

**WHATCOM COUNTY  
OFFICE OF THE HEARING EXAMINER**

*re:* Appeal of SEPA2024-00052 by Friends of the San Juans, Evergreen Islands, RE Sources, Sierra Club, Washington Conservation Action Education Fund, and Whatcom Environmental Council (collectively “Appellant”) and Final Decision on Conditional Use permit CUP2024-00006 by ALA Energy, LLC

**Consolidated**

**APL 2025-0006**  
of SEPA2024-00052 of 9/3/2025

**CUP 2024-00006**

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND DECISION

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**SUMMARY OF CASE AND DECISION**

Appeal: The Appellant, Friends of the San Juans, *et. al.*, timely appealed an administratively determined Mitigated Determination of Non-significance (MDNS) issued to ALA Energy on September 3, 2025, in regard to underlying permit applications, including a Conditional Use Project (CUP) permit application. Pursuant to the law, these matters were consolidated for final review and decision making before the Office of the Whatcom County Hearing Examiner.

Decision: The Hearing Examiner enters a decision to remand to Whatcom County Planning and Development Services (the “Department”) both the Mitigated Determination of Nonsignificance SEPA2024-00052, and the CUP2024-00006, with specific questions of interpretation and fact to determine and actions to take.

**INTRODUCTION**

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing, in which opportunity was afforded

to interested parties to object, comment, or bring information forward.

## FINDINGS OF FACT

### I.

#### PRELIMINARY INFORMATION

Appellant: Friends of the San Juans, Evergreen Islands, RE Sources, Sierra Club, Washington Conservation Action Education Fund, and Whatcom Environmental Council (“Friends of the San Juans, *et.al.*”)

Appellant’s Attorney: Earthjustice  
810 Third Avenue  
Suite 610  
Seattle, WA 98104

Applicant: ALA Energy, LLC  
355 4<sup>th</sup> Ave. SW  
Calgary, AB, Canada

Applicant’s Attorney: Van Ness Feldman LLP  
1191 Second Avenue  
Suite 1800  
Seattle, WA 98104

County Attorneys: Cascadia Law Group, PLLC  
1201 Third Avenue  
Suite 320  
Seattle, WA 98101

Whatcom County Prosecutor’s Office  
311 Grand Avenue, Suite 201  
Bellingham, WA 98225

Site Location/Address: 4100 Unick Road  
Ferndale, WA 98248

Assessor’s Parcel Number(s): 390129428046 and 390129495093

SEPA Decision: Mitigated Determination of Non-Significance issued on September 9, 2025

Dates: APL2025-00006, filed September 29, 2025

CUP2024-00006, filed June 28, 2024

APL2025-00006 and CUP2024-00006 files were consolidated in a Post-Conference Order, dated November 6, 2025

Hearing Date: January 28, 29, and 30, 2026

Notice Information: Legal Notice published in the Bellingham Herald for APL2025-00006 and CUP2024-00006 on January 4, 2026

Whatcom County Hearing Examiner website posted January 5, 2026

Primary Authorizing Codes, Policies, Plans, and Programs, including but not limited to:

- Revised Code of Washington (RCW)
  - RCW 36.70A, Growth Management Act
  - RCW 36.70B, Local Project Review
  - RCW 43.21C, State Environmental Policy
  - RCW 90.58, Shoreline Management Act of 1971
- Washington Administrative Code (WAC) Chapter 197-11, SEPA Rules
- Whatcom County Code (WCC)
  - WCC Title 2 – Administration and Personnel
    - Chapter WCC 2.11, Hearing Examiner
  - WCC Title 12, Roads and Bridges
    - Chapter WCC 12.08, Construction Standards
  - WCC Title 15 – Buildings and Construction
  - WCC Title 16 – Environment
    - Chapter 16.08, Whatcom County SEPA Administration
    - Chapter 16.16, Critical Areas
  - WCC Title 17 – Flood Damage Prevention
  - WCC Title 20 – Whatcom County Zoning Ordinance
    - Chapter 20.68, Heavy Impact Industrial District
    - Chapter 20.74, Cherry Point Industrial District
    - Chapter 20.88, Major Project Permits
  - WCC Title 21 – Land Division Regulations
  - WCC Title 22 – Land Use and Development
    - WCC 22.05, Project Permits
      - WCC 22.05.020, Public Hearings
      - WCC 22.05.026, Conditional Use Permits
      - WCC 22.05.032, Supplemental procedures for fossil fuel refinery and fossil fuel transshipment facility permitting
  - WCC Title 23 – Shoreline Management Program
- *Former* Whatcom County Comprehensive Land Use Plan, as amended by Whatcom County Council on August 9, 2016 (2016 Comprehensive Plan)
- Rules of the Whatcom County Hearing Examiner (WCHE), pursuant to WCC 2.11.220, approved by Whatcom County Council on 09/09/2025 per Res. 2025-025

- Whatcom County Ord. 2021-046 § 3 (Exh. C), 2021 (“Ord. 2021-046”)

Testifying Parties of Record and Attorneys:

Margaret Lee, Attorney for Whatcom County  
Cascadia Law Group  
1201 Third Avenue, Suite 320  
Seattle, WA

Greg Greenan, Whatcom County Deputy Prosecutor  
311 Grand Avenue, Suite 201  
Bellingham, WA

Mark Personius, Director of Planning and Development Services  
Whatcom County Planning & Development Services  
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Bellingham, WA

Amy Keenan, Senior Planner of Planning and Development Services  
Whatcom County Planning & Development Services  
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Nicole Finnamore, Senior Director of Business Development  
ALA Energy  
355 4<sup>th</sup> Avenue SW  
Calgary, AB Canada

Mark Heigold, Chemical Process Engineer

Patrick Couch, Senior Vice President at Clean Transportation Solutions, a TRC Co.

Christina Clarke, sole proprietor at Coastal Process Safety, contractor for SayleGroup Inc.

Gregory Allen Rhoads, principal consultant with GRA, Inc.

Russell Watts, Director of Technical Services for AltaGas

Alexander Maxwell Mathes, Senior Ecologist with Geosyntec Consultants

Lloyd Mendonsa, BW LPG, LLC

Stian Andreassen, consultant with DNV

David Stahlheim, Secretary for the Whatcom Environmental Council

Dr. Joseph Gaydos, Wildlife Veterinarian and Science Director for the SeaDoc Society

Zane Gustafson, researcher, writer, analyst, and consultant

Wendy Hiestler, retired chemical engineer

Charles Brown, retired chemical engineer

Lovel Pratt, Marine Protection and Policy Director at Friends of the San Juans

Dr. Kirsten Kane, Salish Sea Strategy and Engagement Manager with Friends of the San Juans

Eva Schulte

Marlene Finley

Ryan Bowman

Todd Lagestee

Rodd Pemble

Cody Treloar

Jane Bright

Jake Reijm

Cary Clemenson

Chris Thompson

Eleanor Hines

Barbara Chase

Andrea Doyle

Eddy Ury

ADMITTED EXHIBITS:

This case had numerous exhibits, to some extent duplicative, and filed under one of the two cause numbers prior to the final hearing or admitted at the final hearing. To the extent that they are relevant the listing of an exhibit or pleading under one cause number does not exclude its validity or applicability to the other cause number.

Hearing Exhibits (submitted during the hearing, aka “H Series”)

1. Combined public comments received from 1/27-1/28/26
2. Pathology findings and correlation with body condition index in stranded killer whales, submitted at hearing January 29, 2026
  - a. Table Cause of Death for killer whales
3. Combined additional public comments through 1/30/26.
4. Articles
  - a. SeaDoc Society Article, listed on page 7 of exhibit 36, submitted at hearing January 30, 2026
  - b. RE Sources Document, listed on page 7 of exhibit 36, submitted at hearing January 30, 2026
5. Maritime Blue to Protect Endangered Southern Resident Killer Whales, submitted at hearing January 30, 2026
6. Petrogas Marine Loading Arm Replacement CAA, submitted at hearing January 30, 2026
7. Combined public comments through the afternoon of 1/30/26
8. Court Reporter’s Transcripts of Hearings, and attachments and indexes thereto:

- a. Transcript of Day 1 (January 28, 2026), *filed 2/11/26*
  - b. Transcript of Day 2 (January 29, 2026), *filed 2/11/26*
  - c. Transcript of Day 3 (January 30, 2026), *filed 2/17/26*
9. Appellant Post-Hearing Brief, *filed 3/6/26*
  10. Whatcom County Final Hearing Closing Brief, *filed 5/6/26*
  11. ALA Energy Closing Brief, *filed 3/6/26*

SEPA – APL2025-00006

1. Appeal Application, dated September 29, 2025
2. Appellant Statement, dated September 29, 2025
3. List of Appellants, dated September 29, 2025
4. Order for pre-hearing conference, dated October 17, 2025
5. Appellants pre-hearing memorandum, dated October 30, 2025
6. ALA Energy pre-hearing memorandum, dated October 30, 2025
7. Whatcom County pre-hearing memorandum, dated October 30, 2025
8. Post Conference Order, dated November 6, 2025
9. Attachment-ALA - Certificate of Service, dated November 13, 2025
10. Stipulated Motion for Protective Order, dated November 14, 2025
11. Stipulated Protection Order, dated November 14, 2025
12. 2<sup>nd</sup> Post Conference Order, dated November 29, 2025
13. Whatcom County Confirmation of CUP, dated December 9, 2025
14. Appellants Witness disclosure and Proposal re Filing of Exhibits, dated December 19, 2025
15. Notice of Appearance – Greenan
16. Notice of Appearance – Van Ness Feldman
17. Notice of Appearance – Magali Cota – Friends of San Juans
18. Notice of Appearance – Whatcom County
19. ALA Energy Witness List
20. Whatcom County Final Hearing Opening Brief
21. ALA Energy Opening Brief – support of CUP
22. ALA Energy Exhibit List
  - a. ALA Energy Rebuttal Exhibit List, dated January 16, 2026
23. ALA Energy Exhibits
  - a. ALA Energy Rebuttal Exhibit ALA21
24. Appellants Opening Brief
25. Appellants Proposed Exhibit List
  - 25. (01) FSJ-1, Zane Gustafson CV
  - 25. (02) FSJ-2, David Stalheim, CV
  - 25. (03) FSJ-3, Charles A. Brown CV
  - 25. (04) FSJ-4, Wendy Heister CV
  - 25. (05) FSJ-5, Joseph K Haydos, Ph. D CV
  - 25. (06) FSJ-6, Kirsten Kane, Ph. D CV
  - 25. (07) FSJ-7, Lovel Pratt CV
  - 25. (08) FSJ-8, 1975 Permit file
  - 25. (09) FSJ-9, 12.29.1985 20-008488 Intalco Lease
  - 25. (10) FSJ-10, 09.10.1993 SEP93-0923 Environmental Checklist
  - 25. (11) FSJ-11, 02.01.2003 Assignment of DNR lease
  - 25. (12) FSJ-12, SHX2010-00104, Project Description, July 2010
  - 25. (13) FSJ-13, 09.26.2018 SHX2018-00033 Exemption Notice re the requested Shoreline statement of

