

July 9th, 2018

To: Whatcom County Council
311 Grand Ave
Bellingham, WA 98225

Cc. Whatcom County Planning & Development Services

Subject: Cherry Point Amendments to Comprehensive Plan and Zoning Code

Honorable Councilmembers,

It is abundantly clear that existing zoning codes and procedures for SEPA review are completely inadequate for processing permits of high-impact projects in the Cherry Point UGA. The preliminary draft amendments in AB2018-076D are important steps forward, yet fall short of addressing major flaws in the code.

After a decade of proposed projects expanding shipment of hazardous materials through Whatcom County, the scale of the risks to our public health and safety have become apparent. If not for the permit moratorium in place since August 2016, Whatcom County would still be required to accept permit applications for projects that could never be legally and responsibly permitted, such as the Gateway Pacific coal terminal. In 2013-14, Whatcom County permitted rail terminal in the Cherry Point UGA that have brought daily shipments of crude oil and propane on unit trains into Whatcom County, without requiring meaningful review of the risks and impacts. The County issued SEPA determinations of non-significance and granted permits without meaningful review of environmental impacts and the unmitigated risks. As a consequence, Whatcom County's people and environment continue to be exposed to significant risks of oil train derailments, spills, and explosions, which occurred in a dozen other locations from 2013-16.

In the 2016 Comprehensive Plan update process, County government responded in a careful and measured way to concerns about the shortcomings in our permit processes, taking public input over more than two years before setting comprehensive plan policies and goals in place. The Cascadia Law report has clarified that our next steps are appropriate and legally permissible. Throughout this time Council has wisely maintained a temporary moratorium on new unrefined fossil fuel export projects at Cherry Point, preventing proposed developments from getting ahead of the updated policy while still allowing the existing refineries to maintain and improve their operations.

Throughout all of these community discussions, the public has been overwhelmingly clear that they support your actions. Over a thousand citizens have attended hearings to oppose these projects and support measures like the moratorium. Thousands more have submitted written

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COUNCIL MEETING
 COMMITTEE
EXHIBIT: A

comments. Petitions signed by nearly 10,000 whatcom residents, opposing oil and coal train expansions, were presented to the county in July 2016.

After years of process and civil discussion, we are now again asking you to step up and implement regulations that respond to the scale of the threats to our community. While the measures proposed to date by County staff are a good start, there is far more to be done. The following additions would better serve the people and businesses of Whatcom County by improving the permitting process:

1. Prohibit bulk coal storage

Whatcom County spent years studying the risks and implications of a proposed coal export terminal at Cherry Point. Though an EIS was never completed for that project, another coal export project of a comparable scope in Longview, WA, was denied permits by Cowlitz County and the State of Washington because of ten unavoidable, significant adverse impacts. However, challenges to the decisions are at varying stages of appeal, leading to additional legal and staff costs for Cowlitz County. Had Whatcom County ever completed SEPA review, and made a lawful permitting decision in accordance with their duty to the public, undoubtedly our county would also be tied up in years of appeals and incur expenses for defending lawful action.

There is no reason not to outright prohibit coal storage and transfer facilities. The Cascadia Law study affirmed the county's authority to do this. There is ample precedent for local governments to implement this measure. And there is a strong basis for this action in the research and documentation that occurred as the the community studied the impacts of the Gateway Pacific Terminal. No business in Whatcom County will be impacted, nor would any business that we would want to welcome to our community in the future. No facilities in our community are dependent on coal. After half a dozen years of community discussion and consideration it is clear that such a facility would have a serious impact on public health and safety and on protected endangered species.

The city of Portland, OR has passed a measure that is functionally similar (although even more broad in scope). That measure has withstood legal appeals, as was discussed in the Cascadia Law report:

Another powerful option that would create immediate certainty would be to prohibit a defined set of uses in the zoning code and the shoreline regulations for the Cherry Point Heavy Industrial Zone and the adjoining shoreline areas. Such an option is similar to what has been done in Portland, Oregon, and in South Portland, Maine. (Cascadia Law Group. Reducing Impacts from Fossil Fuel Projects, page 27)

2. Update the policies governing how the State Environmental Policy Act is administered for major project review.

Cascadia Law clearly recommended that “the county review its current SEPA policies to be sure they provide a clear basis for mitigating environmental impacts of a major facility. Clear SEPA policies must be adopted by local ordinance to provide a basis for denial or even appropriate conditioning of a project.” (page 30)

- A. **An EIS should be required for any fossil fuel project.** As a matter of policy, any major development permit that involves the bulk transport, processing, or storage of fossil fuels should require an environmental impact statement (EIS) **with a cumulative impacts analysis.**

It was clearly a mistake to allow both the Cherry Point Refinery and the Ferndale Refinery to build oil train storage and offloading facilities with only an administrative mitigated determination of nonsignificance. Skagit County, Vancouver, WA, and Grays Harbor all required full environmental impact statements for projects with similar footprints. In all three cases those projects were determined to have significant and unmitigable impacts which resulted in project denial or in the applicant withdrawing the application. Whatcom County missed an opportunity to protect the public safety. We should have policies in place to ensure that this mistake isn't repeated.

