WHATCOM COUNTY HEARING EXAMINER

re: Appeal of Mitigated Determination of Nonsignificance of ALA Energy, LLC Multiple Projects of 9/3/25 and Conditional Use Permit Application of ALA Energy, LLC	**APL 2025-00006** Of SEPA2024-00052 of 9/3/25 **CUP 2024-00006** APPELLANTS' POST-HEARING BRIEF

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INTRODUCTION

Appellants Friends of the San Juans et al. respectfully submit their closing brief. At the outset, Appellants express their appreciation to the Hearing Examiner and staff for their attention during the hearing. Appellants also extend their appreciation to the other parties and their counsel, who worked collaboratively to put on an efficient hearing. Finally, Appellants thank all members of the public who shared their perspectives during the hearing.

Although the hearing involved many exhibits and witnesses, this is not a complicated appeal. Appellants raise two questions. First, did the company's past construction projects and proposed flare (collectively, the "Project") increase the amount of liquified petroleum gas ("LPG") that the Terminal can handle? The answer to that question is indisputably yes. The County erred by relying on the company's flawed engineering analysis, which was in turn based on an unreasonable interpretation of the County code, that concluded that the terminal's fuel handling capacity shrank rather than grew. The hearing confirmed that this implausible outcome was the product of both legal and factual errors.

Second, are the impacts of expanding the Terminal significant? This too is not a difficult question. The Terminal's growth means substantially more vessels transiting the Salish Sea, presenting cumulative impacts and risks to the region's iconic species, increasing marine pollution, and disturbing already compromised habitat. It means more greenhouse gas emissions that the County is otherwise striving to limit. And it raises numerous safety concerns that need to be independently evaluated, not dismissed based solely on the company's say-so.

As Appellants explained, it would be inconceivable for the County to authorize a new fossil fuel transshipment terminal at Cherry Point without a full environmental impact statement ("EIS"). But a new terminal is effectively what we are dealing with. No EIS has ever been performed for this facility, and the hearing highlighted both serious impacts and countless areas

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of uncertainty. The Hearing Examiner should grant Appellants' State Environmental Policy Act ("SEPA") appeal and deny the Conditional Use Permit ("CUP") until an EIS is performed. In the alternative, the Hearing Examiner could impose mitigating conditions sufficient to keep effects below the threshold of significance. This would necessarily include limits on vessel traffic.

LEGAL STANDARDS

Appellants discussed legal standards for both SEPA and the CUP in their opening briefs, and the parties are generally aligned as to those standards.[1] Appellants incorporate that discussion by reference. The core question in the SEPA appeal is whether the County erred in finding that the Project would not have significant effects, triggering an EIS. Significance under SEPA is a binary threshold: if mitigation reduces impacts to a level of insignificance, a mitigated determination of nonsignificance ("MDNS") is appropriate. However, if effects "may" be significant even with mitigation, an EIS is required.[2] In making this determination, the lead agency is obligated to consider cumulative and indirect effects, impacts outside the immediate area of the project, and the risks of accidents or emergencies, even if unlikely. SEPA also strictly prohibits piecemealing of connected actions into separate projects to avoid review.[3] As to the CUP, AltaGas carries the burden of demonstrating it has satisfied all of the conventional code criteria and the additional criteria for fuel transshipment facilities.[4] If compliance with these is uncertain, the CUP cannot be issued. Alternatively, the Hearing Examiner has authority to attach conditions to a CUP approval to ensure that the criteria for approval are met.[5]

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[1] SEPA Ex. 24 (Appellants' Opening Br.), Ex. 38 (Appellants' Responsive Brief); Ex. 54 (Appellants' Reply).

[2] *Id*. at 1, 12–14; WAC 197-11-360; 197-11-330.

[3] WAC 197-11-060(3)(b). Normally, SEPA reviews are conducted before the action takes place; this case is unusual in that the County performed SEPA review after the fact.

[4] WCC 22.05.026(3)-(4); WCHE 29(a).

[5] *Kelly v. Cnty. of Chelan,* 157 Wn. App 417, 427, 237 P.3d 346, 351 (2010).

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ARGUMENT

I. THE COUNTY ERRED BY INCORPORATING THE COUNTY CODE DEFINITION OF "MAXIMUM TRANSSHIPMENT CAPACITY" INTO ITS SEPA ASSESSMENT.

The hearing involved extensive discussion of the Terminal's "maximum transshipment capacity" ("MTC") as defined under the Whatcom County Code, with sharply divergent interpretations offered by the parties. That term plays a narrow role under the County Code. Specifically, if a project will increase a fuel transshipment terminal's MTC by 10,000 barrels a day or more, then a CUP is required.[6] The CUP is evaluated under the criteria in WCC 22.05.026(3) and (4), which among other things require documentation of changes in the MTC.[7] Crucially, the concept of MTC is not used in SEPA. Instead, as Appellants have explained, and no party has ever refuted, SEPA focuses on impacts that are "caused by" a development project.[8] This inquiry is not governed by County Code's unique CUP standards and does not turn on competing interpretations of MTC.

There is no question that the County relied on the Burns & McDonnell reports to find that the Projects would not increase the MTC of the terminal, and that this conclusion was at the heart of the County's decision.[9] At the hearing, the County conceded that it used that same framework to assess the Projects' impacts under SEPA.[10] This is a fundamental legal error that requires reversal. That is because even if AltaGas's "maximalist" interpretation of MTC were correct, SEPA uses a much simpler formula: would the Project "cause" the increase in transshipment that

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[6] WCC 20.68.154.

[7] *See, e.g.,* WCC 20.05.026(4)(c)(ii); WCC 22.05.032(1)(a).

[8] WAC 197-11-060(4)(d) ("A proposal's effects include direct and indirect impacts caused by a proposal.").

[9] Transcript at 756:20–757:8 (Personius); CUP Ex. 120 at 43. Mr. Personius disclaimed any ability or responsibility to differentiate between the competing interpretations of MTC. Transcript at 758:16–19.

[10] Transcript at 760:7–17 (Personius).

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indisputably occurred?[11] The evidence is clear that it did. Ms. Hiester offered extensive testimony on how the projects increased the ability of the Terminal to import and export LPG.[12] Even if the Hearing Examiner adopts the company's preferred definition of MTC and finds that this work did not increase it—which he should not—the construction unquestionably "caused" an increase in the terminal's ability to handle LPG. While the company has suggested that the increase in transshipment was caused by external factors, like market forces, no evidence was introduced to support those claims. Instead, the evidence overwhelmingly showed that transshipment volumes increased as the projects cleared bottlenecks and added loading and storage capacity—exactly as the company announced it was going to do when it bought the terminal.[13] Importing the company's definition of MTC into SEPA was clear error.