- exemption is approved subject to the attached conditions.
25. (14) FSJ-14, 09.13.2023 SHX2023-00012 Exemption Notice re the requested Shoreline Exemption is approved subject to the attached conditions.
  25. (15) FSJ-15, 2020 SEPA Pier Permit
  25. (16) FSJ-16, 03.17.2020 Email from Chase Carter to Kyla Walters re Marine Loading Arm – SHR2020-00002
  25. (17) FSJ-17, Press release – County and Petrogas Reach Agreement on Permitting Compliance Pathway
  25. (18) FSJ-18, 01.14.2022 Letter to AltaGas from Whatcom County
  25. (19) FSJ-19, AltaGas response to WC (CONFIDENTIAL) – Table 3 REDACTED
  25. (20) FSJ-20, #6187 Utilities and Transportation Commission Standard Inspection Report for Intrastate Hazardous Liquid Systems Records Review and Field Inspection
  25. (21) FSJ-21, 05.17.2022 NWCAA 4516a enforcement report
  25. (22) FSJ-22, 2016 Ferndale Energy Efficiency Project NWCAA Notice of Construction Application
  25. (23) FSJ-23, 10.13.2021 NWCAA 4516 enforcement report
  25. (24) FSJ-24, 10.15.2021 Notice of Violation 4516
  25. (25) FSJ-25, Notice of Violation 4516a
  25. (26) FSJ-26, 03.01.2022 Letter to Toby Mahar from Petrogas re response to Notice of Violation
  25. (27) FSJ-27, 11.10.2022 Letter from NWCAA to Petrogas re compliance order 4516a
  25. (28) FSJ-28, 01.13.2023 Regulatory Order 50 issued by NWCAA
  25. (29) FSJ-29, Settlement Agreement NWCAA Petrogas
  25. (30) FSJ-30, 12.10.2024 Email from Lovel Pratt to Personius, et al re FYI-ENGO questions and requests for additional info from AltaGas
  25. (31) FSJ-31, 08.05.2025 Email from Amy Keenan to Lovel Pratt re: (external) ENGO’s questions and info requests with draft responses
  25. (32) FSJ-32, 04.28.2017 Excerpts of Millennium Bulk Terminals – Longview Final Environment Impact Statement
  25. (33) FSJ-33, 20-A04888 Petrogas, Cherry Point: Contract Compliance Regarding Vessel Limit – 2016-present
  25. (34) FSJ-34, 06.21.2017 Blog article: Floating Bridge – West Coast Alternatives for Exporting LPG to Asian Markets
  25. (35) FSJ-35, 10.16.2020 investor presentation – A Time to Grow, A Time To Optimize: Increasing Our Ownership Position in Petrogas
  25. (36) FSJ-36, 2014 Annual Report
  25. (37) FSJ-37, 04.14.2014 Ferndale blog article – West Coast LPG Exports are a Brand New Game – A New Wave of Exports from Ferndale, WA
  25. (38) FSJ-38, Sightline Institute Article – Fracked Fuel Exports Come to Whatcom County
  25. (39) FSJ-39, Information Used in Valuing the Subject Property
  25. (40) FSJ-40, 2023 Annual Report (excerpts)
  25. (41) FSJ-41, 2021 Annual Report (excerpts)
  25. (42) FSJ-42, FSJ-41 P66 HEX Final Dec w Rev
  25. (43) FSJ-43, 08.09.2016 Whatcom County Council Agenda Bill & 08.09.2016 Ordinance No. 2016-031
  25. (44) FSJ-44, Dr Kane – links in testimony in PDF format, submitted January 29, 2026
  25. (45) FSJ-45, Dr Kane – links in testimony in PDF format, submitted January 29, 2026
  - 26.** Payment of Legal Notice – APL, dated January 7, 2026
  - 27.** Payment of Legal Notice – CUP, dated January 5, 2026
  - 28.** Appellants Notice of filing re: standing, dated January 14, 2026
  - 29.** Notice of Appearance Lydia Heye – Earthjustice, dated January 14, 2026

30. Testimony of Charles A. Brown
31. Testimony of Lovel Pratt
32. Testimony of David Stalheim
33. Testimony of Wendy Hiester
34. Testimony of Joseph Gaydos
35. Testimony of Zane Gustafson
36. Testimony of Kirsten Kane
37. Expert Witness CV Wendy Hiester
38. Appellants Responsive Pre-Hearing Brief, dated January 16, 2026
39. Whatcom County Response Brief, dated January 16, 2026
40. ALA Energy Response Brief, dated January 16, 2026
41. Combined public comments received January 17 – 23, 2026
42. Legal notice for APL, dated January 7, 2026
43. Legal notice for CUP, dated January 5, 2026
44. Proposed Order
  - a. Stipulated Proposed Hearing Schedule
45. ALA Motion to Shorten Time to File Motion in Limine to Strike Expert Testimony
  - a. ALA Proposed Order re Motion to Strike
46. Pre-filed testimony of A. Mathes
47. Pre-filed testimony of M. Heigold
48. Pre-filed testimony of S. Andreassen
49. Pre-filed testimony of C. Clarke
50. Pre-filed testimony of G. Rhoads
51. Pre-filed testimony of L. Mendonsa
52. Pre-filed testimony of P. Couch
53. Certificate of Service
54. Appellants Pre-Hearing Reply, dated January 23, 2026
55. ALA Energy Reply Brief, dated January 23, 2026
56. Findings of Fact, Conclusions of Law, and Order
57. Order on Hearing Schedule, dated January 23, 2026
58. Preliminary Order on ALA Motion – Limine, dated January 23, 2026
59. Appellants Opposition to Motion in Limine, dated January 27, 2026
60. Stipulation re: Motion to Shorten Time and Proposed Order, dated January 27, 2026
61. Proposed Order, dated January 27, 2026
62. Notice of Lloyd Mendonsa Availability and Request Regarding Remote Testimony, January 27, 2026
63. Combined Public Comment received 1.26 – 1.27.2026
64. Motion to modify CUP conditions, dated January 27, 2026

CUP – 2024-00006

0001. Cover letter - Applications for Prior Projects Flare Project and Waste Gas Recycling Project, dated June 27, 2024
0002. Cover Letter Attachment 1 Defined Terms Table, dated June 27, 2024
0003. Major Project Permit Application Form, dated June 27, 2024
0004. MPP Attachment 1 Project Description and Compliance Narrative, dated June 27, 2024
0005. MPP Attachment 2 Additional Elements, dated June 27, 2024
0006. Conditional Use Permit Application Form, dated June 27, 2024
0007. CUP Attachment 1 Compliance Narrative, dated June 27, 2024
0008. CUP Attachment 2 Property Owners Mailing List Mailing Labels, dated June 27, 2024

0009.01. Permit Package - MOC 16-030 signed 2024.06.03  
 0009.02. Permit Package - MOC 16-038 signed 2024.05.29  
 0009.03. Permit Package - MOC 17-022 signed 2024.05.29  
 0009.04. Permit Package - MOC 17-025 - signed 2024.05.29  
 0009.05. Permit Package - MOC 18-001 signed 2024.05.13  
 0009.06. Permit Package - MOC 18-004 signed 2024.05.29  
 0009.07. Permit Package - MOC 18-006 and 18-010 signed 2024.06.07  
 0009.08. Permit Package - MOC 18-013 signed 2024.05.29  
 0009.09. Permit Package - MOC 18-014 signed 2024.05.29  
 0009.10. Permit Package - MOC 18-030 signed 2024.05.29  
 0009.11. Permit Package - MOC 18-031 signed 2024.05.29  
 0009.12. Permit Package - MOC 18-032 signed 2024.06.05  
 0009.13. Permit Package - MOC 18-033 signed 2024.05.29  
 0009.14. Permit Package - MOC 19-009 signed 2024.05.29  
 0009.15. Permit Package - MOC 19-018 signed 2024.05.29  
 0009.16. Permit Package - MOC 19-020 signed 2024.05.13  
 0009.17. Permit Package - MOC 19-025 -027 signed 2024.06.07  
 0009.18. Permit Package - MOC 19-030 signed 2024.06.05  
 0009.19. Permit Package - MOC 19-031 signed 2024.05.29  
 0009.20. Permit Package - MOC 19-34 - signed 2024.05.13  
 0009.21. Permit Package - MOC 19-303-047 Signed  
 0009.22. Permit Package - MOC 19-029 signed 2024.06.06  
 0009.23. Permit Package - MOC 20-65 signed 2024.05.29  
 0009.24. Permit Package - MOC 20-69 signed 2024.05.29  
 0009.25. Permit Package - MOC 20-90 signed 2024.05.29  
 0009.26. Permit Package - MOC 21-101 signed 2024.05.29  
 0009.27. Permit Package - MOC 2021-1231 Signed  
 0009.28. Permit Package - MOC 2021-1286 signed 2024.06.06  
 0009.29. Permit Package - MOC 2021-1367 signed 2024.05.29  
 0009.30. Permit Package - Conex Structures - Arch signed 2024.06.25  
 0009.31. Permit Package - Waste Gas Recycling Signed  
 0009.32. Past Permit - Chiller Permit com2019-00045 - Permit Record  
 0009.33. Past Permit - FEEP com2016-00004 - Permit Record  
 0009.34. Past Permit - FEEP Building Permit com2016-00010 - Permit Records  
 0009.35. Past Permit - NWCAA OAC 1236a Emergency compressor addition  
 0009.36. Permit Package - Flare Project 2024.06.25  
 0009.37. Permit Package - Flare Project Attachment 2 Stormwater Engineering Design Report  
 0009.38. Permit Package - Flare Project Attachment 1 Preliminary Stormwater Proposal  
 0009.39. Permit Package - Conex Structures - Gable signed 2024.06.24  
 0009.40. Permit Package - Conex Structures - Arch signed 2024.06.25  
 0009.41. Past Permit - Chiller Project com2019-00045 - Misc. Staff Docs  
 0009.42. Past Permit - FEEP 2019 permit correction com2016-00004-2019 - Compliance Documentation  
 0009.43. Past Permit - FEEP Revised SEPA SEP2016-00004  
 0010. Project Summary Table - Index of Permit Applications and Copies of Past Permits  
 0011. Responses to County Pre-Application Notes, dated June 27, 2024  
 0012. SEPA Checklist - Prior Projects, dated June 27, 2024  
 0013. SEPA Checklist - Flare, dated June 27, 2024  
 0014. SEPA Checklist - Waste Gas Recycling, dated June 27, 2024  
 0015. SEPA Attachment 1 Orca Checklist, dated June 28, 2024

