



December 15, 2023

Mark Personius  
Director, Whatcom County Planning & Development Services  
5280 Northwest Drive  
Bellingham, WA 98226

Submitted via email: [MPersoni@co.whatcom.wa.us](mailto:MPersoni@co.whatcom.wa.us)

RE: Phillips 66 Ferndale Refinery's Renewable Diesel Infrastructure project ([SEPA2023-00085](#))

Dear Mr. Personius,  
Thank you for the opportunity to comment on the State Environmental Policy Act (SEPA) Mitigated Determination of Non-Significance (MDNS) for the Phillips 66 Ferndale Refinery's Renewable Diesel Infrastructure project (SEPA2023-00085).

Friends of the San Juans is a nonprofit organization established in 1979 and based in Friday Harbor, Washington, with the mission to protect and restore the San Juan Islands and the Salish Sea for people and nature. Friends of the San Juans (Friends) works with diverse stakeholders and communities, including tribal and governmental agencies, and other non-profit organizations in the transboundary Salish Sea region. In 2001, Friends of the San Juans was a co-petitioner that led to the federal listing of the Southern Resident killer whales as an endangered species. The protection and recovery of the Southern Residents continues to be one of our top priorities.

We understand from Phillips 66's communications that this SEPA MDNS has been issued for a permit proposed after Phillips 66 had unlawfully constructed the project without a permit in violation of SEPA and the Whatcom County Code:

The facility modifications included in this application have already been constructed at the Phillips 66 Ferndale Refinery.<sup>1</sup>

Friends submitted a Code Enforcement Investigation Request to Whatcom County on May 15, 2023, with this statement of concern:

Friends of the San Juans received an anonymous alert that Phillips 66 is modifying their piping and racks and adding a new truck rack station in order to import renewable diesel across their dock to tankage for resale to Canadian markets via rail and truck – and that this is being or has been done without a permit.

Friends of the San Juans is concerned about this reported change of operations at the refinery and the potential associated increase in vessel traffic that would occur, and, in particular, if this is occurring without any permitting process and without any environmental review process.

Friends is not aware of any action taken by Whatcom County in response to this code enforcement investigation with the exception of requiring this after-the-fact permit application. The fact that the renewable diesel transshipment infrastructure was constructed without obtaining the necessary permits demonstrates that the Phillips 66 Ferndale Refinery will not abide by the rules without enforcement. The mitigating conditions for this permit need to be explicit, meaningful, and enforceable.

Friends agrees with Whatcom County that this after-the-fact permit application is not exempt from SEPA review. Thank you for requiring the Phillips 66 Ferndale Refinery to submit a SEPA checklist along with the after-the-fact permit application materials.<sup>2</sup> This Renewable Diesel Infrastructure project is a significant change in use of this Heavy Impact Industrial facility, from refinery to transshipment facility. This permit application review process could establish a precedent for future applications for refinery conversions to transshipment facilities.

Friends is concerned about any increase in vessel traffic that may be associated with the Phillips 66 Ferndale Refinery transforming from just a refinery to a refinery and a transshipment facility where products can pass through the facility without being refined. Without the limitations imposed by processing capacity, transshipment operations could increase vessel traffic which would increase vessel noise and presence impacts and the risk of ship strikes, accidents, and oil spills; and could impact Tribal Treaty Rights.

Any increases in vessel traffic resulting from the Renewable Diesel Infrastructure project would impact Southern Resident killer whales, which are one of the most at-risk marine mammals in the world.<sup>3</sup> Since Governor Inslee's Executive Order established the Southern Resident Killer Whale Task Force,<sup>4</sup> Washington State has made significant investments in the protection and recovery of Southern Residents.<sup>5</sup> Disturbance from vessels and vessel noise are identified impacts to the Southern Resident killer whale population, and potential project-related increases in vessel traffic would have significant adverse impacts to this critically endangered species.<sup>6</sup>

In *Phillips 66 Company vs Whatcom County Washington and Friends of the San Juans*, Case no. 82599-2-1, the Court of Appeals, Division One decision states that a project that would increase vessel traffic would "pose a threat to" Southern Resident killer whales, and an EIS would be required:

Here, Phillips 66 has conceded that environmental concerns, including harm to killer whales, could arise if vessel traffic increases. Phillips 66 "does not dispute that Southern Resident Killer Whales are endangered, or that increased vessel traffic poses a threat to that species." Expert opinions corroborated that increased vessel traffic would harm the whales. Clearly, if the evidence showed a probable increase in vessel traffic attributable to the project, an EIS would have been triggered. An MDNS would not have been an option.<sup>7</sup>

The Court of Appeals, Division One, made it clear that a county may impose a condition prohibiting any increase in vessel traffic. The decision also reinforces permit agencies' ability to

use monitoring conditions to hold permit applicants accountable to their claims that there would be no increase in vessel traffic:

In its attachment to the SEPA appeal form, FSJ quoted Phillips 66's MDNS and revised MDNS, where Phillips 66 said, "[W]e can say with complete certainty that the Logistics Flexibility project will not materially affect the number of marine vessels utilizing the Phillips 66 marine terminal in any particular future time period."

Whether these assurances prove true is solely within Phillips 66's control. **The County could have included a condition in the MDNS commanding that no increase would occur.** But, in the record before us, the County was also entitled to rely on Phillips 66's representations as essential details of the project application.

**Under either of its options, the County is entitled to monitor the project to make sure it complies with the application and any conditions imposed.** WAC 197-11-350(7) ("Agencies may specify procedures for enforcement of mitigation measures in their agency SEPA procedures."); WAC 197-11-768(6) ("Mitigation' means . . . [m]onitoring the impact and taking appropriate corrective measures.").<sup>8</sup> (*emphasis added*)

The SEPA MDNS for the Phillips 66 Ferndale Refinery's Renewable Diesel Infrastructure project states:

The RD [Renewable Diesel] project has the potential to bring an annual average of approximately two thousand barrels per day of RD to the facility in barges and marine vessels of the type that already service the facility. The current fleet of third-party vessels contracted by the facility utilizes vessels capable of transporting 50,000 to 180,000 barrels of refined product. P66 does not own or operate any of the refined fuels transport vessels that call on the refinery. Under current operations, these vessels primarily arrive at the facility empty for purposes of loading and transporting refinery product out. The project plans to bring in RD on these same vessels that would otherwise arrive partially or fully empty. The RD would then be offloaded before commencing current product loading operations. Thus, the RD project would not increase existing barge or vessel traffic or change the type of vessel traffic already occurring at the facility.<sup>9</sup>

However, there is nothing that requires the Phillips 66 Ferndale Refinery, in its new use as a transshipment facility, to restrict receipt of renewable diesel to only those tank vessels that are also loaded with products that are refined at the refinery. Additional permit conditions are needed to prohibit any increase in vessel traffic and require the Phillips 66 Ferndale Refinery to only receive renewable diesel from tank vessels that are subsequently loaded with refined products, and monitor the renewable diesel deliveries for compliance. Monitoring could be achieved by requiring the refinery to report to Whatcom County the same Advance Notice of Transfer (ANT) data that is already reported to Ecology.

On-going publicly accessible vessel traffic monitoring could also address potential piecemeal development and any circumventing of the required conditional use permit process for this

refinery's change in use to a transshipment facility. SEPA and SMA both seek to avoid misleading, piecemeal environmental review and the potential snowballing effect decisions made without review of the entire proposal may have.<sup>10</sup>

The September 25, 2023, letter from Trinity Consultants states that, "the renewable diesel project does not meet the criteria for the requirement to obtain an air permit."<sup>11</sup> However, this evaluation of air quality impacts only considers the air quality impacts from the vessel unloading and not the impacts of the vessels' engine emissions during the time it takes to unload. The SEPA MDNS Project Description states, "The project plans to bring in RD [Renewable Deisel] on these same vessels that would otherwise arrive partially or fully empty. The RD would then be offloaded before commencing current product loading operations."<sup>12</sup> The project will require these vessels to spend more time at berth for the additional offloading operations, which will result in increased emissions if these vessels continue to idle their engines at berth.