II. THE PROJECT INCREASES THE TERMINAL'S CAPACITY TO IMPORT AND EXPORT LPG.

The Code's CUP criteria require the applicant to address the impact of the Project on the Terminal's MTC.[14] The County's interpretation of that term also underlies many other findings, since it relies on the Burns & McDonnell reports (which interpret MTC) to find that the Project would not increase the amount of fuel handled by the Terminal. Accordingly, the Hearing Examiner must resolve the competing approaches to defining this term, which appears to be a question of first impression. It is crucial to get it right, as one outcome of the CUP, if issued, is that it would set a new permitting "baseline" far above what the facility can currently handle. Under the proposed CUP, the terminal could expand further, up to a level of 111,000 barrels per

[11] WAC 197-11-060(4)(d).

[12] *See generally,* SEPA Ex. 33 (Hiester Testimony).

[13] SEPA Ex. 35 (Gustafson Testimony), ¶¶ 7–8.

[14] WCC 22.05.026(4)(c)(ii); WCC 20.68.154.

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day—double current operations—without a new CUP or any additional SEPA review.[15] There will never be another opportunity to revisit whether the County did this correctly.

A. The County's Interpretation of MTC Is Not Reasonable.

The hearing brought into focus that there are two potential interpretations of the term MTC under the first prong of the code's two-part definition.[16] The author of the Burns & McDonnell study, Mr. Heigold, explained how the company's approach looks only at the physical capacity of the facility's equipment, rather than real world constraints on terminal operations or regulatory and safety constraints.[17] It assumes a "continuous supply [of LPG] into the terminal", i.e., that the terminal is receiving fuel, from all potential sources, all the time.[18] No one disputed that achieving such a continuous supply is impossible.[19] For example, the company'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.[20]

The same is true for loading LPG onto vessels: Mr. Heigold agreed that the model

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[15] Transcript at 758:21–759:20 (Personius).

[16] *See* WCC 20.97.130(1) ("maximum physical limit" of facility capacity), (2) ("Shipment limitations imposed by county, state or federal authorities"). These were referred to at the hearing as the "engineering" definition and the "regulatory" definition. Most testimony focused on the engineering part of the definition. Transcript at 126:17–19 (Heigold) (Burns and McDonnel was "confined" to equipment capacity).

[17] Transcript at 122–25 (Heigold) (Code definition "is strictly dealing with the facility equipment"), 130:10–12 (analysis is "strictly based on the facility's equipment as installed"). Although WCC 20.97.130 requires that the MTC analysis "shall be conducted by a professional engineer licensed in the state of Washington," Mr. Heigold does not appear to be licensed in the state of Washington. SEPA Ex. 23 at 48-54 (Heigold CV). The Burns & McDonnell reports are signed by a different engineer, Jeff Bartels, who did not testify and was never mentioned. CUP Ex. 34 at 2; *see also* WAC 196-27A-020(2)(c) ("Registrants shall seal only documents prepared by them or under their direct supervision …"). Mr. Heigold testified that he prepared the reports. Transcript at 155:12 (Heigold).

[18] *Id*. at 159:19–23 (Heigold) (trains and vessels were "out of the equation"); *id*. at 160:6 (capacity model is "irrespective" of rail unloading constraints); *id*. at 132:15–21 (did not consider "the time it takes to bring in rail cars, hook them up, to disconnect").

[19] *Id*. 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.").

[20] *Id.* at 254–256 (Rhoads).

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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.[21] 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.[22] 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.[23]

The results of this analysis were, unsurprisingly, untethered from reality. AltaGas calculated the pre-project capacity of the terminal at about 110,000 barrels per day—a level that no one even attempted to argue was possible to achieve in practice.[24] It further found that the result of implementing the various construction projects was to *shrink* that capacity to 101,000 barrels per day—a level that still cannot be achieved in practice. The evidence is undisputed that these estimates are wildly out of line with what the company has itself said about the terminal's capacity, which was 30,000 barrels/day before they implemented the projects, and 75,000 barrels/day after.[25] For its part, the County conceded it had no technical or engineering expertise to assess the Burns & McDonnell report, and instead accepted it without question.[26]

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[21] *Id.* 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 at 156:8-10.

[22] *Id*. at 161:1–4 (Heigold); *id.* at 141:8–9 (study did not consider the "batch operations" actually used at the terminal); *id.* at 521:1–8 (Hiester) (not "physically possible" to load up vessels all the time).

[23] *Id*. at 165:5–166:5 (Heigold).

[24] Ms. Hiester called this "a completely inaccurate and unrealistic estimate" and that there was "no conceivable way the terminal could have ever processed" that much of LPG. SEPA Ex. 33 (Hiester Testimony), ¶ 39.

[25] SEPA Ex. 35 (Gustafson Testimony), ¶¶ 7, 14; SEPA Ex. 33 (Hiester Testimony), ¶¶ 18, 35. While the company's witness complained that it was "impossible" to calculate a realistic capacity based on typical batch processing, Mr. Brown explained how a "dynamic process model" could readily provide such a calculation. Transcript at 921:13-25.

[26] *Id.* at 757:1–5; 758:18–19 (Personius) ("our code says you accept that engineering analysis and that's what we did").

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The Hearing Examiner should reject AltaGas's "maximalist" interpretation of MTC that underlies virtually all of the County's findings in the MDNS and proposed CUP.[27] First, there is no textual reason to accept the company's argument that the definition omits the practical realities of operating a terminal.[28] To the contrary, the code expressly requires consideration of the capacity of "loading" and "off-loading" equipment.[29] As the testimony revealed, such equipment does not allow for 24 hour a day loading and unloading. Second, the company's maximalist interpretation also does not account for compliance with regulatory and safety codes, instead focusing only on the maximum physical capacities of the terminal's equipment.[30] Third, the company's interpretation is also implausible in light of the goals of the Code. The County adopted a moratorium on expansions of fuel transshipment terminals like this one, and later integrated numerous provisions into the code to address them.[31] It did so based on deep concerns about the risks and impacts of such facilities, their potential harm to the environment, and their contribution to greenhouse gas emissions.[32] To meet these goals, the Council could not have intended such a capacious interpretation that effectively allows significant unregulated growth.

[27] *Id.* at 885:6–14 (Heigold) (agreeing that "the answer to every question leads you to the same place, which is what is the most maximalist interpretation to consider").

[28] *Id.* at 130:10–12; 880:4–15 (Heigold). Nor is there any textual basis for the company's distinction between "continuous" and "instantaneous" operations. *Id*. at 166:6–7 (Heigold); *id*. at 501:14–23 (Hiester) (only place where "instantaneous capacity" is used in regulations is for hot water heaters).

[29] WCC 20.97.130(1)(a), (b).

[30] Transcript at 500:13–18 (Hiester): *id*. at 920:21–921:1 (Brown) ("all of your compressors running all day every day all year… I cannot imagine that as a practicable or safe operation"); *id*. at 925:3–926:11 ("you can't operate equipment in a way that violates permit conditions or permit limits"); SEPA Ex. 33 (Hiester Testimony), ¶ 56 (regulatory limits like VOC act as "brakes" on capacity but were not considered).