- 0016. SEPA Attachment 2 Fossil Fuels Facility Evaluation, dated June 28, 2024
- 0017. Appendix A.01 ALA Energy Ferndale Trip Generation Analysis, dated June 28, 2024
- 0018. Appendix A.02 Concurrency 1 Prior Projects, dated June 28, 2024
- 0019. Appendix A.03 Concurrency 2 Waste Gas Recycling Project, dated June 4, 2024
- 0020. Appendix A.04 Concurrency 3 Flare Project, dated June 4, 2024
- 0021. Appendix A.05 Site Plans, dated June 28, 2024
- 0022. Appendix A.06 Ferndale Terminal Survey, dated June 28, 2024
- 0023. Appendix A.07 Bargain and Sale Deed - Chevron to Petrogas - Recording No. 2140500065, dated June 5, 2016
- 0024. Appendix A.08 Bargain and Sale Deed - Petrogas Inc to Petrogas West , dated May 1, 2014
- 0025. Appendix A.09 Recorded Document Guarantee , dated July 31, 2023
- 0026. Appendix A.10 NWCAA NOC Application, dated April 2022
- 0027. Appendix B.1 Windborne Emissions Analysis, dated May 29, 2024
- 0028. Appendix B.2 Green House Gas Analysis, dated June 24, 2024
- 0029. Appendix B.3 Marine Vessel Analysis, dated June 27, 2024
- 0030. Appendix B.3 Attachment 1 Ferndale Terminal Marine Vessel Handbook, dated June 28, 2024
- 0031. Appendix B.4 Stormwater Analysis, dated June 28, 2024
- 0032. Appendix B.5 Rail Operations Analysis, dated June 28, 2024
- 0033. Appendix C.1 Current Capacity Assessment CBI UNREDACTED, dated June 2023
- 0034. Appendix C.2 Prior 2016 Capacity Assessment CBI UNREDACTED, dated June 8, 2023
- 0035. Appendix C.3 Burns and McDonald Capacity Assessment – Flare, dated June 26, 2024
- 0036. Appendix C.3 Attachment 1 Flare Design Basis, dated May 23, 2023
- 0037. Appendix C.4 Burns and McDonald Capacity Assessment - Waste Gas Recycling – Deethanizer, dated June 26, 2024
- 0038. Appendix C.4 Attachment 1 Waste Gas Recycling Design Basis, dated January 24, 2024
- 0039. Appendix D.1 Geological Hazard Area GHA Assessment, dated June 24, 2024
- 0040. Appendix D.2 Health and Community Services Water Facilities Inventory Form, dated February 24, 2024
- 0041. Appendix D.3 International Building Code IBC Review, dated April 25, 2024
- 0042. Appendix D.4 ALA Energy Ferndale Facility Prior Projects Stormwater Review Memo, dated June 23, 2024
- 0043. Appendix D.5 ALA Energy Ferndale Facility Waste Gas Recycling Project Stormwater Memo, dated June 23, 2024
- 0044. Appendix D.6 ALA Energy Ferndale Terminal Flare Stormwater Memo, dated June 25, 2024
- 0045. Appendix D.7 ALA Energy Facility Site Development Report Unpermitted Prior Projects, dated June 28, 2024
- 0046. Appendix D.8 ALA Energy Flare and Waste Gas Site Development Report, dated June 28, 2024
- 0047. Appendix D.9 Archaeological Survey for the Petrogas Ferndale Terminal New Ground Flare Project Confidential, dated March 14, 2022
- 0048. Appendix F Cost Reimbursement Agreement, dated June 28, 2024
- 0049. Appendix F.1 Insurance Certificate ALA Energy LLC - 570106509057 - Liab-Auto-Excess CBI REDACTED, dated June 18, 2024
- 0050. Appendix F.2 Insurance Certificate ALA Energy LLC - 061924 - MTOL-WC CBI REDACTED, dated June 18, 2024
- 0051. Appendix G Table of Avoidance , Minimization - and Mitigation Measures, dated June 10, 2025
- 0052. Determination of Incompleteness Response cover letter, dated July 24, 2024
- 0053. SEPA Checklist – Merged, dated July 24, 2024
- 0054. 2024 Subdivision Guarantee - Effective 7.11.2024 - File No. W-210524, dated July 11, 2024

0055. determination of completeness, dated August 7, 2024  
0056. notice of application public comments, dated September 17, 2024  
0057. ALA Energy response to Comments Dated November 1, 2024  
0058. NOAR v.1, dated November 12, 2024  
0059. ALA NOAR response, dated November 28, 2024  
0060. flare elevation drawing, dated November 28, 2024  
0061. department of health public water system operating permit, dated November 28, 2024  
0062. stormwater site plan, dated November 28, 2024  
0063. response to comments regarding wetlands and habitat conservation areas, dated November 27, 2024  
0064. NOAR v.2 , dated January 16, 2025  
0065. NOAR 2 Cover Letter and Responses, dated June 10, 2025  
0066. NOAR Appendix A-Whatcom County Health Department Sewage Permit Application, dated May 17, 2015  
0067. NOAR Appendix B-Portable washroom location map, dated Jun 10, 2025  
0068. NOAR Appendix C-Revised Stormwater Site Plan, dated May 30, 2025  
0069. NOAR Appendix D-ALA Energy Ferndale Terminal Critical Areas Assessment Report\_with attachments, dated May 2025  
0070. NOAR Appendix E-ALA Energy Ferndale Green House Gas Analysis, dated May 13, 2025  
0071. NOAR Appendix F - Marine Vessel Analysis, dated June 10, 2025  
0071.01. 2020 May - Salish Sea Ambient noise evaluation, dated June 10, 2025  
0071.02. 2021-03-15 OBPS Salish Sea Ambient Noise submission  
0071.03. 2023-24-Quiet-Sound-Slowdown-Final-Report\_Aug6  
0071.04. ALA applic - App G f Avoidance Min and Mit Measures 20240819  
0071.05. ALA response to comments 2024 1101 see Exh C vetting  
0071.06. April Construction Update Woodfibre LNG  
0071.07. Attachment 1 Ferndale Terminal Marine Vessel Handbook 20240628  
0071.08. Attachment B.3 Marine Vessel Operations -Analysis 20240628  
0071.09. BC Ferries UNMP 2021  
0071.10. BC Ferries URN Management Plan  
0071.11. Boundary Pass Underwater Listening Station JASCO Applied Sciences  
0071.12. BP Cherry Point Dock Final EIS  
0071.13. BPCP EIS Appendix C GWU Vessel Traffic Risk Analysis  
0071.14. Burnham et al Marine Pollution Bulletin  
0071.15. Construction Woodfibre LNG Building the world's first  
0071.16. DNV and URN Canadian waters  
0071.17 DNV URN Canadian waters  
0071.18. DP World Breaks Ground on Duke Point Terminal Exp website  
0071.19. Ecosphere 2024 Nelson Identifying drivers of demographic rates in an at - risk population  
0071.20. EDB investors look under the hood at SeaPort Sound Term website  
0071.21. Friends of the San Juans Salish Sea Vessel Traffic Projections\_ Infographic Sept-2024  
0071.22. GCT Deltaport Expansion - Berth Four Project  
0071.23. Green Marine report2023 web  
0071.24. Industrial Rail Corridor Expansion Port of Longview WA  
0071.25. Joy et al 2019  
0071.26. Marine Pollution Bulletin  
0071.27. May Investor Presentation 2025  
0071.28. MEPC 72-16-5 - Reducing underwater noise utilizing ship design and operational measures Canada  
0071.29. NOAA NPS Ocean Noise Reference Station Network Acoustics Program  
0071.30. Port-of-Prince-Rupert-Green-Wave-Program-1

