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VIA ELECTRONIC MAIL

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Mr. Barry Buchanan
Mr. Rod Browne
Mr. Todd Donovan
Mr. Ken Mann
Mr. Satpal Sidhu
Mr. Carl Weimer
Whatcom County Council
311 Grand Avenue, Suite 105
Bellingham, WA

COUNCIL MEETING
 Special COTW COMMITTEE
SUBMIT: _____

Re: Whatcom County Comprehensive Plan Revisions

Dear Council Members:

This letter is submitted on behalf of Petrogas West, LLC ("Petrogas"), which is the owner of a storage and distribution terminal in Ferndale for bulk shipments of propane, butane, and iso-butane (collectively "LPG"). We write to provide the comments of Petrogas regarding the preliminary draft Comprehensive Plan amendments, in particular those proposed by Council Member Weimer for Chapter 2 concerning the Cherry Point Urban Growth Area ("Cherry Point UGA").

Background

Petrogas has owned the Ferndale terminal and related facilities since May 2014. Chevron formerly owned the terminal. The terminal consists of two above-ground storage tanks (with capacities of 400,000 and 350,000 barrels respectively), an LPG loading facility on the wharf shared with Intalco Aluminum, and associated rail, tank car, and truck facilities for unloading and loading. The LPG handling facilities on the wharf are subject to a Washington State Department of Natural Resources, Aquatic Lands Lease No. 20-A08488, which provides for a maximum of 48 vessel dockings per year for all products (Intalco as well as Petrogas). The Petrogas terminal currently has 32 local employees.

Comments

Petrogas has reviewed the various proposed updates for the revised Comprehensive Plan, including the 2015 staff recommendations, the final Planning Commission recommendations, and the County Council's preliminary draft proposals, dated June 21, 2016 ("Preliminary Draft"). The focus of this letter and Petrogas' comments are the recently proposed modifications submitted by Council Member Weimer for Chapter 2, concerning the Cherry Point UGA ("Proposal"). The Proposal is contrary to and violates the provisions of the Growth Management Act, Chapter 36.70A RCW ("GMA"), and the guidelines set forth in WAC 365-190.

1. Proposal Is Not Internally Consistent. RCW 36.70A.070 provides that a comprehensive plan of a county that is required to plan under RCW 36.70A.040 shall "be an internally consistent document[.]" The Proposal is rife with inconsistencies.

- The Proposal conflicts with the planning goals of the GMA, specifically Goals 5 and 6.
 - Goal 5 provides that comprehensive plans must "promote the retention and expansion of existing businesses." RCW 36.70A.020(5). The Proposal explicitly states that the intent is to "limit fossil fuel exports" and its policies are intended to accomplish that end. Consequently, the Proposal does not promote the retention and expansion of the businesses existing at Cherry Point.
 - Goal 6 provides: "Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6). The Proposal effectively deprives property owners such as Petrogas of the use of its property and does so in an arbitrary and discriminatory fashion by imposing a moratorium on any "renovation, modification, or alteration of any terminal, dock, or other facility" at Cherry Point that may result in "any increase in the volume of crude oil capable of being handled at such facility." To the extent that this policy might in any way limit Petrogas' ability to export LPG the policy violates Goal 6.
- The Proposal undermines and conflicts with the Shoreline Management Act, Chapter 90.58 RCW, and the County's adopted Shoreline Master Program, WCC 23.100 ("SMP")(see ¶ 3, below).
- The Proposal contradicts the entire purpose of the Cherry Point industrial area, which is to ensure the continued viability of the industrial land base.