[31] SEPA Ex. 25.42 (moratorium); WCC 16.08.090(E) (SEPA review of fossil fuels); WCC 20.66 (prohibition of fossil fuel uses); WCC 20.68 (limits on fossil fuel expansion); WCC 20.97 (definitions); WCC 22.05 (permit requirements for expansion).

[32] SEPA Ex. 63 at pdf pp. 56–58 (comment from former Whatcom County Council member) (code "was meant to preclude Cherry Point from becoming a major hub for the transshipment of fossil fuels").

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B. The Past Construction Projects Allow the Terminal to Increase MTC.

Ms. Hiester offers a different approach to calculating MTC, one based on the realities of operating a transshipment terminal where fuel arrives and is offloaded, stored in tanks, and then periodically loaded onto vessels.[33] Ms. Hiester's approach also follows recognized engineering practices that adhere to federal safety and environmental regulations.[34] Contrary to AltaGas's arguments, Ms. Hiester uses the identical language from the County code as Mr. Heigold did.[35] The key difference is that her approach includes constraints on "loading and unloading" as the code requires, as well other real-world considerations when operating a fuel terminal, like safety and regulatory standards.[36]

Under Ms. Hiester's engineering analysis, using the same baseline data as Burns & McDonnell, the Terminal had a capacity of around 26,000 barrels/day as of 2015, which closely tracks the company's own statements at the time they acquired the terminal.[37] AltaGas then implemented a series of construction projects to expand that capacity.[38] It started with the conversion of Tank T-1 from butane to propane service.[39] Then, the company added additional compressors with significantly higher horsepower.[40] It later put in mechanical "chillers" to boost

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[33] SEPA Ex. 33 (Hiester Testimony), ¶ 39 (Burns and McDonnell offer "completely inaccurate and unrealistic estimate of the terminal's prior actual" MTC). Ms. Hiester's testimony was corroborated by another professional process engineer with decades of relevant industry experience, who reviewed and agreed with her work. Transcript at 608:21–609:6 (Brown).

[34] Transcript at 501:24–502:6 (Hiester).

[35] *Id*. at 502:21–503:4; 556:11–557:1 (Hiester). As Ms. Hiester's testimony makes clear, the company's assertion that she used a completely different definition of maximum transshipment capacity than they did is flat wrong. SEPA Ex. 40 (AltaGas Responsive Pre-Hearing Br.), at 17 n.75.

[36] Transcript at 505:12–506:14. As Ms. Hiester explains, her calculation does not include "cycle times" for rail and vessel transit, but does include the act of unloading and loading fuel. *Id*.; *see also id*. at 571:1–6.

[37] *Id*. at 507:2–15. The capacity was split between butane (23,000 barrels/day) and propane (3,000).

[38] *See generally* SEPA Ex. 25.19; SEPA Ex. 25.21 at 4 (documenting "expansion projects").

[39] Transcript at 508:7–25 (Hiester).

[40] *Id*. at 509:15–510:12 (Hiester). That project had previously been approved by the County, based on a SEPA review which insisted that it would not increase the amount of fuel handled by the terminal. *Id*. A company

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the Terminal's butane capacity, which had been reduced by expanding propane capacity.[41] Finally, it added a series of rail unloading projects—including "debottlenecking" one of the rail racks, adding vapor recovery facilities, and upgrading unloading compressors—to increase the Terminal's ability to receive propane via rail.[42] At the conclusion of all of these projects, she found a MTC of roughly 76,000 barrels/day, which again correlates closely with the company's public statements.[43] Her opinions are corroborated by NWCAA, which carefully documented how the construction projects resulted in a growth in capacity.[44] In short, the evidence shows that rather than shrinking the terminal's capacity, the construction projects tripled it.[45]

Ms. Hiester also identified a number of other technical flaws in the Burns & McDonnell capacity study that render its conclusions unusable.[46] For example, her testimony explained how Burns & McDonnell assumed that both the electric compressors and their gas backups were running all of the time, another assumption untethered to reality or safety standards.[47] The company admitted that this assumption was part of its study, but insisted that it was possible to

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executive said the opposite during the hearing. *Id*. 101:18-19 (Finnamore) ("FEEP increased the capacity to move propane through the facility").

[41] *Id.* at 511:1–13; SEPA Ex. 25.21 at 5 (Chillers Project "debottlenecked" rail rack "for faster unloading times" that "expanded the facility propane capacity").

[42] *Id.* at 511:23–513:17; SEPA Ex. 25.21 (NWCAA letter) (projects undertaken to "lift bottlenecks" that "immediately expanded" propane receiving capacity). Even the company's rail expert admitted that the projects would allow the Terminal to "unload [railcars] faster." Transcript at 258:8–13.

[43] *Id.* at 517:2-3; *id.* at 469:20–23 (Gustafson); SEPA Ex. 35 (Gustafson Testimony), ¶ 14; SEPA Ex. 25.41 at 15.

[44] SEPA Ex. 30 (Brown Testimony), § III.

[45] When faced with incontrovertible evidence that propane capacity increased, AltaGas conceded that it did but that butane capacity was reduced by a greater amount. *See, e.g.,* Transcript at 102:2-5 (Finnamore). This was false: both propane and butane capacity increased through the projects. SEPA Ex. 33 (Hiester Testimony), ¶ 21.

[46] SEPA Ex. 33 (Hiester Testimony), § VII; Transcript at 531:10-14 (Hiester) ("they were providing a misleading look-back so that it would appear that they hadn't expanded the capacity of the terminal since the moratorium.").

[47] SEPA Ex. 33 (Hiester Testimony), ¶ 47; Transcript at 521:14–522:15 (Hiester).

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run all four compressors at the same, without explaining whether it was safe or lawful to do so.[48] And it was neither: AltaGas itself told the County that the old compressors are only allowed "for use as emergency and back up" and limited to 640 hours combined per year.[49] Heigold's testimony that the old compressors "are not dedicated backups" was wrong.[50]

Similarly, Ms. Hiester explained how the analysis assumed that a specific pump (P-13) had been included in the "prior" configuration when in reality it had been added later as one of the projects under review, which again masked a major increase in MTC.[51] While the company's expert disputed that this assumption was inappropriate because the pump had previously been in place and was only being reinstalled, the company's own documents revealed that the existing pump was a bottleneck to butane transfer that was relieved through an unpermitted project that modified existing piping, installed new piping and valves, and reinstalled P-13 in a new service.[52] That project added 20,000 barrels/day of capacity that was missed in the Burns and McDonnell studies, further upending their conclusion. At very best, the conflicting testimony raised serious questions about the validity of those studies that Whatcom County should have subjected to independent scrutiny.[53]

AltaGas complains that Ms. Hiester's analysis encompasses a different timeframe than

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[48] Transcript at 163:16-164:18 (Heigold) (confirming that "capacity study assumed that all four compressors were working all the time" but that he was not "familiar" with OSHA safety standards).