0071.31. PSE Safe and Secure Natural Gas Storage website  
0071.32. PSE Tacoma LNG  
0071.33. Puget Sound Anchorages QRS  
0071.34. Puget Sound Harbor Safety Plan January 2023 FINAL  
0071.35. QuietSoundThermalCamera  
0071.36. Revised - Appendix G Table of Avoidance, Minimization, and Mitigation Measures 20240819  
0071.37. Roberts Bank Terminal 2 Vancouver Fraser Port Authority website  
0071.38. SDC 8-14-3 - Proposal on approach to the review of the 2014 Guidelines for the reduction of underwater... (Japan)  
0071.39. SeaPort Sound FinalEIS 10-25-2023  
0071.40. Seaspan Shipyards - Seaspan website  
0071.41. Seaspan-Shipyards-Economic-Contribution-StudyJuly 2023  
0071.42. SEPAMitigationOpportunities  
0071.43. Sterling Shipyard Remediation and Infill  
0071.44. Sterling Shipyard Remediation Infill Project - Vancouver Fraser Port Authority  
0071.45. T4 Project - Port of Grays Harbor  
0071.46. Terminal 5 Improvements Northwest Seaport - Port of Tacoma  
0071.47. Terminal 46 - Cruise Terminal Development Port of Seattle  
0071.48. Tilbury Phase 2 LNG Expansion project Talking Energy  
0071.49. Trans Mountain - Marine Plans  
0071.50. Trans Mountain oil pipeline just shy of target for first-month loadings Reuters  
0071.51. Trans Mountain pipeline running 80percent full to load 22 oil tankers in Vancouver Reuters  
0071.52. TWZ First Constellation Frigate Only 10percent Complete Design Still Being Finalized  
0071.53. Vancouver port-information-guide-0  
0071.54. WA state Crude oil movement report 4Q24  
0071.55. WA State Regs on Separation Distances  
0071.56. Westshore Terminals Ltd  
0071.57. Whale Sanctuary Listening Station Raincoast  
0071.58. Williams 2024 Bright Extinction SRKW  
0071.59. williams CONCEAL 2016 JMPO page numbers  
0071.60. Woodfibre LNG TERMPOL  
0071.61. 14 Tech Memo-Guidance -3.0 - OCT-2024-508 OPR1  
0072. REVISED Appendix G Table of Avoidance Minimization and Mitigation Measures  
0073. sepa2024-00052 SEPA comments, dated September 3, 2025 – September 17, 2025  
0074. Washington Department of Natural Resources DNR Responses to August 4, 2025, Letter , dated September 4, 2025  
0075. Appellant statement SEPA2024-00052, dated September 29, 2025  
0076. apl2025-00006 appeal application, dated September 29, 2025  
0077. apl2025-00006 list of appellants, dated September 29, 2025  
0078. NOAR third , dated July 24, 2025  
0079. third NOAR 2025 0724 ALA Response, dated October 8, 2025  
0080. Appendix 1 - ALA Energy Septic Design Basis Final, dated October 8, 2025  
0081. Appendix 2 - ALA Energy Flare Project SSP, dated October 8, 2025  
0082. 4100 Unick Road history, dated October 8, 2025  
0083. ldp93-0923 SEPA DNS , dated September 14, 1993  
0084. Aquatic lands Lease 20-A08488  
0085. onsite sewage system construction permit, dated June 1, 2015  
0086. NWCAA letter to pds, dated November 21, 2021  
0087. NWCAA Press Release, dated November 18, 2023

- 0088. Compliance Agreement, dated March 2, 2023
- 0089. Pre Application Packet\_Petrogas\_Revision 0\_Redacted
- 0090. Pre-application Meeting Presentation\_Redacted
- 0091. DOH public water system approval, dated June 23, 2023
- 0092. pre2023-00035 preapplication comments, dated November 6, 2023
- 0093. determination of incompleteness w attachments, dated July 11, 2024
- 0094. pre2023-00035 preapplication comments revised, dated December 13, 2023
- 0095. invoice, dated July 11, 2024
- 0096. receipt, dated July 18, 2024
- 0097. determination of completeness, dated August 7, 2024
- 0098. SEPA2024-00052 Pre-threshold Consultation and Request for Comments - Ferndale Terminal Existing  
- Planned Improvements
- 0099. Legal Notice no sepa, dated August 21, 2024
- 0100. Notice of Application
- 0101. Mailing Labels
- 0102. Vicinity Map
- 0103. Notice of Application Postcard
- 0104. certificate of mailing , dated August 21, 2024
- 0105. title 22, dated January 28, 2025
- 0106. title 16, dated January 28, 2025
- 0107. ALA Energy Donation Letter Quiet Sound, dated June 2025
- 0108. 2025 0610 ENGO Follow-up Cover Letter and Responses
- 0109. ENGO Appendix A-Application SEPA Attachment 2 Fossil Fuels Facility Evaluation
- 0110. ENGO Appendix B-List of Terminal Vessels\_Current Contracts
- 0111. ENGO Appendix C-Uniform Inspection Protocol
- 0112. additional sepa comments, dated December 4, 2025
- 0113. sepa2024-00052 final determination mdns, dated August 27, 2025
- 0114. sepa2024-00052 MDNS Distribution Packet
- 0115. fire marshal memo, dated October 15, 2025
- 0116. plans examiner memo, dated October 16, 2025
- 0117. public works engineering memo, dated October 23, 2025
- 0118. health memo, dated October 28, 2025
- 0119. geohazards memo, dated November 14, 2025
- 0120. Planning and Development Services Final Staff Report, dated December 9, 2025
- 0121. Attachment A - Exhibit List Revised, dated December 9, 2025
- 0121. A\_Attachment A - Exhibit List DRAFT, dated November 21, 2025
- 0122. Additional SEPA comments, dated January 13, 2026
- 0123. Public comment – Clemenson, dated January 13, 2026

## II.

The evidentiary record is extensive as were the three days of testimony, and this summary of facts is not meant to note every document the Hearing Examiner reviewed in coming to a decision based on the totality of the evidence in the record, but to give a high-level overview.

## General Overview of Facility/Use History

It appears the facility was established through a building permit issued by the County in 1975 and there is a lengthy permit history at the site.<sup>1</sup> The facility was originally built by the California Liquid Gas Corporation to transship butane received from nearby oil refineries, primarily via pipeline, and to receive and store propane for local distribution to transport butane and propane that were received from nearby crude oil refineries.

The original permit holder was the California Liquid Gas Corporation and appears to have been held by Texaco Exploration and Production, Inc. before eventually the facility permit holder was Petrogas.<sup>2</sup> Petrogas Pacific, LLC was the parent company of Petrogas West, LLC (“Petrogas West”), and until 2020 was the majority shareholder in the subsidiary. ALA Energy’s parent, AltaGas Ltd. (“AltaGas”), became a minority shareholder of the facility in 2014, and assumed operatorship of the Facility in December 2020. In 2024, AltaGas changed the subsidiary facility owner’s name from “Petrogas West” to ALA Energy.<sup>3</sup> At various times throughout the parties’ briefing and the materials admitted as exhibits the facility is referred to as “Petrogas” or “AltaGas” interchangeably.

Initially, the facility shared a wharf and pier with an aluminum smelter owned by Intalco Aluminum Corp. (“Intalco”) on an adjacent parcel. A 2003 aquatic lands lease between Intalco and the Department of Natural Resources (“DNR”) states that 24 vessels used the pier annually for unloading raw materials for aluminum production, and another 24 vessels used it for butane and propane. The lease limits the use of the pier to 48 vessels total annually. In 2016, Intalco assigned its rights and duties under the lease to Petrogas Pacific LLC (“Petrogas”), which had acquired the terminal.

Petrogas applied for and was granted a Commercial Building Permit in 2019 for 1,944 square feet of concrete slab foundations with curbed secondary containment for exchangers, a glycol tank and pump, transformer, chiller, and associated piping and components; the permit was granted and the work was completed.<sup>4</sup>

Between 2016 and July 2021, Whatcom County passed a series of “emergency moratorium” prohibiting “the filing, acceptance, and processing of new applications for conversion of land or water, new building or structure permits, or other County permits or authorizations in the Cherry Point Urban

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<sup>1</sup> SEPA Ex. 25-8; *see generally* the evidentiary record

<sup>2</sup> CUP Ex. 120

<sup>3</sup> SEPA Ex. 21

<sup>4</sup> CUP Ex. 9-32

Growth Area for new or expanded facilities whose purpose is to facilitate the increased shipment of unrefined fossil fuel or new projects that would export fossil fuels.” The ordinance effectively prohibited issuance of County permits for activities at the Ferndale terminal that would facilitate “increased shipment” of propane or butane.

During this time period, the owners of the facility made unpermitted changes to the facility that eventually triggered permit review and compliance action by the Northwest Clean Air Agency (“NWCAA”). NWCAA determined that the facility failed to obtain air permits for some of the plant’s emission sources and required a temporary emissions control device. Ultimately NWCAA issued significant penalties for the discovered permitting violations. On October 15, 2021, NWCAA notified the Department that there was potentially construction at the ALA facility by the former operating entity, Petrogas, that had not received necessary permitting from the County.<sup>5</sup> After significant investigation and discussions between the Whatcom County Planning and Development Services Department (“Department” or “PDS”) and ALA/Petrogas, the Department determined that permits should have been obtained for a number of facility modifications made between 2016 and 2021.

In 2021, the County amended its code to put new permanent limits on new and expanded fossil fuel terminals, replacing the emergency moratorium with permanent limits.<sup>6</sup> In that ordinance the Whatcom County Council specifically called out the importance of preventing harm to habitat of the Cherry Point Herring stock and Southern Resident Killer Whales, in addition to many other species.<sup>7</sup> The following year, AltaGas Ltd., purchased 100% control of Petrogas.

On March 2, 2023, the Department and ALA Energy entered into a Compliance Agreement that set forth an agreed upon process to bring the Facility into compliance with the new Whatcom County Code.<sup>8</sup> ALA Energy then applied for a Major Project Permit (“MPP”), a CUP, and several commercial building permits in order to permit: (1) prior unpermitted improvements; (2) a new enclosed ground flare; and (3) a new waste gas recycling project (collectively the “Projects”).<sup>9</sup>

Over the next fifteen months, the Department conducted permit review, including SEPA review. The Department issued a Mitigated Determination of Non-Significance (“MDNS”) on September 9<sup>th</sup>,

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<sup>5</sup> CUP Ex. 86

<sup>6</sup> WCC 20.68.154.