The SEPA review must address all the additional air quality impacts of the project. A possible means of mitigating these impacts would be to require project-related vessels at the Phillips 66 Ferndale Refinery dock to connect to shore power and shut down their auxiliary engines, to reduce air quality impacts from tank vessel engines while at the dock. "Shore power infrastructure has the potential to significantly reduce emissions by enabling vessels to turn off their engines, and instead plug into the local electricity grid to power auxiliary systems while at berth."<sup>13</sup> Shore power's reduction of harmful emissions include diesel particulate matter, fine particulate matter (PM2.5) oxides of nitrogen (NOx, a precursor to smog), reactive organic gases (ROG, another precursor to smog), greenhouse gases, and oxides of sulfur (SOx). Tankers in Northern California will have to comply with California's Ocean-Going Vessels At Berth Regulation by 2027.<sup>14</sup>

Once fully implemented, the updated regulation will deliver a 90 percent reduction in pollution from an expected additional 2,300 vessel visits per year, and result in a 55 percent reduction in potential cancer risk for communities near the Ports of Los Angeles, Long Beach, and Richmond.<sup>15</sup>

Two mitigating conditions are included in the MDNS:

- 1) Inadvertent Discovery of Archaeological Resources
- 2) Inadvertent Discovery of Human Skeletal Remains on Non-Federal and Non-Tribal Land in the State of Washington (RCWs 68.50.645, 27.44.055, and 68.60.055)<sup>16</sup>

However, these permit conditions are not appropriate given that the project has already been constructed. Whatcom County should consult with affected Tribes to identify an appropriate condition(s) for this after-the-fact permit. If deemed appropriate by affected Tribes, include the requirement for thorough documentation that there was no discovery of archaeological resources and/or human skeletal remains in the construction of this project.

A revised MDNS with the following additional enforceable conditions is needed:

1. Explicitly require the Renewable Diesel Infrastructure project to "not increase existing barge or vessel traffic or change the type of vessel traffic already occurring at the

facility” as has been stated in the application. Require the Phillips 66 Ferndale Refinery to regularly provide documentation showing that the Ferndale Refinery only receives renewable diesel from tank vessels that are subsequently loaded with products refined at the Ferndale Refinery. This could be achieved by requiring the refinery to report to Whatcom County and the public the same Advance Notice of Transfer (ANT) data as is reported to Ecology.

2. The SEPA review must address all the project-related air quality impacts, including the impacts from the vessels’ engine emissions at the dock during the time it takes to unload the renewable diesel. One option would be to withdraw the MDNS and require an updated SEPA checklist. Another means of mitigating these impacts would be to require project-related vessels at the Phillips 66 Ferndale Refinery dock to connect to shore power and shut down their auxiliary engines, to reduce air quality impacts from tank vessels’ engines while at the dock.
3. Consult with affected Tribes to identify appropriate mitigating conditions for this permit. If deemed appropriate by affected Tribes, include the requirement for thorough documentation that there was no discovery of archaeological resources and/or human skeletal remains during the construction of this project.

Thank you for your attention to these comments.

Sincerely,



Lovel Pratt  
Marine Protection and Policy Director

Cc. The Honorable Anthony Hillaire, Chair, Lummi Nation  
The Honorable Steve Edwards, Chair, Swinomish Indian Tribal Community  
The Honorable Teri Gobin, Chair, Tulalip Tribes  
The Honorable W. Ron Allen, Chair, Jamestown S’Klallam Tribe  
The Honorable Frances Charles, Chair, Lower Elwha S’Klallam Tribe  
The Honorable Rosemary LaClair, Chair, Nooksack Tribe  
The Honorable Amber Caldera, Chair, Port Gamble S’Klallam Tribe  
The Honorable Leonard Forsman, Chair, Suquamish Tribe  
The Honorable Timothy J. Greene, Sr., Chair, Makah Tribe  
Tom Buroker, Director, Northwest Region, Washington State Department of Ecology

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<sup>1</sup> October 5, 2023. Letter from Bob Stiles, Phillips 66, to Mark Personius AICP, Director, Whatcom County Planning and Development Services. Page 1. <https://www.whatcomcounty.us/DocumentCenter/View/81908/com2023-00087-Cover-Letter-10-5-23-re-SEPA-Catex12472954>.