[49] SEPA Ex. 25.19 at 4; CUP Ex. 89 at 17 (compressors "to be used only as an emergency backup to enhance safety of facility operation"); SEPA Ex. 33 (Hiester Testimony), ¶ 47 ("gas compressors are backups that are used only if power loss occurs" and explaining how error results in huge overestimate of prior capacity).

[50] Transcript 874:6–875:4 (Heigold).

[51] SEPA Ex. 33 (Hiester Testimony), ¶ 45; Transcript at 522:17–525:19 (Hiester); *id*. at 882:12–15 (Heigold) (pump "was physically not there installed" but was "in the facility available for use if needed").

[52] CUP Ex. 9.10; Transcript at 524:6–525:19 (Hiester).

[53] Transcript at 928:19–22 (Brown) ("[H]aving AltaGas select and pay for their engineering contractor for this, given a limited scope of work, isn't working out.").

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theirs, by including the change in use from butane to propane at Tank T-1.[54] That attack misfires for several reasons. First, Burns & McDonnell used the same timeframe of analysis, and confirmed that their capacity analysis would not change even if it started in 2015.[55] Second, the shift in service at T-1 was the original change that triggered all of the other changes to its auxiliary systems, making it impossible to segregate it from the other projects constructed in response to it.[56] Finally, the issue only highlights the arbitrary use of the August 16, 2016 cutoff date. All parties agree that the terminal was subject to county permits prior to that date.[57] And SEPA requires that the "project" be defined correctly.[58] An EIS would allow the County to ensure that the project is correctly scoped to include construction work prior to August of 2016.

In sum, the evidence overwhelmingly revealed that the terminal's ability to handle fuel—whether defined as an increase in MTC or simply an increase in its fuel handling capacity—dramatically expanded due to the construction projects. The County's conclusion that capacity shrank rather than grew was clearly erroneous and warrants reversal.

C. The Terminal's History Reveals a Strategy of Expansion and Deception.

Appellants provided detailed evidence about AltaGas's expansion plans starting when the company acquired an interest in the Terminal in 2014.[59] Mr. Gustafson's testimony confirms that the company intended to expand the Terminal to take advantage of its competitive location.[60] He

[54] Transcript at 535:5–10 (Hiester).

[55] CUP Ex. 57 at Exhibit B; Transcript at 570:15–22; 871:22–872:15 (Heigold) (prior capacity study assumed both tanks were in butane service, as was the case in 2015).

[56] *Id.* at 553:10–14 (Heigold).

[57] *Id.* at 115:1–9 (Finnamore); *id*. at 762:1–19 (Personius). Thus, even though the fossil fuel moratorium was not in place before August of 2016, AltaGas still needed construction permits from the County for work at the Terminal, and SEPA still applied to those permits.

[58] WAC 197-11-060(3)(a).

[59] Prior to that, the Terminal "was in the backwater of LPG markets." SEPA Ex. 33 (Hiester Testimony), ¶ 11.

[60] SEPA Ex. 35 (Gustafson Testimony), ¶¶ 14–18; Transcript at 468:25–470:19 (Gustafson).

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also testified that actual volumes of fuel shipped from the Terminal tracked those plans.[61] AltaGas never offered any basis on which to question this evidence. Instead, it unsuccessfully objected that it was irrelevant and hearsay.[62] The evidence on this point is undisputed.

Also undisputed is the fact that no agency has *ever* performed an EIS on this Terminal or its operations.[63] The Terminal was built in 1975 without an EIS, over the objection of fisheries experts and others who expressed grave concerns about impacts to Cherry Point herring.[64] Since AltaGas purchased it, the Terminal has gradually transformed from a modest terminal serving local needs to a major fossil fuel export facility, without ever finding that its effects would be enough to warrant an EIS. AltaGas accomplished this by repeatedly and falsely stating that the various construction and improvement projects would not increase the operation of the facility.[65] AltaGas made the opposite representations to other agencies, but made no effort to explain these contradictions.[66] For its part, NWCAA documented a pattern of deceptive representations behind the growth of the facility.[67] This evidence was also undisputed.

D. The Flare Will Allow the Terminal to Further Increase LPG Volumes.

Unlike the past construction projects, the flare has yet to be built and would allow the

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[61] SEPA Ex. 35 (Gustafson Testimony), ¶¶ 14–18.

[62] Transcript at 467:18–468:22. The company's argument that AltaGas's annual reports are "hearsay" is puzzling. ER 801(d)(2) (statements of party are not hearsay). As to relevance, the question of whether the Terminal expanded lies at the heart of this case, making AltaGas's statements that it intended to expand the Terminal highly relevant.

[63] Transcript at 369–70, 407:4–6 (Stalheim).

[64] SEPA Ex. 32 (Stalheim Testimony), ¶¶ 10–12; SEPA Ex. 25.8 (1975 Permit file).

[65] SEPA Ex. 30 (Brown Testimony) § III; SEPA Ex. 25.16 (AltaGas states that the "Project will not impact how much product is moved."); CUP Ex. 53 at 3 (falsely stating flare and past construction projects "are functionally independent" from each other).

[66] SEPA Ex. 25.22 at vi (project "will increase the facility's capacity to unload product via railcar or ship"); SEPA Ex. 25.26 at 2. (purpose of project was to "improve the facility's rate of propane receiving").

[67] SEPA Ex. 25.23 at 8–9 (company's claims that projects "will not increase the total number or frequency of rail cars to and from the facility" are not supported by data); id. at 10 (FEEP "was not fully disclosed to the lead SEPA agency"); SEPA Ex. 25.20 (NWCAA) (documenting "numerous" projects "that allowed the facility to incrementally increase its capacity").

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Terminal to expand even further than it already has. Appellants' experts explained how the NWCAA VOC limit acts as a constraint on current operations—expanding past current volumes would release more VOCs than allowed.[68] By using the flare, however, VOCs would be controlled more effectively, allowing the Terminal to operate up to the MDNS limits of 48 vessels/year and 85 railcars/day.[69] AltaGas's only response was to explain that VOCs could be controlled through other means, such as routing excess VOCs to railcars.[70] But that is not how SEPA or development permits work. It is "the proposal at hand that must be assessed in the threshold SEPA phase;" it does not allow those effects to be ignored because some hypothetical alternative action could potentially be implemented in its stead.[71] For example, Mr. Heigold's supposition that excess VOCs could be pumped back into railcars triggers more questions than it answers. Would it be safe? Is it allowed? What happens to the gases when the train reaches its destination? If this was the proponent's proposal, those questions could be examined under SEPA. But it is not, so the focus must remain on the action as proposed.[72] And when it comes to the action as proposed, the evidence confirms that while reducing VOC pollution is in general positive, the flare would enable further expansion of Terminal operations.