<sup>7</sup> Ord. 2021-046 at 3, 8, and 9

<sup>8</sup> CUP Ex. 88

<sup>9</sup> CUP Exs. 1, 3, and 6

2025,<sup>10</sup> which the Appellants appealed on the 29<sup>th</sup> of that same month.<sup>11</sup> The Department also made a recommendation to the Office of the Hearing Examiner that the CUP could be lawfully approved with mitigating conditions.<sup>12</sup>

### Short Overview of SEPA Appeal Nature

Appellants for the SEPA appeal are six environmental non-governmental organizations: Friends of the San Juans, Evergreen Islands, RE Sources, the Sierra Club, Washington Conservation Action, and Whatcom Environmental Council; all of whom provided comments to Whatcom County Development and Planning Services (“Department”) regarding this permitting process.<sup>13</sup> They argue that the Department erred in issuing the MDNS when it erroneously assumed that the actions under review will not increase the amount of product handled by the facility.<sup>14</sup> Specifically, they argue that the “Maximum Transshipment Capacity” calculation of the terminal’s theoretical maximum capacity was a fatally incorrect piece of information the Department relied on in making its SEPA decision.<sup>15</sup> They seek the Office of the Hearing Examiner “to overturn the MDNS and direct PDS to issue a determination of significance and initiate a full Environmental Impact Study (“EIS”) process that considers all of the direct, indirect, and cumulative impacts of increasing throughput at the terminal[,]” or to otherwise impose greater conditioning on the project to mitigate the adverse impact of the project.<sup>16</sup>

In opening and closing briefing the Appellant argues that the effect of this error will have significant impact on several broad areas: marine vessel noise and pollution, specific risks to Southern Resident Killer Whales (“SRKW”) and Cherry Point Herring, greenhouse gas (“GHG”) production, and safety risks.<sup>17</sup>

### General Fact Findings on Specific Points Relevant to the Arguments of the Parties

There were a number of factual and legal disputes between the parties which warrant addressing

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<sup>10</sup> CUP Ex. 113

<sup>11</sup> SEPA Ex. 1

<sup>12</sup> CUP Ex. 120

<sup>13</sup> SEPA Ex. 2

<sup>14</sup> SEPA Ex. 8, Post-Conference Order at §4(a), *entered* 11/6/25; and *see generally* SEPA Ex. 2, Appeal Statement

<sup>15</sup> SEPA Ex. 2 at 3-4

<sup>16</sup> SEPA Ex. 2 at 4

<sup>17</sup> SEPA Ex. 24 at 2. 19-22; H Series Ex. 9 at 13-22

and fact finding without extensive discussion. These conclusions come from the totality of the evidence, testimony, and arguments of the parties; while being remanded, unless the facts on the ground actually change, these facts will be applied to any review that returns to the Office of the Hearing Examiner on this matter.

### **Nature of Compliance Agreements and Promises about EIS**

A narrative in some public comments and in the Appellant’s argument is that “Whatcom County promise[d] an EIS on the company’s expansion projects but then backtrack[ed].”<sup>18</sup> This was not found to be correct, there is no covenant on the part of the County, explicit or implicit, to conduct an EIS.

### **Reduction in GHG Emissions**

The totality of the evidence demonstrates that implementation of all of the projects, in particular the “permanent” flare, would result in a reduction of GHG.

### **Butane vs. Propane**

The use of either LNG or change from prior use to a different composition was not substantively relevant to the questions at hand.

### **Safety of Tank T-1 and the Facility in General**

The totality of the evidence demonstrates that there is no specific threat posed by Tank T-1 and its current or intended use.

### **Appropriateness of Critical Areas Report**

The totality of the evidence leads to the conclusion that the Critical Areas Report, its delineations, and its compliance with the law as determined by the Department was appropriate.

### **Cherry Point Herring Decline**

Despite years of study, there is no clear understanding as to why the Cherry Point herring stock has failed; no causal link has been established between the industry at Cherry Point and that decline.

### **Southern Resident Killer Whales**

There is sufficient evidence in the record to demonstrate that it is substantively probable that an increase in marine traffic would have an impact on the SRKW without mitigation.

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<sup>18</sup> *E.g.* SEPA Ex. 24 at 8

### III.

#### Procedural History

After the filing of the SEPA appeal, the appeal was stayed on November 6, 2025 after a pre-hearing conference of the parties, pending consolidation with the potential CUP recommendation to the Office of the Hearing Examiner.<sup>19</sup>

### IV.

#### Public Comments

Numerous comments were submitted via email and at the hearing both in support and against this project. It would be impossible to capture the essence of every comment, but they are within the record and have been reviewed.

Generally and broadly speaking, those in support of the project state that the ground flare and waste gas recycling project would significantly reduce volatile organic compounds (VOC) and greenhouse gas (GHG) emissions, improving air quality and contributing to regional climate goals, as well as having a positive economic impact on the community, bringing job growth, skilled labor, higher paying wages, new investments into local Whatcom County, vendors, suppliers, consultants and contractors, as well as a positive impact on our local housing market.

Further generally and broadly speaking, those in opposition of the project state that liquid petroleum gas (LPG) has and will negatively impact communities and endangered species in the Salish Sea, including the Southern Resident Killer Whales. In particular the opponents highlight the harm from potential harmful noise affecting marine life, fuel spills, air pollutant emissions, and effluent discharge associated with an increase in marine vessel traffic of Very Large Gas Carriers (VLGC).

### V.

All witnesses were found to be credible, though that does not mean they were given equal weight. There is no finding that any witness or party attempted to intentionally perjure themselves in any of the exhibits submitted or the testimony given.

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<sup>19</sup> SEPA Ex. 8; *see also* discussion on ‘Consolidation’ in Conclusions of Law

## **VI.**

WCC 2.11.220 allows the Hearing Examiner to issue subpoenas and compel attendance of witnesses— but in this case no party requested the Hearing Examiner to compel a witness to appear in person and be cross examined.

## **VII.**

WCHE §14(A) grants parties the right to object to evidence and to cross-examine. The 64 exhibits listed in the APL2025-00006 file, 123 exhibits listed in subfolder CUP-ALA Energy file, and the first 7 exhibits listed in subfolder Hearing Examiner exhibits, were subject to these rights before being admitted.

## **VIII.**

The Findings of Fact of Whatcom County Planning and Development Services, as set forth in the Conditional Use Permit Staff Report,<sup>20</sup> dated December 9, 2025, copies of which are attached hereto, are supported by the record as a whole and are hereby adopted and incorporated herein by this reference, to the extent they are not contradicted by articulated findings in this decision – which they are. As this was an open-record hearing, there are facts that have been raised and put into the record that the Department may not have had or taken into consideration in its decision making, but the totality of that additional evidence has been used on the Hearing Examiner’s decision making and conditioning.

## **IX.**

Any Conclusion of Law made below 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.**

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<sup>20</sup> CUP Ex. 0120

## Jurisdiction

The WCC requires project permits, approvals, and other actions to undergo different processes depending on a “type” classification; such classification also mandates who the final decision maker is and where appeals are heard.<sup>21</sup>

SEPA decisions are Type II decisions made by the Department’s Director in their role as the County’s “SEPA Official.”<sup>22</sup> The Department applies WCC 16.08 criteria in making that final determination, and appeals of such decisions are made to the Whatcom County Hearing Examiner.<sup>23</sup>

CUP decisions are Type III decisions made by the Whatcom County Hearing Examiner after an open record hearing, applying WCC 22.05.026 criteria.<sup>24</sup>

Consequently, the Office of the Hearing Examiner has jurisdiction over both the SEPA Appeal and the CUP Permit final decision.

## Consolidation

Pursuant to WCHE §11, WCC 22.05.030, RCW 36.70B.060, and RCW 43.21C.075, which require consolidation of the SEPA Appeal with the underlying permit matter, the SEPA Appeal hearing was consolidated to also include the decision making on application CUP2024-00006 by ALA Energy LLC.<sup>25</sup>

The arrangement of the hearings regarding the facts and the law within the consolidation was the subject of some pre-hearing maneuvering;<sup>26</sup> to which the Hearing Examiner ultimately determined that staging the hearings sequentially in the same place was not the same as legal consolidation nor fit within, or would render meaningless, the definitions of public hearing and public notice applicable to both matters, and would “seek to stage public comment in a manner that is not responsive to the arguments raised by the parties in their totality, excise public comment on the SEPA appeal, and deprive the public of their consolidated rights under the WCC and RCW.”<sup>27, 28</sup>

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<sup>21</sup> WCC 22.05.020 (1-2)

<sup>22</sup> WCC 22.05.020(3) at Table 1

<sup>23</sup> *Id.*; see also WCC 2.11.210(A)

<sup>24</sup> *Id.*; see also WCC 2.11.210(C)

<sup>25</sup> SEPA Ex. 8 at §1(a); see also Ellensburg Cement Products, Inc. v. Kittitas County, 179 Wn.2d 737, 317 P.3d 1037 (2014)

<sup>26</sup> SEPA Ex. 44

<sup>27</sup> SEPA Ex. 57

<sup>28</sup> *But see also* the Hearing Examiner’s oral ruling in Transcript of Day 1 at 8:56:06 to 8:56:34 ensuring all formal parties being able to address or rebut public comments.

## Standing

Any person with standing may appeal any order, final permit decision, or final administrative determination made by the director or designee in the administration or enforcement of any chapter to the Hearing Examiner.<sup>29</sup> Establishing standing is part of Appellants' burden in a SEPA appeal.<sup>30</sup> The allegations and comments of the parties establish that standing.<sup>31</sup>

The Applicant did not object to the standing of the Appellant.<sup>32</sup>

For an appeal to the Hearing Examiner, the Appellant with standing is also required to submit a statement and meet other requirements.<sup>33</sup> These requirements have been met by the appellants.

## Nature and Standard of Review

In both of the matters consolidated here "...the hearing examiner has the power to grant in part or as a whole, reject in part or as a whole, or to remand in part or as a whole with directions for interpretation by a department. Further, in granting, denying, or remanding any decision or application, partially or otherwise, the hearing examiner shall have the power to impose, modify, or remove conditions." <sup>34</sup>

## **SEPA Appeal**

The standard of review for a SEPA appeal is *de novo*.<sup>35</sup> The Appellant bears the burden of proof in a SEPA Appeal.<sup>36</sup> A SEPA threshold determination is reviewed under the "clearly erroneous" standard.<sup>37</sup> As such, a decision should be overturned only when the hearing examiner "...on the entire

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<sup>29</sup> WCC 22.05.160

<sup>30</sup> Kucera v. State, Dep't of Transp., 140 Wn. 2d 200, 212, 995 P.2d 63 (2000) (Where a party alleging environmental damage is sufficient for standing in a SEPA appeal; and where held "A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA, and (2) the party must allege an injury in fact.").

