposed coal-export terminal. *Id.* In fact, it was at the  
25 hearing that the Hearing Examiner learned that impacts were far greater than represented in the  
26 application materials. *Id.*

1 In our case, the County, in the revised MDNS, concluded there would be “no likely  
2 significant adverse impacts to the habitat of the southern resident killer whale,” based on facts  
3 presented by the Applicant in the SEPA Checklist and correspondence during the application  
4 process. Rec. at 155. If these facts are erroneous, change (indeed, Phillips 66 is arguing for  
5 operational flexibility, *see infra* at page 11), or were misrepresented, the impacts to the Southern  
6 Residents also potentially change and should be reevaluated by the County. If there is a future  
7 increase in vessel traffic, Phillips 66 should have to submit that data to the County and allow the  
8 County, under its SEPA authority, to reevaluate potential impacts to the Southern Residents. The  
9 Applicant cannot promise the County that it will not generate more vessel traffic from the Project  
10 and then be left to potentially generate more traffic without any future monitoring.

11 In his decision, the Hearing Examiner clarified the language of Conditions E and F in  
12 order to evince the County’s intent and purpose of the original conditions. The Hearing  
13 Examiner modified Condition F to clarify vague language and to add language that ensures  
14 Whatcom County’s ability to monitor marine vessel traffic. If the information presented by the  
15 Applicant in the SEPA Checklist is accurate—and there is, in fact, no material increase in  
16 cumulative vessel traffic because of this Project—Phillips 66 will not be impacted by the  
17 Hearing Examiner’s modifications to this condition, because additional SEPA review of the  
18 project would not be triggered. If vessel traffic increases, additional review would be triggered.

19 Based on the hearing, expert testimony, and information in the record, the Hearing  
20 Examiner properly revised Condition E to ensure ongoing monitoring of potential impacts.

21  
22 **3. The Hearing Examiner properly revised Conditions E and F to condition the project  
as it was proposed.**

23 Revised Condition E was modified as follows:

24 The two new storage tanks to be permitted under SEPA 2019-00033 shall be  
25 utilized only for the separation and storage of low sulfur crude oil intended for  
26 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 ~~to be exported, unrefined, from the marine terminal~~

1           for any other purpose except for the refining of that crude oil on site; crude oil shall  
2           not be exported or removed for other purposes. Rec. at 19-20 (emphasis added—  
3           modifications in cross-out deletions and underlined additions).

4 The Hearing Examiner concluded, “Condition E was thoughtfully and appropriately put forward  
5 by the County after it was proffered by the Applicant.” Rec. at 15.

6           However, Phillips 66 raised new facts in the Request for Reconsideration. Under  
7 Business Rule 5.5 of the Whatcom County Hearing Examiner, this is not allowed. Phillips did  
8 not originally propose new storage tanks “to store other crude oil intermediates” and/or  
9 “unfinished products” or to use these storage tanks for “the operational flexibility that the new  
10 tanks can and should provide.” But on Reconsideration, the proposed project was newly  
11 described as:

12           While Phillips 66 intends to use the tanks primarily for production of IMO-compliant  
13           lower-sulfur marine fuels, intermediate fuel components, and crude oil storage, there are  
14           occasionally circumstances where refinery operations demand that the tanks be available  
15           to store other crude oil intermediates, which are products generated at the refinery that  
16           require further refining. Rec. at 44-45 (emphasis added).

17 Although the word “flexibility” was used in the Applicant’s SEPA Checklist to describe the  
18 project, it was only used to specifically reference “the additional operating flexibility needed to  
19 comply with the pending International Maritime Organization (IMO) regulatory requirements.”  
20 Rec. at 136.

21           The SEPA Checklist descriptions of the new storage tanks said: “The additional crude  
22 storage tank is needed to segregate the lower sulfur crude for processing and the additional fuel  
23 oil tank is needed to segregate the low sulfur fuel oil product to maintain quality standards meet  
24 the new fuel specifications.” Rec. at 140. If Phillips 66 had expanded scope of the proposed  
25 project in the SEPA Checklist to “other crude oil intermediates,” FSJ’s comments, appeal  
26 briefing, exhibits, and expert witnesses would have addressed these points with additional  
information and asked for SEPA analysis regarding impacts of other intermediates.