III. THE IMPACTS OF INCREASED VESSEL TRAFFIC ARE SIGNIFICANT.

A. Vessel and Rail Traffic to the Terminal Has Increased and Can Increase Further.

There is no dispute that vessel traffic has increased significantly from 2014, when

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[68] SEPA Ex. 30 (Brown Testimony), ¶¶ 31–33 ("Without the flare, the facility would be far out of compliance with its compliance order limits of 80 tons of VOCs annually."); SEPA Ex. 33 (Hiester Testimony), ¶¶ 62–68; Transcript at 594:25–595:6.

[69] *Id*.

[70] Transcript at 166:9–167:15 (Heigold).

[71] *Chuckanut Conservancy v. Washington State Dep't of Nat. Res*., 156 Wash. App. 274, 290, 232 P.3d 1154, 1161 (2010) ("The agency's task is to analyze the proposal's impacts against existing uses, not theoretical uses.").

[72] Transcript at 595:14–23 ("the flare is the project"); 626:19–22 (flare required in order to be "compliant" with regulatory law); 606:2–7 (Brown).

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AltaGas first acquired an interest in the terminal, and today.[73] Prior to AltaGas's acquisition, NWCAA confirmed that the terminal had been using the facility at a mere 2-5 vessels per year, a figure that was never challenged.[74] Today, after the completion of the construction projects, the terminal has been averaging around 30-32 vessels per year.[75] The same is true for rail traffic, which has expanded dramatically after AltaGas took over and expanded capacity.[76]

AltaGas claimed there was no increase in vessel traffic, but this claim was only achieved by conflating Alcoa's aluminum vessels with the LPG carriers using the same dock.[77] Alternatively, it claimed that the increase in vessel traffic is the product of external factors like market demand.[78] But it never introduced a single document or line of testimony supporting this claim.[79] The undisputed evidence of an increase in vessel and rail traffic supports Appellants' claims that the construction projects increased the Terminal's capacity. It is also true that there is plenty of room for vessel and rail traffic to increase further under the terms of the MDNS. The MDNS limits vessels to 48 per year; substantially above current levels. Using the largest

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[73] SEPA Ex.25.19 at 5 & Tables 1–3 (AltaGas agrees that "the daily volume of butane and propane processed at the Facility [has] increased since 2016"); SEPA Ex. 25.19 at 8-9 (tables). Indeed, it was the increases in terminal capacity that triggered the CUP in the first place. CUP Ex. 120 at 43 (assumption of DNR lease "represents an increase on the shipment limitation established by a state authority which constitutes a capacity increase requiring a CUP"); Transcript at 66:10–13 (Keenan).

[74] CUP Ex. 86 (NWCAA letter); Transcript at 498:13–22 (Hiester) ("it took months to store enough to load a vessel").

[75] SEPA Ex. 25.33 (DNR vessel traffic summary). The record also makes clear that these impacts are cumulatively significant in the context of multiple other new and expanded projects in the Salish Sea. *See, e.g.,* SEPA Ex. 63 (public comment), pdf p. 33.

[76] CUP Ex. 86 (NWCAA letter). While rail traffic volumes to and from the Terminal are not as significant as other projects discussed in the evidence, it was also undisputed the vessel tr effects of rail traffic in the region (including traffic servicing the nearby crude oil refineries) was a concern. Transcript at 389:2–23 (Stalheim).

[77] CUP Ex. 53 (SEPA Checklist), at 27.

[78] SEPA Ex. 40 (AltaGas Response Brief), at 19.

[79] The sole potential exception is evidence that BNSF added a second switch in 2017. SEPA Ex. 50 (Rhoads Testimony), 14. But no evidence was submitted to show that this change was the cause of the dramatic increase in rail traffic to the terminal, which mostly occurred before that addition was complete. CUP Ex. 86 at 2.

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VLGCs, the terminal can achieve that level under either the company's capacity calculation (101,000 barrels/day) or Appellants' estimate (around 75,000/day).[80]

B. Risks to Killer Whales.

As all parties acknowledge, Southern Resident killer whales (SRKWs) are at the brink of extinction.[81] As Dr. Joseph Gaydos stated in his expert testimony, "preventing the loss of even one Southern Resident from a human-caused mortality like trauma every year or two can alter the trajectory of the population from decline towards recovery."[82] With a population of only 74 whales, with only a third being reproductively active females, "every single animal in the population is very important."[83] That is why it is crucial to carefully consider any action that could compound the risks.

The hearing revealed several ways in which the Terminal's vessel traffic poses threats to SRKWs.[84] Vessel traffic increases underwater noise, and noise is important for SRKWs.[85] Respondents rely on the DNV study to argue that the increase in vessel traffic will not harm SRKWs.[86] However, Dr. Gaydos—an actual expert in orca health—testified that the DNV study "didn't ask the right questions about noise" by basing its analysis of noise impacts on a limited set of noise thresholds.[87] Dr. Gaydos explained why noise beyond these thresholds still

[80] SEPA Ex. 63 (public comment), pdf p. 58 (48 vessels/year equates to 77,589 barrels/day).

[81] Transcript at 350:14–19 (Andreassen), 418:22–419:15 (Gaydos).

[82] SEPA Ex. 34 (Gaydos Testimony), ¶ 8.

[83] Transcript at 418:22–419:15 (Gaydos).

[84] SEPA, Ex. 34 (Gaydos Testimony), ¶ 7; SEPA Ex. 48 (Andreassen Testimony), 3 ("All ships transiting through areas where SRKWs are present may cause a threat").

[85] SEPA, Ex. 34 (Gaydos Testimony), ¶ 7, 12; SEPA Ex. 48 (Andreassen Testimony), 3.

[86] CUP Ex. 114 at 2.

[87] Transcript at 427:3–7; 421:25–424:11 (Gaydos).

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undermines killer whale health.[88] For example, for every decibel increase in ambient noise, SRKWs must increase their voice, leading to energy expenditure in a population that is already energy deficient.[89] Increasing underwater noise also makes it difficult for SRKWs to echolocate to find food.[90] These impacts are not addressed in the SEPA Orca checklist or the DNV study. No party disputed this testimony.

Moreover, the SEPA Orca checklist and the DNV study do not meaningfully assess other impacts to SRKWs from increased vessel traffic such as vessel strikes, oil spills, and nearshore explosions. Dr. Gaydos testified that vessel strikes are "an excellent example of a preventable cause of mortality and has been identified as a threat for Southern Residents."[91] While Mr. Andreassen tried to brush off vessel strikes as rare, Dr. Gaydos explained that the low level of documented SRKW vessel strikes is misleading because so few accidents are documented.[92] And while strikes are not common, "[r]isk should always be evaluated in concert with consequence, and while many of these impacts may be lower risk, the consequences of them occurring are significant because the Southern Resident killer whale population is in a precarious state."[93]

The SEPA Orca checklist and accompanying materials also did not evaluate the risk of oil spills on the SRKW population.[94] As Dr. Gaydos explained in both his written and oral testimony, oil spills have been shown to have a "catastrophic" impact on killer whale species,

[88] SEPA Ex. 34 (Gaydos Testimony), ¶ 22.