<sup>31</sup> *E.g. see generally* SEPA Ex. 28 and declarations therein

<sup>32</sup> Transcript of Day 1 at 8:45:51 to 8:46:01

<sup>33</sup> WCC 22.05.160(1)(a)

<sup>34</sup> WCC 2.11.200(A)

<sup>35</sup> WCC 2.11.200(A) at final line

<sup>36</sup> WCHE §29(a); See also Moss v. City of Bellingham, 109 Wn. App. 6, 13, 31 P.3d 703 (2001) (*citing Assoc. of Rural Residents v. Kitsap Co.*, 141 Wn.2d 185, 195–96, 4 P.3d 115 (2000)).

<sup>37</sup> See Moss, 109 Wn. App. at 13; King Cnty. v. Wash. State Boundary Rev. Bd. for King Cnty., 122 Wn.2d 648, 661, 860 P.2d 1024 (1993).

evidence, is left with the definite and firm conviction that a mistake has been committed.”<sup>38</sup> “The ‘clearly erroneous’ standard provides a broader review than the ‘arbitrary or capricious’ standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision.”<sup>39</sup>

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,<sup>40</sup> and that the decision to issue a MDNS was based on information sufficient to evaluate the proposal’s environmental impact; moreover, mitigation measures imposed must be reasonable and capable of being accomplished.”<sup>41</sup> The Appellants must prove that the proposed use was erroneously approved as MDNS where it will “have a probable significant adverse environmental impact, even with mitigation measures.”<sup>42</sup>

In SEPA review, the County’s decision “shall be accorded substantial weight,”<sup>43</sup> and the Hearing Examiner shall give due deference to the expertise and experience of the staff rendering such decision.<sup>44</sup>

### **CUP Final Decision**

The Applicant bears the burden of proof,<sup>45</sup> and the code directs that the applicants must show “that the proposed development is consistent with all applicable policies and regulations using the ‘preponderance of the evidence’ standard.”<sup>46</sup> In this case the applicant must show that its proposal is consistent with: Supplemental Fossil Fuel Facility Procedures,<sup>47</sup> Conditional Use Approval Criteria,<sup>48</sup>

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<sup>38</sup> WCC 16.08.170(A)(4); See also Moss, 109 Wn. App. at 13; and Wenatchee Sportsmen’s Ass’n v. Chelan Cnty., 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000) (agency must show “that environmental factors were considered in a manner sufficient to be *prima facie* compliance with the procedural dictates of SEPA” and based on sufficient information) (citing Norway Hill Pres. & Prot. Ass’n v. King Cnty. Council, 87 Wn.2d 267, 274, 552 P.2d 674, 678 (1976) (*superseded* by statute on other grounds)).

<sup>39</sup> Norway Hill Pres., 87 Wn.2d at 678

<sup>40</sup> Wild Fish Conservancy v. Dep’t of Fish & Wildlife, 198 Wn.2d 846, 867, 502 P.3d 359 (2022).

<sup>41</sup> Anderson v. Pierce Cty., 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (citing Pease Hill Community Group v. Cty. Of Spokane, et. al., 62 Wn.App. 800, 810, 816 P.2d 37 (1991); RCW 43.21C.060; WAC 197–11–660(1)(c); and Kiewit Constr. Group, Inc. v. Clark County, 83 Wn.App. 133, 143, 920 P.2d 1207 (1996)).

<sup>42</sup> WAC 197-11-350(2); Anderson v. Pierce Cnty., 86 Wn. App. 290, 304, 936 P.2d 432 (1997) (Rejecting MDNS challenge when appellant failed to demonstrate that the project, as mitigated by the 54 MDNS conditions, would cause significant adverse environmental impacts.).

<sup>43</sup> RCW 43.21C.090

<sup>44</sup> WACHE §29(B)

<sup>45</sup> WACHE §29(A)

<sup>46</sup> WCC 22.05.080(3)

<sup>47</sup> WCC 22.05.032

<sup>48</sup> WCC 22.05.026(3)

Approval Criteria for Expansion of Fossil Fuel Transshipment Facilities,<sup>49</sup> and any criteria integrated thereby.

## II.

### Zoning

The subject property is located within the Heavy Impact Industrial zoning district and is also located within the Cherry Point Industrial District overlay.

The primary purpose of the Heavy Impact Industrial District is “...supplying a reasonable amount of land, commensurate with demand, for the location and grouping of heavy impact industrial uses.”<sup>50</sup> This includes the distribution of raw materials.<sup>51</sup>

The purpose of the Cherry Point Industrial District is “...establishing a range of land uses and types of development appropriate for the Cherry Point UGA and to encourage large scale master planning of industrial sites to preserve sites of sufficient size to accommodate major port and industrial development.”<sup>52</sup> The land has long been planned and designated by Whatcom County for industrial development and is currently the site of three major industrial facilities including two oil refineries, the facility in question here, and previously an aluminum smelter.<sup>53</sup>

In either zone, the expansion of existing fossil fuel transshipment facilities is considered a conditional use and requires a conditional use permit.<sup>54</sup>

## III.

### Maximum Transshipment Capacity

The hearing involved extensive discussion of the facility’s “Maximum Transshipment Capacity” (“MTC”) as defined under the Whatcom County Code, with sharply divergent interpretations and applications offered by the parties.

The appellant is correct that MTC plays a narrow role under the WCC; it is the determination as to whether an expansion in use in a fossil fuel transshipment facility necessitates a CUP.

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<sup>49</sup> WCC 22.05.026(4); and WCC 20.68.154.

<sup>50</sup> WCC 20.68.010

<sup>51</sup> WCC 20.68.010

<sup>52</sup> WCC 20.74.010

<sup>53</sup> 2016 Comprehensive Plan at 2-70

<sup>54</sup> WCC 20.68.154; WCC 20.74.050 referencing WCC 20.68, *et. al.*

Expansion of existing fossil fuel transshipment facilities. For purposes of this section, an expansion is any development (including otherwise permitted or accessory uses), vested after August 8, 2021, that cumulatively increases the facility's total maximum transshipment capacity for fossil fuels by more than 10,000 barrels (or 420,000 gallons) per day, based upon an evaluation conducted by a licensed professional engineer in accordance with the definition of "maximum transshipment capacity" found in Chapter 20.97 WCC.

If a conditional use permit is obtained, the baseline for determining the cumulative increases is reset.<sup>55</sup>

This calculation must be conducted to determine whether or not a CUP is necessary. Competing calculations by both the appellant and the applicant both show an expansion in the MTC that meets the threshold. That does not make this a moot point, because there are consequences to adopting the calculation numbers; specifically resulting baselines, and whether or not it was appropriate to use this calculation in measuring environmental impacts for a SEPA analysis. MTC does not have a direct statutory connection to SEPA, which is focused on actual impacts, but that does not mean at first blush that the measurement is inappropriate to use by the Department; after all, there are many factors used by the Department in analyzing environmental impacts which are not outlined in detail by SEPA.

The WCC directs calculations of MTC as follows:

The calculation of maximum transshipment capacity shall be conducted by a professional engineer licensed in the state of Washington and shall consist of one or a combination of the following limitations:

- (1)** The maximum physical limit of a facility's capacity for off-loading fossil fuels from one or more modes of shipment (i.e., rail, truck, pipeline, etc.), then storing and/or loading such fossil fuels, without processing through a fossil fuel refinery, onto another mode of shipment to be transported outside of the designated zoning district boundaries such as the Cherry Point Industrial District, based on the facility's maximum physical limits to move fossil fuels from the receipt points of all its inbound shipment methods to the delivery points of all its outbound shipment methods, including the capacities or other physical attributes of the facility's equipment, including but not limited to capacities of:
  - a.** Loading equipment;
  - b.** Off-loading equipment;

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<sup>55</sup> WCC 20.68.154

- c. Pumps and/or compressors;
- d. Bulk storage;
- e. Piping hydraulics; or
- f. Any combination of the above.

The capacity calculation shall exclude any equipment installed with a permit condition that prohibits that equipment from being used for transshipment purposes.

[Or]

- (2) Shipment limitations imposed by county, state or federal authorities that can be demonstrated by the applicant to restrict the frequency and/or annual amount of fossil fuel shipments at its facility. If any such limitations form the basis of a maximum transshipment capacity calculation, then any future increases in fossil fuel shipments above those previously imposed limits would constitute an increase in maximum transshipment capacity.<sup>56</sup>

This is an incredibly broad and flexible definition – either of the criteria or an undefined combination of the criteria can be applied by the Department, subject to a Washington-licensed professional engineer conducting the calculation. The determination of reasonableness in the calculation lies with the Department’s Director relying on the counsel of his in-house designated technical experts. Due to the broad and flexible nature of the definition, there is a lot of potential data and criteria to mix and match for a final decision maker; ultimately it must be interpreted in context of its enabling ordinance and the Comprehensive Plan.

#### DNR Lease

ALA Energy’s application materials and the Staff Report explained that Washington’s Department of Natural Resources (“DNR”), a state authority, restricts both the frequency and amount of fossil fuel shipments received at the Facility through the DNR Lease.<sup>57</sup> The DNR lease articulates:

Each year, up to 24 shiploads of alumina ore are delivered to support plant operations. The unloading time is approximately 5 days per vessel depending on the cargo size and vessel configuration. Additionally, up to 24 vessels will utilize this facility for unloading liquid petroleum gas product.

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<sup>56</sup> WCC 20.97.130 at “Maximum Transshipment Capacity”

<sup>57</sup> CUP Ex. 120 at 43–44; Transcript of Day 1 at 87:12–15

A maximum of 48 vessels per year are allowed at the Intalco pier for all products. Any traffic beyond 48 vessels per year or more than five (5) vessels per month between March 1 and June 30th of any year, Tenant will be subject to the following conditions under this agreement...”<sup>58</sup>

At the hearing, ALA Energy’s witnesses also explained that “[p]rior to the purchase of the pier, DNR confirmed that the terminal had access to all 48 vessels for LPG facility transit, and [DNR] reconfirmed that statement in September of 2025.”<sup>59</sup> The Hearing Examiner did not find this particularly persuasive as to determining government regulatory limitations on an existing use, as opposed to potential contractual limitations with a body that happens to be a government. The 48 vessel a year limit for use of the pier is a state agency limitation on shipping, but it appears to be one based on pre-negotiated contractual limitations of a lease with a party that happens to be a government agency, and not any kind of environmental limitation or evaluation determined by DNR; indeed, the original lease seems to have contemplated environmental review being needed for a change in use.<sup>60</sup> It is a limit, and perhaps an upper contractual bound, but it is not a limit associated with the current or prior transshipment capacity.