- B. **Greenhouse Gases (GHGs) should be accounted for and fully mitigated.** The County should establish that for permits requiring an EIS and involving the transport, processing, or storage of bulk fossil fuel, that a full GHG accounting will be required, including lifecycle emissions from extraction, transportation and combustion. The County should also establish that mitigation will be required for 100% of emissions increases resulting from these projects. A preference should be established for local mitigation (occurring in or near Whatcom county). This issue is currently in dispute in both Cowlitz and Skagit counties on related projects, where the local agency did not have an effective policy for how to deal with the complications and administrative decisions. Whatcom County Council has an opportunity to get out in front of the issue and make sure that businesses know what will be expected so that there is regulatory certainty and to make sure that the impacts will be measured and applied equally and fairly.

At the committee discussion on June 19, there was some confusion on this point. This kind of analysis is *allowed* under existing SEPA guidelines and is currently at the discretion of staff to determine the best approach. We are requesting that the County establish a policy reducing the discretion and stating that a climate impact analysis *must* be included in any EIS involving fossil fuel shipment and directing how it should be conducted. We are requesting this policy so that these rules can be applied consistently to every project.

- C. **Protect the endangered fisheries.** Similarly, the County should established a policy requiring that any EIS carefully consider any and all impacts on endangered Cherry Point Pacific herring stocks and endangered salmon fisheries and deem that *any* negative impact on these populations be treated as significant, unmitigable, and sufficient basis for permit denial.
- D. **Insurance and Financial Surety.** At the committee meeting on Tuesday June 19, a question was raised as to whether it was possible to require financial surety for a worst case disaster event as a condition of permit approval for projects that involve transport of significant dangerous cargos. The Cascadia Law report provides a clear path to implement this policy:

The current Cherry Point Heavy Industrial District requires new projects to undergo a County Council review under the provisions of Chapter 20.88 for Major Project Permits. We suggest that the current code provisions be substantially bolstered by making it clearer that this is a discretionary review that must meet key decision-making criteria. We also recommend providing clearer authority in the process for requiring mitigation of project impacts on the community and the environment. One new element would be adding a requirement that a "Development Agreement" be negotiated with project proponents to agree on the required mitigation. The code could also provide authority for bonding and insurance to ensure that any agreed-upon community improvements are installed on a timely basis, and that a liability insurance requirement for potentially hazardous activities guards against risks to the community. While there would still be a legal requirement that a rational nexus exist between any project impacts and required mitigation, establishing clearer authorizing language in the Major Project Permit process would create clearer expectations from the County for project applicants. (page 23)

We urge the county to implement this policy. In the town of Lac-Mégantic, Quebec, an oil train derailed and exploded and caused billions of dollars in damages and injuries (including dozens killed). The responsible railroad had insufficient insurance and declared bankruptcy, leaving the public with the cost of cleanup and repair. This risk to the community is significant and the financial burden should be carried by the project owners, not the taxpayers.

- E. **Federal approval should be required prior to county permit decisions.** We also request that the County establish new criteria in the SEPA checklist process based on the Cascadia Law analysis which states that:

The Major Project Permits Criteria here could also include provisions tailored to Whatcom County and to the issues the Cherry Point Heavy Industrial District presents. A decision-making criterion could be added that requires any

necessary state leases to have been already acquired for any piers or aquatic lands improvements, and to have already met any federal permitting needs, including properly addressing tribal treaty rights or the provisions of the Magnuson Amendment. This would not have the County enforcing the provisions of state or federal law; it would merely have the County requiring a demonstration in advance of County approvals that all federal and state approvals have been completed. (page 24)

During the SEPA review, an early step in the checklist should be a mandatory consideration of whether the project might be at odds with any potentially relevant federal policies or established sovereign treaty rights. If it is concluded that the project might be at odds with these federal rules, the County should require the applicant to seek certification that the project can attain the necessary federal approvals *before* spending public resources on Whatcom County's permit evaluation. The GPT project was a needless drain on public resources and time, that in retrospect could never have received approval regardless of the outcome of the County's analysis and permitting decisions.

During the committee hearing on June 19, it was pointed out that this County has already amended the code with ordinance 2017-027 which clarified the conditions under which the County may dismiss applications where federal or state permits, leases, or other conditions have already been denied. We applaud the adoption of that policy, but must emphasize that this point is different. In our view it addresses the problem too late in the game.

3. Require shoreline conditional use permits. The requirements for zoning conditional use permits included in the draft presented by PDS are a good step. Shoreline conditional use permits should also be required for changes of use at marine terminals such as increased loading of heavy oils or petrochemicals or a significant change in the chemical composition of substances transferred over the dock.

Storage and shipment of all petroleum products, refined or unrefined, ought to be conditional uses rather than permitted uses. In practice it is frequently unclear whether a project is focused on local production or pass through projects. For example, expanded propane (liquefied petroleum gas) storage or transport facilities could facilitate production at the oil refineries, or a project could enable an increase in propane transported by rail through Whatcom County for transshipment onto marine vessels. Those two projects would have a very different impact on the health and safety of people living in Whatcom County (particularly near the railroad tracks). A conditional use permit is a more effective permitting tool for distinguishing between these.

As always, thank you for your time and attention on this issue. Please contact us with any questions. We are happy to provide more information to aid your careful deliberation of these matters. We are grateful for your continuing hard work and diligence in service of our county.

Respectfully,

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