[89] Transcript at 421:25–424:11 (Gaydos).

[90] *Id.*

[91] SEPA Ex. 34 (Gaydos Testimony), ¶ 8.

[92] Transcript at 419:22–421:22 (Gaydos).

[93] SEPA Ex. 34 (Gaydos Testimony), ¶ 27.

[94] Transcript at 355:22–24 (Andreassen).

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noting one pod going functionally extinct after the Exxon Valdez oil spill.[95] As Dr. Gaydos noted, the SEPA Orca checklist wrongfully dismisses the risk of an oil spill by arguing they are not transporting oil; however, VLGCs carry large amounts of propulsion fuel.[96] Additionally, "the presence of ever-growing numbers of large vessels in the Salish Sea does raise the risk of a spill from an oil tanker due to collisions."[97] Finally, nearshore LPG explosions have been shown to impact killer whales, yet the SEPA documentation ignores it altogether.[98]

Without any analysis of risk and impact from vessel strikes, oil spills, or explosions on SRKWs and their critical habitat, it is impossible for Whatcom County to find that the Projects will not significantly impact SRKWs. Moreover, the mitigating conditions are insufficient to minimize these risks to a level of nonsignificance. Mitigating Condition 7 merely asks terminal vessels to comply with existing laws and regulations, which is already required.[99] Mitigating Conditions 11 and 12 involve voluntary efforts, which offer no assurances that impacts will be avoided. [100] Even with voluntary vessel slowdowns in place, between 2020 and 2025, there were eight documented whale strikes in Washington's inland sea.[101]

C. Impacts of Vessel Pollution.

The threats posed by vessels employing exhaust gas cleaning systems, or scrubbers, to human health and the Salish Sea ecosystem are not seriously disputed.[102] The evidence is clear

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[95] *Id.* at 424:14–425:13 (Gaydos).

[96] *Id.* at 425:14–426:4 (Gaydos).

[97] SEPA Ex. 34 (Gaydos Testimony), ¶ 20.

[98] *Id.*; Transcript at 426:5–17 (Gaydos); Transcript at 492:18–493:7 (Hiester) (discussing explosion risks).

[99] Transcript at 767:10–16 (Personius).

[100] SEPA Ex. 34 (Gaydos Testimony), ¶ 27 ("While laudable, voluntary vessel slowdowns, performing routine hull cleaning, using the US Coast Guard real-time whale alert systems, etc. do not reduce risk to zero for affecting Southern Resident killer whale foraging and feeding, reducing vessel strikes or reducing the risk of oil spills.").

[101] Transcript at 427:22–428:11 (Gaydos).

[102] SEPA Ex. 36 (Kane Testimony), § II.

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that pollutants discharged from these vessels adversely affect marine ecosystems.[103] Even so, the MDNS did not provide any meaningful analysis of the impacts of these pollutants on ecosystems and the species they support.[104] Nor do MDNS conditions mitigate these adverse impacts.

In her written and oral testimony, Dr. Kirsten Kane explained the impacts of heavy fuel oil, or residual fuel oil emissions and scrubber discharge on humans[105], marine organisms,[106] the gaps in federal law,[107] and the applicant's failure to comply with the laws that do exist.[108] The applicant offered no evidence to contradict Dr. Kane's statements regarding the impacts to marine ecosystems and coastal communities. Instead, they offered disputed statements of compliance with current federal laws, such as the Vessel General Permit ("VGP").[109]

The company's expert, Mr. Mendonsa, is neither a marine biologist nor an ecologist, and was unable to speak on the impacts of scrubber discharge on marine ecosystems.[110] He offered no evidence to contradict Dr. Kane's testimony regarding the health impacts to marine ecosystems and the coastal communities. He did, however, claim that the applicant withdrew proposed mitigation for scrubbers from the MDNS[111] because the "verbiage that is contained in the [VGP] does not permit any vessel fitted with a scrubber to discharge the effluent within the

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[103] Transcript at 729:2–5 (Kane).

[104] CUP Ex. 71.08 at 7 (Marine Vessel Operations Analysis, entirety of analysis on scrubber discharge is a few sentences briefly mentioning regulations provided by Clean Water Act); *see also* CUP Ex. 113.

[105] Transcript at 682:5–683:7 (Kane); SEPA Ex. 36 (Kane Testimony), ¶ 5 (discussing health problems from sulfur dioxide emissions, such as respiratory and cardiovascular issues and increased risk of mental health disorders).

[106] Transcript at 694–697 (Kane); SEPA Ex. 36 (Kane Testimony), ¶¶ 6, 7; see also Transcript at 683:14–22 (Kane), SEPA Ex. 36 (Kane Testimony) ¶ 8 (explaining how (as little as .001% of scrubber discharge can disrupt the survival and reproduction of zooplankton, which causes disruption up the food chain to larger species and humans).

[107] 33 Transcript 701:6–24 (Kane) (explaining why federal regulations do not protecting marine ecosystems).

[108] Transcript at 688-689:20 (Kane).

[109] *Id*. at 293–297 (Mendonsa); SEPA Ex. 51 (Mendonsa Testimony), 13, 27.

[110] *Id*. at 305:10–12 (Mendonsa).

[111] *See* CUP Ex. 113 at 7; *contra*, CUP Ex. 71.36 at 4.

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port area and within the VGP waters," relying on his belief that Terminal vessels are compliant with the VGP.[112] Ms. Keenan, however, admitted that the choice of a less strict standard as a condition was an error.[113] Mr. Mendonsa also undercut his own testimony, suggesting that compliance with the MDNS would be effectively impossible, meaning that there is no mechanism for the company to know whether vessels are complying,[114] Mr. Mendonsa's faith in vessel compliance was not supported, as Dr. Kane revealed that the Aquamarine Progress, one of the terminal's vessels, has violated its VGP for two consecutive years.[115]

In sum, Mr. Mendonsa's written and oral testimony was solely focused on demonstrating that federal regulations prevent harm from scrubber discharges. Dr. Kane provided ample evidence to show that not only are there gaps within federal laws that fail to prevent such discharge from negatively impacting marine ecosystems in the Salish Sea, but that the Terminal vessels violate those laws anyway.[116] Appellants have met their burden of showing that significant harm could occur that was neither assessed nor mitigated.

