

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 Schmidt, 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 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.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*