1           **D. Condition E is not a Dormant Commerce Clause issue.**

2           Phillips 66 objects that Condition E prohibiting the export of crude under this permit violates  
3 the Dormant Commerce Clause (DCC). However, Phillips 66 did not apply to transport crude  
4 under this permit. “Crude oil from the new storage tanks will not be loaded onto a marine vessel  
5 without refining.” Rec. at 154. In fact, Phillips 66 insisted it would not export crude and had no  
6 plans to do so. Rec. at 196. As a result, impacts from the transport of crude from the refinery  
7 were not analyzed under this SEPA process. Phillips 66 cannot avoid SEPA analysis on crude  
8 transports from the refinery in the permitting process and then object that crude transport from  
9 the refinery is not allowed under the permit. This is an issue of what is allowed under the permit,  
10 not what is prohibited by law. This is not a DCC issue.

11           Note that the Hearing Examiner stated in his November 26, 2019 Order on Motion for  
12 Reconsideration that he did not rely on the Whatcom County “Interim Moratorium” ordinance as  
13 the basis for his revision of Condition E. Rec. at 51. The Hearing Examiner pointed out that  
14 Whatcom County relied on Phillips 66’s representation that no crude would be loaded onto a  
15 marine vessel for transport from the refinery when issuing the Revised MDNS on August 20,  
16 2019, rather than requiring additional environmental review of the project. *Id.* If Phillips 66 had  
17 wanted to appeal the substance of Condition E, they must have filed a timely appeal of the  
18 MDNS by August 30, 2019, as stated above.

19           **E. The Hearing Examiner’s Decision is Supported by the Record.**

20           **1. There is, in fact, evidence in the record that the switch to low sulfur fuel production**  
21 **facilitated by these tanks will increase vessel traffic.**

22           The September 23, 2019 letter from Jolie Rhinehart, Phillips 66 Ferndale Refinery  
23 Manager, clearly states that:

24           Phillips 66 intends to obtain crude oil from other sources that can be substituted for low-  
25 sulfur Bakken crude oil in the production of IMO 2020-compliant fuel. Presently, the  
26 only crude oils that have similar low-sulfur quality comparable to Bakken crude oil are  
from Russia, Saudi Arabia, and West Africa, which are received by the Ferndale Refinery

1 at its marine terminal. In addition, although these foreign crude oils are of similar quality  
2 in terms of sulfur content, their relatively significant distance from the Ferndale Refinery  
3 will likely result in (as compared to Bakken crude oil): increased transportation  
4 emissions; **increased vessel traffic in the Salish Sea**; increased transportation costs; and  
5 crude oil input interruptions for the refinery. Rec. at 998 (emphasis added).

6 Ms. Rhinehart gave similar sworn testimony at the public hearing on March 19, 2019 before the  
7 WA State House Environment & Energy Committee in regard to ESSB 5579 (Rec. at 1003)  
8 which the Governor signed into law on May 9, 2019 (Rec. at 1006 and 1013):

9 I would have no option, if this bill passes, other than to shut down the crude rail facility at  
10 my refinery. ... In addition if the crude rail facility could not be used because the Bakken  
11 is unable to be unloaded it would force additional crude to be brought over the water. The  
12 only crude that's of comparable quality for low sulfur and high yields, which are very  
13 beneficial to the refineries in Washington State, would have to come from West Africa,  
14 Saudi Arabia, or Russia. **That would all be brought in via additional and significant  
15 vessel bound traffic.**<sup>6</sup> Rec. at 1189 (emphasis added).

16 Further, the record shows that the Project-related changes in vessel traffic, even if there is no  
17 *increase* in vessel traffic, could result in increased oil spill risk if inferior tankers are used to  
18 transport low-sulfur crude oil from West Africa, Saudi Arabia, or Russia as compared with  
19 tankers currently used for crude oil transport. Rec. at 1192 -1193.

20 The Transportation Study for the Ferndale Refinery Logistics Flexibility Project “does  
21 not include modeling of vessel traffic or marine spill risk.” Rec. at 1337. However, this  
22 transportation study includes several references to—and data from—the Draft Final Report,  
23 VTRA [Vessel Traffic Risk Assessment] 2015 (VTRA 2015). Rec. at 1336, 1348, 1354. The  
24 VTRA 2015 analyzed actual 2015 vessel traffic in comparison to the 2015 traffic levels plus the  
25 increases in large commercial vessel traffic associated with marine terminal projects in various  
26 stages of permitting and/or construction in the Salish Sea. While the VTRA 2015 study area  
includes the Project location, the VTRA 2015 analyses did not include this Project. The VTRA