#### Maximum Transshipment Calculations

The hearing involved extensive discussion of the facility’s “maximum transshipment capacity” (“MTC”) as defined under the Whatcom County Code, with sharply divergent interpretations and applications offered by the parties.

The appellant is correct that MTC plays a narrow role under the WCC; it is the determination as to whether or not an expansion in use of a fossil fuel transshipment facility necessitates a CUP.

Expansion of existing fossil fuel transshipment facilities. For purposes of this section, an expansion is any development (including otherwise permitted or accessory uses), vested after August 8, 2021, that cumulatively increases the facility's total maximum transshipment capacity for fossil fuels by more than 10,000 barrels (or 420,000 gallons) per day, based upon an evaluation conducted by a licensed professional engineer in accordance with the definition of "maximum transshipment capacity" found in Chapter 20.97 WCC.

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<sup>58</sup> CUP Ex. 84 at 28.

<sup>59</sup> Transcript of Day 1 at 95:5–11

<sup>60</sup> CUP Ex. 84 at 26

If a conditional use permit is obtained, the baseline for determining the cumulative increases is reset.<sup>61</sup>

As referenced above and repeatedly throughout the hearing, there are two competing calculations, both flawed for distinct reasons:

**Burns & McDonnell Calculation**<sup>62</sup>

The applicant’s “maximalist” calculation assumes a “continuous supply into the terminal,” that is that the terminal is receiving fuel, from all potential sources, at all times.<sup>63</sup> This is predicated on the ordinance’s “maximum physical limit” being interpreted from a pure physics/materials science theory as applied to equipment only. This is admittedly not a calculation based in the realities of what occurs.<sup>64</sup> For example, the applicant’s own rail expert testified that trains can only be unloaded four at a time, and that considerable work is needed to move rail cars through the facility, connect and disconnect them, and meet safety protocols.<sup>65</sup> Similarly, the same is true for loading LPG onto vessels: Mr. Heigold agreed that the model assumes that the terminal is loading onto a ship 24 hours a day, 365 days a year, up to the maximum capacity of its hoses and pumps.<sup>66</sup> Mr. Heigold agreed that “that’s just not the way it works in reality,” but claimed that the code does not allow for such considerations.<sup>67</sup> Calculating a “realistic” amount of what the terminal can actually handle, i.e., “how many thousands of barrels can the facility move in a day,” is a “very different definition of what the facility can do” than the volume calculated in the Burns & McDonnell report.<sup>68</sup> However, there are advantages to using this calculation, including using a maximalist calculation of potential GHG when evaluating environmental impacts.

The calculation is required to be “...conducted by a professional engineer licensed in the State

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<sup>61</sup> WCC 20.68.154

<sup>62</sup> CUP Ex. 33 (Prepared by Heigold; Transcript of Day 1 at 155:10-12)

<sup>63</sup> Transcript of Day 1 at 159:19-23

<sup>64</sup> Transcript of Day 1 at 161:1-3 (Heigold) (Q: “And you know that’s just not the way it works in reality? A: Right.”); *id.* at 520:12-20 (Hiester) (Q: “Is it rational to assume that fuel is flowing continuously into the terminal? A: No, it’s not.”).

<sup>65</sup> Transcript of Day 1 at 254-256 (Rhoads).

<sup>66</sup> Transcript of Day 1 at 160:21-25 (Heigold); SEPA Ex. 33 (Hiester Testimony), ¶ 41 (discussing overestimate of loading capacity: “there was simply no way that the terminal as configured in 2016 could load and unload anywhere close to that volume of LPG”). Mr. Heigold also conceded that this report was the “first one that we had done” of this kind, *i.e.*, that his company had never prepared a report on “capacity” that looked like this one. Transcript of Day 1 at 156:8-10.

<sup>67</sup> Transcript of Day 1 at 161:1-4 (Heigold), 141:8-9 (study did not consider the “batch operations” actually used at the terminal), and 521:1-8 (Hiester) (not “physically possible” to load up vessels all the time).

<sup>68</sup> Transcript of Day 1 at 165:5-166:5 (Heigold).

of Washington.”<sup>69</sup> Mr. Heigold does not appear to be an engineer licensed in the State of Washington.<sup>70</sup> The calculation reports are stamped by a Jeff Bartels with a State of Washington Professional Engineer stamp, his presumed signature and date next to the stamp.<sup>71</sup> The relationship of Bartels to Burns McDonald or any supervisory capacity he carries out there or their involvement in “conducting” the study is unknown.

### **Hiester Calculation**

The appellant’s witness’s calculation attempts to calculate the actual capacity of the facility in the past, using other physical limitations not accounted for in the Burns & McDonnell Calculation, such as the actual physical limitations of logistics. The Hiester Calculation is based on a “commonly understood engineering definition of capacity,” and in explicit disregard of the WCC’s definition of MTC.<sup>72</sup> This calculation is also flawed (or at least based on the declaration of Hiester<sup>73</sup> and the testimony at the hearing, viewed *prima facie* as being flawed) because it is the WCC that controls. It is the Hearing Examiner’s understanding that there may be other assumption errors in the calculation, however, that is not relevant to delve into, because the Hearing Examiner is not adopting that calculation as determinative or correct. It is not clear whether Hiester is “licensed” in Washington, though they are certainly an engineer who has a long history of working in Washington.<sup>74</sup> Despite Hiester’s self-admissions that they were disregarding the code, the Hearing Examiner disagrees that Hiester’s assumption is not embedded in the words and intent of the code.

### MTC Conclusions

Ord. 2021-046 specifically contemplated greater public review of the expansion of existing fossil fuel transshipment facilities in ways that could impact public safety, transportation, and the environment, and very specifically expressed concern about “increased pollutant emissions to the air, increased chance of crude oil or refined product spills, increased chance of fire or explosion, increased rail traffic that can

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<sup>69</sup> WCC 20.97.130 at “Maximum Transshipment Capacity”

<sup>70</sup> SEPA Ex. 23 at 48-54

<sup>71</sup> CUP Ex. 33 & 34

<sup>72</sup> SEPA Ex. 33 at 9 ln. 12 to 10 ln. 2

<sup>73</sup> *Id.*

<sup>74</sup> SEPA Ex. 37, Sub Ex. 4

impact other modes of transportation [], increased chance of derailment, and increased vessel traffic.”<sup>75</sup> It is difficult to contemplate that the code was intended to completely disregard the physical limitations associated with the arrival of material to the facility, when the ordinance states these are the concerns at hand – indeed, such a maximalist interpretation seems to disregard a grounded view of the capacity of “loading equipment” – it does not seem to be a reasonable assumption. “The maximum physical limit of a facility's capacity for off-loading fossil fuels...” must take into account the actual physical limitations of off-loading of fuels, including the logistics. The maximum physical limit is “based on the facility's maximum physical limits to move fossil fuels from the receipt points of all its inbound shipment methods to the delivery points of all its outbound shipment methods, ***including*** the capacities or other physical attributes of the facility's equipment...”<sup>76</sup> Including, does not mean exclusively based on the equipment. The equipment *might* be a limiting factor in an MTC analysis, like other governmental regulations, or export infrastructure limitations like the DNR lease, but the equipment’s capacity is an included factor for the Department, not an exclusive factor. There are physical limitations beyond the equipment.

The Department SEPA Responsible Official, Mark Personius, testified that he had reviewed the expert evaluations on physical capacity, the Burns & McDonnell reports, and found the reports credible and consistent with the WCC.<sup>77</sup> However, he also testified that the Department did not use any discretion and just accepted the calculation. “[W]e don't know the inner workings of all of those operations and engineering calculations and all of that. So our code says you accept that engineering analysis and that is what we did.”<sup>78</sup> Personius did use the applicant’s MTC calculation to determine whether the unpermitted uses had an impact under SEPA.<sup>79</sup>

The Hearing Examiner cannot accord the Department’s decision substantial weight or give deference to the expertise and experience of the staff rendering such decision, if they abrogate their responsibility to make such a decision or do any analysis. It is an error for the Department not to use its judgment and discretion in evaluating what is provided to it; the code does not dictate acceptance of any analysis provided by an applicant. The Department has an obligation to see if the analysis meets the

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<sup>75</sup> E.g. Ord. 2021-046 at 16-17

<sup>76</sup> WCC 20.97.130 at “Maximum Transshipment Capacity” (***emphasis*** added)

<sup>77</sup> Transcript of Day 3 at 740:12-25, 741:1-7

<sup>78</sup> Transcript of Day 3 at 758:16-19

<sup>79</sup> E.g. Transcript of Day 3 at 760:16-7; *see also* CUP Ex. 113 at 2

goals and intentions of the ordinance and the Comprehensive Plan, examines whether it addresses realistic germane issues, and whether a licensed Washington engineer conducted it. The Department, even if not staffed by mathematicians to check calculations, can and should check underlying factual assumptions and outcomes and adhere to reality-based policy outcomes.

Even if the code was meant to be interpreted as a pure equipment capacity calculation ignoring all other physical limitations for the CUP, which would defeat all of the policy intents expressed by the Whatcom County Council thus far, it would be error to use the MTC calculation to determine there was no environmental impact in the SEPA appeal. An MDNS may in fact be appropriate as there does in fact seem to be a reduction in GHG and volatile organic compounds (VOC) and these developments may in fact reduce the environmental impact – but a usage rate set at the maximalist MTC calculation at many multiples higher than the prior usage seems like it would have a substantive environmental impact on its face. The Department needs an understanding of actual logistic capacities and changes, including rail and ship traffic as was, and as is, to determine the environmental impact.