<sup>2</sup> *Ibid.* Page 1.

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<sup>3</sup> NOAA Fisheries (National Oceanic and Atmospheric Administration National Marine Fisheries Service). 2021. *Species in the Spotlight, Priority Actions 2021-2025*. <https://www.fisheries.noaa.gov/resource/document/species-spotlight-priority-actions-2021-2025-southern-resident-killer-whale>.

<sup>4</sup> EXECUTIVE ORDER 18-02. SOUTHERN RESIDENT KILLER WHALE RECOVERY AND TASK FORCE. [https://www.governor.wa.gov/sites/default/files/exe\\_order/eo\\_18-02\\_1.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/eo_18-02_1.pdf).

<sup>5</sup> Southern Resident Killer Whale Task Force website: <https://www.orca.wa.gov/about/> which monitors progress to date on the Task Force recommendations: <https://www.orca.wa.gov/progress/>.

<sup>6</sup> NOAA Fisheries. 2022. *2021 Southern Resident Killer Whales (Orcinus orca) 5-Year Review: Summary and Evaluation*. <https://www.fisheries.noaa.gov/resource/document/2021-southern-resident-killer-whales-orcinus-orca-5-year-review-summary-and>.

<sup>7</sup> PHILLIPS 66 COMPANY, a Delaware company, Appellant, v. WHATCOM COUNTY WASHINGTON and FRIENDS OF THE SAN JUANS, a Washington nonprofit corporation, Respondents. Case no. 82599-2-I. Page 10. <https://sanjuans.org/wp-content/uploads/2022/03/P66-appeal-decision-28feb2022.pdf>. See also: <https://twv.org/video/division-1-court-of-appeals-2022011091/?eventID=2022011091>.

<sup>8</sup> *Ibid*. Pages 11-12.

<sup>9</sup> December 8, 2023. SEPA Mitigated Determination of Nonsignificance (MDNS). File: SEPA2023-00085. Page 1 of 3. <https://www.whatcomcounty.us/DocumentCenter/View/81902/sepa2023-00085-MDNS-Distribution-Packet-20231208>.

<sup>10</sup> WAC 197-11-060(3)(b); RCW 90.58.020.

<sup>11</sup> September 25, 2023. Trinity Consultants to Mr. Vivek Gopal, Phillips 66 Ferndale Refinery. Page 2.

<https://www.whatcomcounty.us/DocumentCenter/View/81906/sepa2023-00085-Trinity-Report-Phillips-66-Ferndale-2022-RD-Project-9-25-23>.

<sup>12</sup> December 8, 2023. SEPA Mitigated Determination of Nonsignificance (MDNS). File: SEPA2023-00085. Page 1 of 3. <https://www.whatcomcounty.us/DocumentCenter/View/81902/sepa2023-00085-MDNS-Distribution-Packet-20231208>.

<sup>13</sup> 2022. EPA (Environmental Protection Agency). *Shore Power Technology Assessment at U.S. Ports*. <https://www.epa.gov/ports-initiative/shore-power-technology-assessment-us-ports>.

<sup>14</sup> September 4, 2020. *California approves updated "At-Berth" regulation, expanding efforts to cut pollution from ships in California ports*. CARB (California Air Resources Board). <https://perma.cc/HW9G-QLV6>.

<sup>15</sup> *Ibid*.

<sup>16</sup> December 8, 2023. SEPA Mitigated Determination of Nonsignificance (MDNS). File: SEPA2023-00085. Page 3 of 3. <https://www.whatcomcounty.us/DocumentCenter/View/81902/sepa2023-00085-MDNS-Distribution-Packet-20231208>.