D. Greenhouse Gases.

Greenhouse gas emissions ("GHGs") from the terminal's expansion received relatively little attention at the hearing but loom large over this appeal. The County has adopted a range of code provisions intended to reduce its GHG footprint and mitigate its many harms.[117] Many were

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[112] Transcript at 294:7–12 (Mendonsa).

[113] *Id*. at 791:5–16 (Keenan).

[114] *Id*. at 295:6–11 (Mendonsa) (vessels could not comply with proposed condition because they "have no way of continuously monitoring the pH of the effluent at a distance of 4 meters from the point of outflow").

[115] SEPA Ex. 36 (Kane Testimony), ¶ 10; Transcript at 683–689 (Kane); SEPA Ex. 25.44, Ex. 25.45 (Aquamarine Progress did not comply with corrective action following the violation in 2022 to "change over to compliant fuel prior entry into VGP limits of US waters" thus resulting in a further VGP violation in 2023").

[116] Transcript 688:9-689:16 (Kane).

[117] WCC 16.08.160(F)(1); SEPA Ex. 30 (Brown Testimony), ¶ 40. Most of the project's GHG emissions are unregulated by Ecology's cap-and-invest program. Transcript at 627:19–24 (Brown).

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enacted specifically in response to the siting and expansion of fossil fuel transshipment facilities like this one. The County is taking action and spending resources to reduce GHG emissions. While permitting the expansion of a fossil fuel terminal, with its attendant growth in GHG emissions, is not prohibited, it is a decision that only should be made after full disclosure and careful consideration. But the County concluded that GHG emissions would decline, and hence proposed no mitigation for such emissions.[118] This was a critical mistake.

The facts are straightforward. Experts agreed that the amount of GHGs, both direct and indirect, increases as transshipment increases.[119] The County accepted the findings of the company's expert, who determined that GHGs would shrink based on the Burns & McDonnell studies.[120] As their expert conceded, if those studies got it wrong, and the Projects in fact facilitated an expansion of the project, then GHGs would increase by levels that are indisputably "significant."[121] Moreover, while the company tries to defend the analysis by arguing that it included additional information to show emissions based on actual volumes shipped, rather than the theoretical "capacity" limit, the report inescapably concludes that GHG emissions would shrink.[122] The County affirmed that conclusion, without qualification, in the staff report.[123] While it can be challenging to put the Terminal's GHG emissions into context, no party disputed

[118] CUP Ex. 120 at 28 ("proposed projects will reduce facility GHG emissions").

[119] Transcript at 190:9–19 (Couch); *id.* at 597-98 (Brown).

[120] *Id*. at 191–92. The County's post-facto argument that if the Burns and McDonnell report overestimated capacity it would have similarly overestimated GHGs is not a serious argument. Transcript at 745:3-21 (Personius). There's no dispute that the County's conclusion, like the GHG expert study, was that GHGs would decline.

[121] *Id*. at 597–598 (Brown).

[122] CUP Exs. 33 & 34; Transcript at 197:9–17 (Couch) (real world numbers are "not discussed in the introduction"); 764:9-12 (Personius) (agreeing that "bottomline finding of the [GHG] study is" that emissions "would decrease").

[123] CUP Ex. 120 at 43.

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that they were consequential.[124] Notably, there was only one method proposed during the hearing that could mitigate GHG emissions: curtailing the volume of fuel handled by the terminal.[125]

E. Cherry Point Herring.

The herring spawning grounds at Cherry Point once served as the foundation of a food web that sustained the region's entire ecology, including salmon and killer whale populations. Today, herring populations have been decimated: there has been no documented herring spawning near the Terminal for the last few years.[126] While Appellants do not contend that the Terminal is the sole cause of this collapse, there was little dispute that Terminal operations are harmful to Cherry Point herring and their habitat. Those impacts arise from vessel operations and stormwater discharges (which are being considered, yet again, under a separate permit).[127]

There was also no dispute regarding how little this played into the County's SEPA and CUP analysis. The County accepted a critical areas report that drew an arbitrary line around the Terminal's terrestrial boundary and only looked at impacts to critical areas within that line.[128] The company's expert concluded that there would be no impacts to herring, but—remarkably—never looked at herring habitat.[129] Indeed, the word herring does not even appear in the MDNS

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[124] Transcript at 199:16–19 (Couch); *id*. at 598:5–16 (Brown) (Terminal's lifecycle emissions equivalent to operating two and a half million cars).

[125] *Id*. at 628:23–629:2 (Brown) ("Really the only thing you can do to mitigate is the right word, I think, to mitigate this amount of transshipment is to limit it.") The company initially tried to argue that flare was GHG "mitigation", but their own expert undercut that argument, saying flare was not a "GHG reduction device." *Id*. at 185:23-24 (Couch); *id*. at 763:19-21 (Personius) ("The flare is not a mitigation requirement per se…").

[126] SEPA Ex. 32 (Stalheim Testimony), ¶ 17; SEPA Ex. 34 (Gaydos testimony), ¶ 18.

[127] SEPA Ex. 32 (Stalheim Testimony), ¶¶ 17, 37–39; Transcript at 384–87 (Stalheim). County staff conceded they could not determine whether future compliance with stormwater standards under a separate permit would avoid environmental impacts. *Id*. at 789:3–8 (Keenan). This alone requires denial of the CUP, as 22.05.026(4)(g), as the CUP cannot be issued unless the Hearing Examiner concludes that "[p]lans for stormwater and wastewater releases have been approved."

[128] *Id*. at 277 (Mathes) (no suitable habitat "within the fenceline"). The company's expert was a wetlands ecologist with no expertise in marine ecosystems or fisheries biology. *Id.* at 279:6–11; SEPA Ex. 63 (public comment), pdf p. 25 (AltaGas expert lacks any qualifications to offer opinions on herring).

[129] Transcript at 281–82; *id*. at 375–76 (Stalheim) (master site plan does not include terminal's pier).

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or staff report.[130] But the CUP standards revolve around protecting key ecological values, which include Cherry Point herring.[131] To receive a CUP, it is the company's burden to show that those criteria have been satisfied. One of those criteria is consistency with the comprehensive plan, which calls for the County to "act conservatively" in land use matters to ensure the protection of Cherry Point herring.[132] On this record, it cannot meet that burden. Similarly, impacts to herring arising from terminal operations is a classic "indirect effect" that needs to be assessed under SEPA.[133] The County violated SEPA by concluding that there would not be significant impacts to herring when it never even assessed them.

F. Terminal Safety.

Safety and the risk of accidents is a key issue under both SEPA as well as the CUP criteria. While the hearing highlighted different opinions regarding the safety of storing 350,000 barrels of propane in a single-walled tank built in 1975, the facts are undisputed. First, every other large-volume propane storage site in North America is in deep underground caves or modern double-wall tanks.[134] The Terminal's tank T-1 is the only single-walled propane storage tank in the entire nation.[135] Second, T-1 was built to a 1975 industry standard that has been updated multiple times since then, and could not be lawfully built today. [136] While the company

[130] Even though herring were never analyzed during the permit process, the County's SEPA lead tried to blame "bird predation" for the collapse of the herring. *Id.* at 750:5–11 (Personius). This claim is not supported by any evidence in the record.

