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NW MANAGER

FILE UNDER AB 2018-077B  
DATE RECEIVED: 8.8.18  
SUBMITTED BY: Holly Johnson?  
for WSPA  
 COUNCIL MEETING  
 COMMITTEE  
EXHIBIT: A

August 8, 2018

Whatcom County Council  
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Re: WSPA Comments on the Ongoing Whatcom County  
Unrefined Fossil Fuels Moratorium, Ordinance 2018-77B

Honorable Council Members:

The Western States Petroleum Association (WSPA) appreciates the opportunity to provide comments on Ordinance 2018-77B. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport, and market petroleum and petroleum products in five western states, including Washington. WSPA members have operated refineries along Cherry Point in Whatcom County for years. This area provides key energy and emergency infrastructure as recognized by various city, state, and federal documents and is a regional hub for energy production and distribution.

WSPA opposes the Whatcom County Council's ongoing extension of the Unrefined Fossil Fuels Moratorium. The continued imposition of this "temporary" moratorium exceeds Whatcom County's powers under state law and likely may violate the United States Constitution as it pertains to interstate and foreign commerce. The moratorium also is a breach of the compact created between Whatcom County and the Cherry Point businesses in existence when county planning policies for the Cherry Point area were enacted decades ago. Those countywide planning policies announced the County's interest in creating an area where industrial business would be fostered, and this commitment led many businesses to commit significant resources to Whatcom County. However, it appears the Council is turning away from these longstanding commitments, which threatens the viability of some of the most significant economic engines of Whatcom County.

Along with other community stakeholders, WSPA opposed the initial August 9, 2016 emergency moratorium, and each extension that has taken place (Sept. 2016, March 2017, Sept. 2017, Feb. 2018). Additionally, when a moratorium is repeatedly extended, it becomes a de facto revision to a lawful land use provision. This is now the fifth "interim" moratorium action by Whatcom County on this issue. As we have noted in our prior comment letters, continued extensions of the "temporary" moratorium are an improper proxy for revising the Whatcom County Comprehensive Plan or zoning regulations. To legally change a zoning regulation, the action must be consistent with the Whatcom County Comprehensive Plan, the Growth Management Act, and SEPA, among many applicable legal obligations. The moratorium has not undergone any such assessment, despite the fact that it has been in place for over two years.

Each extension of the moratorium that does not comply with these laws is a further failure to comply with both the letter and the spirit of Washington's robust planning laws.

WSPA does not believe that the County has the statutory authority to impose the moratorium in this manner. The Planning Enabling Act is the authority under which the County is considering extending this moratorium. Yet, the Planning Enabling Act is limited to planning and zoning; it does not grant the County authority to enact commodity regulations, export restrictions, or favor some commodities over others.

The moratorium also runs afoul of federal constitutional restrictions on local government's ability to regulate commerce and exports. The United States Constitution reserves to the federal government the power to regulate interstate commerce and exports, and the commerce clause in the federal constitution forbids local governments from enacting laws that overly burden interstate commerce. The moratorium exceeds these limitations in several ways. It favors some commodities over others by forbidding permits that would facilitate the increased shipment of "unrefined fossil fuels," while not forbidding other commodities, including other fossil fuels. On its face, the moratorium adopts the type of economic protectionism forbidden by the federal constitution. The moratorium purports to regulate the transport of dangerous fuels through Whatcom County by limiting the shipment of unrefined fossil fuels that are not processed at Cherry Point; yet the moratorium also does not (because Whatcom County cannot) regulate "transport of dangerous fuels" to Cherry Point, so long as they are processed at Cherry Point, and does not regulate what is transported through the County to other locations. Finally, the moratorium lacks any analysis of whether the commodities it regulates are less safe than commodities it does not regulate.

The nearly 300-page Cascadia Law Group report (prepared by the outside counsel hired by the Council) cautions against such discriminatory, pretextual action. Through the continued introduction of this "interim" moratorium, the Council appears to have disregarded this advice. At bottom, the moratorium is but a pretext; the County is not attempting to exercise its police powers to regulate some local concern but is instead attempting to enact national—and even global—energy policy through its development regulations.

Each restriction Whatcom County imposes could lead to a bottleneck in energy supply for the state and region through zoning provisions that violate state and federal law. The right to regulate trade among the states and with foreign nations is vested exclusively with the United States Congress pursuant to the Commerce Clause of the United States Constitution. Whatcom County has neither the right nor the duty to legislate what products may or may not be exported from Cherry Point to other states or nations. Further, as a matter of policy, the County may not pick winners and losers, favoring some commodities over others or local commerce over export commerce.

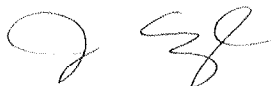
Existing County Planning Policies encourage growth of these existing businesses to support the economic viability of Whatcom County. The County has declared that "Cherry Point industrial area is an important and appropriate area for industry due to its access to deep water shipping, rail, all-weather roads, its location near the Canadian border and its contribution to the County's goal of providing family wage jobs." Other County policies recognize the importance of the expansion of the existing business: "Expansion of existing businesses [is] a key[] factor in providing 'family wage' jobs and a strong tax base. Economic development that pays family wage rates should be encouraged. Industrial land designations must be sufficient to permit the concentration of industry in appropriate locations beyond 20 years." Countywide Planning Policy E.3. The moratorium breaches these social contracts that Whatcom County has had with the businesses in Cherry Point for decades.

Finally, WSPA would like to express its concerns about the lack of transparency throughout the series of moratoriums. WSPA strives to have a collaborative relationship with Whatcom County and hopes that it will have an opportunity to engage with Whatcom County in a productive and open manner. Thus far, instead of working together with industry to create energy and economic policy that will work for all of Whatcom County, Whatcom County has decided to continue the "interim" moratorium, without any of the process protections that Washington law typically affords to the enactment of such restrictions.

WSPA respectfully urges Whatcom County to restore to its local stakeholders the right to apply for and have processed any land use and development permit applications that are authorized by the Whatcom County Code. To do so, the current moratorium should be allowed to expire without further renewal.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact me or the Senior Coordinator for the Northwest Region of WSPA, Holli Johnson at (360) 352-4506 or by email at [hjohnson@wspa.org](mailto:hjohnson@wspa.org).

Sincerely,



cc: Jodie Muller, WSPA