#### **IV.**

As proposed in the project, a Conditional Use Permit could be approved if consistent with the Conditional Use Criteria and the Approval Criteria for Expansion of Fossil Fuel Transshipment Facilities.

The Conditional Use Criteria are as follows:

- a.** Will be harmonious and in accordance with the general and specific objectives of Whatcom County’s Comprehensive Plan, zoning regulations, and any other applicable regulations.
- b.** Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not change the essential character of the same area.
- c.** If located in a rural area (as designated in the Comprehensive Plan), will be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan.
- d.** Will not be hazardous or disturbing to existing or future neighboring uses.
- e.** Will be serviced adequately by necessary public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water,

sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.

- f. Will not create excessive additional requirements at public cost for public facilities and services, and will not be detrimental to the economic welfare of the community.
- g. Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or the general welfare by reasons of excessive production of traffic, noise, smoke, fumes, glare or odors.
- h. Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets.
- i. Will not result in the destruction, loss or damage of any natural, scenic, or historic feature of major importance.<sup>80</sup>

The Hearing Examiner finds, independently from the findings in the Staff Report, due to the additional testimony at the hearing, that *with appropriate conditions of approval*, the project could be compliant with the Conditional Use Criteria.

Consequently, the project could be approved for a Conditional Use Criteria Permit, if it could also meet the Approval Criteria for Expansion of Fossil Fuel Transshipment Facilities<sup>81</sup> and supplemental conditional use permit criteria regarding such facilities.<sup>82</sup>

## V.

As this is a fossil fuel transshipment facility, a conditional use permit can only be granted if it meets the Approval Criteria for Expansion of Fossil Fuel Transshipment Facilities:

Expansion of existing fossil fuel transshipment facilities. For purposes of this section, an expansion is any development (including otherwise permitted or accessory uses), vested after August 8, 2021, that cumulatively increases the facility's total maximum transshipment capacity for fossil fuels by more than 10,000 barrels (or 420,000 gallons) per day, based upon an evaluation conducted by a licensed professional engineer in accordance with the definition of "maximum transshipment capacity" found in Chapter

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<sup>80</sup> WCC 22.05.026 (3) (§a. through i.)

<sup>81</sup> WCC 20.68.154

<sup>82</sup> WCC 22.05.026(4)

20.97 WCC.

If a conditional use permit is obtained, the baseline for determining the cumulative increases is reset.<sup>83</sup>

In addition to the above criteria, conditional uses involving fossil fuel transshipments must meet additional conditional use criteria:

- a) The conditional use permit approval criteria listed under subsection (3)<sup>84</sup> of this section are met;
- b) Within shorelines, if applicable, county approval shall be contingent upon approval of a shoreline permit;
- c) The applicant has documented to the county decision maker (as applicable):
  - i. All of the anticipated types and volumes of substances to be processed, stored, or transferred in bulk with the proposed expansion;
  - ii. Changes in the maximum transshipment capacity or the maximum atmospheric crude distillation capacity occurring as a result of the proposed expansion, as applicable; and
  - iii. The mode of shipment vessels to be loaded or unloaded with the proposed equipment and/or as a result of the proposed expansion. The permit shall be limited exclusively to those types and volumes of materials or products as documented and approved.
- d) Insurance requirements meet the provisions of WCC § 22.05.132.
- e) Mitigation of transportation impacts consistent with Chapter 20.78 WCC, Transportation Concurrency Management, and Chapter 16.24 WCC, Commute Trip Reduction.
- f) Mitigation of impacts to other services including fire and emergency response capabilities, water supply and fire flow, to address risks created by expansions.
- g) Plans for stormwater and wastewater releases have been approved.

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<sup>83</sup> WCC 20.68.154

<sup>84</sup> The standard Conditional Use Permit criteria

- h) Prior to commencement of any site preparation or construction activities, all necessary state leases shall be acquired for any piers or aquatic lands improvements, and it shall be demonstrated to the zoning administrator that the project applicant has met any federal or state permit consultation requirements, including tribal treaty rights or the provisions of the Magnuson Amendment through state and federal permitting decisions.
  - i. The county decision maker may approve a conditional use permit with a condition to obtain relevant leases and complete any necessary federal and state permitting requirements, and may restrict the conditional use permittee from undertaking site preparation or construction activities until it has fulfilled that condition.
- i) The permittee must inform the county permitting authorities of a change in the aforementioned disclosures so that the department can document current capacity levels to ensure that the cumulative thresholds under WCC § 20.68.153 or § 20.68.154 (as applicable) have not been exceeded.
- j) The county decision maker shall include, in any approval of an application for an expansion, as per WCC § 20.68.153 or § 20.68.154, a condition that the permitted equipment shall only be used in the manner described by the project proponent in the application and approved in the permit.<sup>85</sup>

Due to the defects in the MTC calculation, the project cannot meet the Approval Criteria for Expansion of Fossil Fuel Transshipment Facilities or criterion (C)(2) of the additional conditional use criteria. Consequently, the CUP cannot be approved.

## VI.

### Condition 11

There was argument by the Applicant about the Hearing Examiner's ability to condition the behavior of third parties. The Hearing Examiner cannot condition third parties, but they can condition the nature and standard of the contracts the applicant utilizes with its agents, employees, and third parties it invites to its facilities. While there was a great deal of testimony and argument about the word "guidance" being a "requirement," words should be used that convey their intended effect so that we avoid ambiguities. All conditions put forward by the Department should seek to be concrete and

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<sup>85</sup> WCC 22.05.026(4)

quantifiable in nature to the best of their ability. Had this not been remanded for further determination, Condition 11 as imposed by the Hearing Examiner would have been couched in less ambiguous terms: “11. The following contractual requirements must be present in agreements with contracted Terminal Vessels in advance of their arrival to the Strait of Juan de Fuca:”

The SEPA Decision Condition 11’s final bullet read:

Operate non-dual fuel vessels to use Marine Gas Oil (MGO) or an alternative marine fuel that meets or exceeds the IMO regulatory requirement within the ECA and if scrubbers are installed, any discharges from marine vessel scrubbers must be in compliance with all NPDES discharge requirements.

Though originally ALA Energy offered the following stronger mitigating condition:

Operate non-dual fuel vessels to use Marine Gas Oil (MGO) or an alternative marine fuel that meets or exceeds the regulatory requirement within the ECA and if scrubbers are installed, those Terminal Vessel Operators should not discharge within the ECA.<sup>86</sup>

The latter stricter condition regarding discharge was a voluntary condition and representation put forward by the Applicant in response to the County’s NOAR, and to presumably in part dissuade the County from requiring additional study such as an EIS. It was commendable of the Applicant to represent that to the County and concerned community members, but it was an error to not implement the proffered stricter standard, especially in light of the testimony regarding scrubbers. The County’s witness testified that use of the lesser condition was an error.<sup>87</sup> The Hearing Examiner can correct this error through harmonizing and revising the conditioning, but as this is ultimately being remanded it will be put back in the hands of the Department.

## VII.

A great deal of the SEPA appeal and public challenges to the CUP seemed to take a kitchen sink approach to the facts and did not hold up under scrutiny; however, this case did turn on a question of law, its interpretation and the Department’s abrogation of its discretion and decision making powers, which led to an impermissible absence of factual findings that need to be intentionally made by the

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<sup>86</sup> CUP Ex. 72 at 4

<sup>87</sup> Testimony of Keenan at Day 3 Transcript at 790, ln. 23 – 791, ln.16

Department before they can issue a SEPA determination and ultimately the applicant can seek a final hearing on a CUP. The applicant and Department’s reading of the law is too narrow for it to have its intended effect of carrying out the policies in the underlying ordinance or the Comprehensive Plan. The issue of the MTC may be able to be decoupled from the underlying SEPA appeal though the Hearing Examiner is not certain of that being a true possibility as it truly is the underlying facts that are in question and need to be determined, and decoupling the assumptions might result in absurd contradictory results. If the MTC that appears to be relied on for the SEPA decision was not a complex calculation beyond the scope of the Office of the Hearing Examiner to conduct,<sup>88</sup> perhaps the Hearing Examiner could determine the logistical levels of use based on actual shipping and rail transports and issue conditioning to cap activity at that level to avoid environmental impacts, but that would still not allow the CUP to move forward without the calculation. It must be remanded to the Department to exercise their expertise and analytical resources to move certain questions forward.

### VIII.

Any Finding of Fact in the prior section deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

### DECISION

*The Hearing Examiner enters a decision to remand the Mitigated Determination of Nonsignificance SEPA2024-00052 and the CUP2024-00006, with direction as follows:*

1. To Interpret before proceeding: What does it mean for the Department for an MTC Calculation to be “conducted by an engineer licensed in the State of Washington?” pursuant to WCC 20.97.130 at “Maximum Transshipment Capacity.”
2. SEPA Remand:
  - a. Did the County’s SEPA determination substantially rely on the MTC calculations to come to its SEPA determination?
  - b. If the MTC calculations are disregarded, can the Department still do a SEPA determination?

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<sup>88</sup> Also, the Hearing Examiner is not a licensed engineer in the State of Washington

- i. If the Department can still do a determination, re-issue a determination.
    - ii. If the Department cannot do a determination without more data, issue a NOAR or take whatever actions are most appropriate to obtain the data, and then post-analysis, re-issue a determination.
  - c. Such a determination should take into account and make a factual finding of prior and post-unpermitted-improvement rail and shipping traffic levels.
3. CUP Remand:
- a. The CUP cannot proceed without resolving the SEPA issue above; but
  - b. For the CUP to proceed MTC calculations must be conducted by an engineer licensed in the State of Washington, and it must take into account the facility's maximum physical limits inclusive of not only equipment and regulatory limitations, but actual physical logistical constraints on inbound shipment methods and outbound shipment methods.

**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; or for shoreline permit applications and revisions which are subject to appeal to the State Shoreline Hearings Board within 21 days pursuant to 23.60.150(E), RCW 90.58.180, and WAC 461-08.

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>.

DATED this 31<sup>st</sup> day of March 2026




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Rajeev Majumdar, Hearing Examiner