1 2015 analyses conclusively show that increases in vessel traffic, without additional risk  
2 mitigation measures, increase accident and oil spill risk in the VTRA 2015 study area. *Id.*

3  
4 When Phillips 66 builds tanks to facilitate a conversion to low sulfur fuel production,  
5 potential cumulative impacts from that entire conversion effort must be considered.<sup>8</sup>

6 **2. The statement in Phillips 66’s opening brief, “Phillips 66 has a robust oil-spill  
7 prevention plan,” is a misnomer.**

8 Phillips 66’s “Oil Spill Contingency Plan Phillips 66 Ferndale Refinery” which is not in  
9 the record, is an oil spill response plan, not a prevention plan. Rec. at 1245-1246. Major oil spills  
10 always cause adverse environmental impacts, no matter how rapid, aggressive, and well-  
11 coordinated the oil spill response.<sup>9</sup>

12 **3. The Hearing Examiner’s finding of fact regarding a new cap on sulfur is not  
13 erroneous.**

14 The application Phillips 66 submitted to the County specifically describes the intended use of  
15 the new storage tanks as product segregation needed to comply with new IMO regulations.<sup>10</sup> The  
16 Hearing Examiner’s finding is consistent with the Phillips 66 application. The additional fact that

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18  
19 <sup>8</sup> See WAC 197-11-060. Content of environmental review.

20 (3) Proposals (a)... (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a  
single course of action shall be evaluated in the same environmental document...

21 (4) Impacts (a-c)... (d) A proposal's effects include direct and indirect impacts caused by a proposal. Impacts  
include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal  
will serve as a precedent for future actions...

22 <sup>9</sup> See RCW 90.56.005: (2) The legislature finds that prevention is the best method to protect the unique and special  
23 marine environments in this state. **The technology for containing and cleaning up a spill of oil or hazardous  
substances is at best only partially effective...**

24 (3) The legislature also finds that:

25 (b) **Even with the best efforts, it is nearly impossible to remove all oil that is spilled into the water, and  
average removal rates are only fourteen percent;**... (emphasis added)

26 <sup>10</sup> “Beginning January 1, 2020, the IMO will enforce a new 0.5% global sulfur cap on marine fuels, lowering the cap  
from the present 3.5% limit.” Rec. at 132.

1 the use of scrubber technology is an acceptable way to continue the use of high sulfur fuel<sup>11</sup> does  
2 not make this finding erroneous.

3 **IV. CONCLUSION**

4 Phillips 66 did not timely appeal Conditions E or F in the MDNS. Those conditions stand  
5 regardless of whether the Hearing Examiner's revision is upheld.

6 Hearing Examiner had the authority to modify the Revised MDNS Conditions E and F  
7 and exercised reasonable judgement to correct vague language. The Hearing Examiner's decision  
8 was made after reviewing of over a thousand pages of exhibit files and overseeing a hearing that  
9 lasted four hours and included the testimony of multiple expert witnesses.

10 The Court should uphold the Hearing Examiner's decision.

11 DATED this 24<sup>th</sup> day of April, 2020.

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13  
14 FRIENDS OF THE SAN JUANS

15  
16 By: s/ Jennifer Barcelos  
17 Jennifer Barcelos, WSBA #43879  
18 Attorney for Respondent,  
19 Friends of the San Juans  
20 jennifer@sanjuans.org  
21

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25 <sup>11</sup> Information about vessels with sulfur scrubbing technology (aka "scrubbers") that allow for the continued use of  
26 high-sulfur Heavy Fuel Oil is included in Exhibit 21-8, Rec. at 1306-1321; and once in the application and  
environmental review materials. Rec. at 140.

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In Accord,



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**DECLARATION OF SERVICE**

I, Jennifer Barcelos, declare under penalty of perjury and the laws of the State of Washington that, on April 24, 2020, I caused the foregoing response to be served on the persons listed below by email:

Whatcom County Superior Court  
Sandra Kiele  
Chief Deputy Clerk  
skiele@co.whatcom.wa.us

Royce Buckingham  
Civil Deputy Prosecuting Attorney  
Whatcom County  
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Friends of the San Juans  
Shawn Alexander  
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DATED and certified this 24<sup>th</sup> day of April 2020, in Eastsound, Washington.

s/ Jennifer Barcelos  
Jennifer Barcelos, WSBA #43879  
Attorney for Respondent,  
Friends of the San Juans