[131] WCC 22.05.026(3), (4).

[132] SEPA Ex. 32 (Stalheim Testimony), ¶ 21; SEPA Ex. 63 (public comment) at pdf pp. 20–23.

[133] SEPA Ex. 24 (Appellants Opening Br.), 12–14.

[134] Transcript at 493–494 (Hiester).

[135] SEPA Ex. 33 (Hiester Testimony), ¶ 25; Transcript at 494:8-16 (Hiester). Propane has a "much higher vapor pressure" than butane and "experts a lot more force on interior walls of a storage tank." Transcript at 220:22–221:9 (Clark). And as Ms. Hiester explained, it is not just the tanks but "auxiliary systems" that need to be able to handle the much colder temperatures and higher vapor pressure of propane as compared to butane. *Id*. at 491:16–25.

[136] Transcript at 221:11-16 (Clark), 496:14–23 (Hiester); SEPA Ex. 33 (Hiester Testimony), ¶ 24-25.

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touted safety "testing" on the tank, such testing occurred "during the design phase" in 1975, not more recently.[137] Third, while incidents involving tanks and vessels are rare, their consequences can be catastrophic.[138] Finally, while the company and County deferred to federal safety regulations in finding that safety concerns could be dismissed, none had grappled with the current administration's deregulatory agenda and efforts to reduce federal agency staff.[139]

In short, the only basis for assurance that the Terminal is safe is the company's say-so.[140] AltaGas's safety expert struggled to explain even rudimentary safety concepts like double-walled tank construction, and lacked familiarity with key U.S. regulatory changes.[141] But a former federal hazardous material expert opined that "it is my expert opinion that there is a substantial risk of a marine casualty associated with this terminal that would cause irreversible environmental harm and profound economic damage" to Whatcom County.[142] The County does not have its own engineers equipped to make this determination, and simply deferred to the company's consultants.[143] Moreover, safety judgments involve accepting different levels of risk to different values.[144] The County should be the one to make these judgments in an transparent and accountable fashion, not the company. A full EIS examining the safety implications of

[137] Transcript at 221:11-16 (Clark), 862:6–11 (Watts).

[138] SEPA Ex. 33 (Hiester Testimony), ¶¶ 7–10.

[139] Transcript at 106:19–23 (Finnamore) (county "relied on compliance with these State and Federal safety requirements… as part of its analysis of the safety impacts" of project); *id*. at 219–220 (Altagas Safety expert Clark has not "followed" the Trump administration attacks on safety and environmental agencies).

[140] *Id*. at 106:2–8 (Finnamore). The company claimed to have submitted "an analysis" of safety as part of its application. That "analysis" consists of two paragraphs stating how the Terminal would not violate any federal safety regulations. CUP Ex. 16 (Fossil fuel checklist), at 2.

[141] Transcript at 226-28; 230:4–8 (unable to discuss safety implications of lacking backup compressors).

[142] Hearing Examiner Exhibit 08 (public comment).

[143] Transcript at 757:15–20 (Personius).

[144] Transcript at 218:15–219:4 (Clark), 494:21–495:10 (Hiester); SEPA Ex. 49 (Clark Testimony), 12–19; SEPA Ex. 34 (Gaydos Testimony), ¶ 27.

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expanded operations is the appropriate way to make such judgments.[145]

IV. ADDITIONAL MITIGATION MUST BE IMPOSED TO AVOID AN EIS.

The appropriate remedy for the County's errors is to deny the CUP pending completion of a full EIS.[146] Alternatively, an EIS could be avoided by imposing additional MDNS conditions that reduce impacts below the level of significance. First and foremost, to avoid the harms of operating a significantly larger terminal, fuel handling must be restricted to the level that the terminal could have achieved prior to the implementation of the projects. Appellants' experts put that level around 26,000 barrels/day, a level confirmed by AltaGas's own contemporaneous statements.[147] This level would avoid the impacts and risks of increased vessel traffic discussed above, like underwater noise, vessel strikes, spills, and pollution discharges. It is also the only way to avoid significant GHG emissions.[148] Without such a restriction, other measures would not be sufficient to avoid significant effects triggering an EIS.

Other measures will assist in avoiding significant adverse impacts when implemented in combination with fuel handling limits. Several were explored during the hearing. These include: (a) making all voluntary mitigation measures, like speed limits, mandatory, with third party oversight;[149] (b) imposing the restrictions on scrubber discharge from vessels that was omitted from the final list of mitigation measures;[150] (c) a requirement for an additional emergency

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[145] Transcript at 381–84, 402–03 (Stalheim) (discussing County oversight during EIS process).

[146] *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 867 (9th Cir. 2005) (ordering EIS for expansion of dock at oil terminal); SEPA Ex. 24 (Opening Brief), 24-25. Additionally, there should be interim limits imposed on the Terminal's operations pending completion of an EIS and issuance of a CUP. *Id*. at 25.

[147] SEPA Ex. 33 (Hiester Testimony), ¶ 20; SEPA Ex. 33 (Gustafson Testimony), ¶ 7.

[148] Transcript at 628:13–629:4 (Brown).

[149] CUP Ex. 73 at 72; SEPA Ex. 31 (Pratt Testimony), ¶¶ 18–20; Transcript at 647:16–648:3 (Pratt).

[150] CUP Ex. 72 at 4; SEPA Ex. 36 (Kane Testimony), ¶¶ 14 & 15; Transcript at 791:5–16 (Keenan).

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response towing vessel stationed in proximity to the Terminal;[151] (d) a requirement that creosote pilings at the Terminal's pier be replaced;[152] (e) limits on vessel drafts and re-berthing vessels during low tides;[153] (f) a thorough independent safety analysis; and, (g) a careful analysis of how terminal operations may be contributing to the collapse of Cherry Point herring and what can be done to mitigate it.

CONCLUSION

For the foregoing reasons, the Hearing Examiner should GRANT Friends of the San Juans' SEPA appeal, order an EIS, and DENY the CUP pending compliance with SEPA.

Respectfully submitted this 6th day of March, 2026.

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[151] Transcript at 460:25–461:7 (Gaydos); Transcript at 675:5–16 (Pratt).

[152] SEPA Ex. 32 (Stalheim Testimony), ¶ 22; SEPA Ex. 63 (public comment), 57; Transcript at 750:24-751:1 (Personius); *id*. at 935:18-25 (Stalheim).

[153] Transcript at 390:15–391:14 (Stalheim); *id*. at 635–39 (Pratt).

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CERTIFICATE OF SERVICE

I, Azmera Melashu, declare as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused a true and correct copy of the foregoing document to be delivered in the method as indicated below:

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