- The Proposal refers to the Cherry Point UGA as the second-largest emitter of carbon air pollution in Washington State and in a run-on sentence equates that with overseas uses of fossil fuels contributing to mercury pollution in Northwest soils and carbon deposition in water contributing to ocean acidification. The statement is internally inconsistent with itself and is not supported by the record for the Comprehensive Plan.¹
- The Proposal assumes, without evidence, that the large acreage, good rail access, and proximity to Washington State and Canadian ports makes the remaining upland area of Cherry Point suitable for major, sustainable, clean-energy manufacturing or production of other commercial or industrial products, in contradiction with the SMP.
- The Proposal fails to include an analysis of the fiscal impact of the planning policies in violation of RCW 36.70A.215(3)(h). If adopted, the Proposal would greatly impact the County's employment projections for the Cherry Point UGA over the 20-year planning period, creating internal inconsistency within the Comprehensive Plan.

2. There Has Not Been Adequate Public Participation. RCW 36.70A.140 provides that each county that is required to plan under the GMA "shall establish and broadly disseminate to the public a public participation program identifying procedures for *early and continuous* public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." [emphasis added] WAC 365-190-040(8)(a)(i) provides that public participation should include "early and timely notice of pending designations and regulations[.]"

The release of the Proposal in June 2016, and scheduling on the day after a national holiday a 30-minute session to take public comment, and not just on the Proposal but to a number of other chapters in the proposed revisions to the Comprehensive Plan, is not the kind of early and continuous public participation contemplated by the statute or guidelines.

¹ Notwithstanding the statement in the Proposal, the Northwest Clean Air Agency recently noted that Bellingham is one of only eight cities in the country ranked by the American Lung Association as the "cleanest for ozone and short-term particle pollution." (Available at <http://nwcleanairwa.gov/news-release/national-report-highlights-clean-air-in-bellingham-whatcom-county-skagit-county>) The news release quotes NWCAA Executive Director Mark Amundson stating: "In our three-county jurisdiction, we have some of the best air quality in the country." *Id.* Furthermore, monthly air quality summaries on the NWCAA website demonstrate that the industries in the Cherry Point UGA consistently report levels of particulate matter, ozone, carbon monoxide, and sulfur dioxide well within the range to regularly attain a "Good" rating on EPA's Air Quality Index.

3. Proposal Is Contrary to the Shoreline Master Program. The GMA incorporates as an element of a county's comprehensive plan the goals and policies of a county-adopted shoreline master program approved under Chapter 90.58 RCW: RCW 36.70A.480(1). The Proposal contradicts and would undermine the existing Whatcom County SMP for the Cherry Point Management Area, WCC 23.100.17.

The express purpose and intent of the SMP for the Cherry Point Area is to "recognize and balance the special port, industrial and natural resource needs associated with the development of this marine resource." WCC 23.100.17.A.1.a. The SMP states:

Development of the Cherry Point Major Port/Industrial Urban Growth Area will accommodate uses that require marine access for marine cargo transfer, *including oil and other materials*. For this reason, water-dependent terminal facilities are encouraged as the preferred use in the Cherry Point Management Area.

WCC 23.100.17.A.1.c [emphasis added].

The Proposal would effectively eliminate the balance reflected in this portion of the SMP. Proposed Policy 2CC-2 injects a heretofore unarticulated preference for clean energy and low carbon-emitting industries in future developments or expansions. This preference does not appear anywhere in the SMP.

The preference in the Proposal also does not appear in the Preliminary Draft, which stated that the Cherry Point Management Plan, adopted by the Washington Department of Natural Resources in November 2010 "acknowledges that the existing industries, complying with laws and regulations, do not conflict with the Aquatic Reserve although their activities may pose risks for the Aquatic Reserve."² The Preliminary Draft further states: "Existing industries can serve the Aquatic Reserve's objectives so long as they are managed according to the Plan and so long as the lessees actively work to further goals for the Reserve." Preliminary Draft, p. 2-77. Although the Proposal retained some of that language, Proposed Policy 2CC-2 negates much of the intent of underlying the SMP and the Preliminary Draft by the insertion of the preference for clean energy and low carbon-emitting industries.

4. Improper Imposition of Legal Effect. Proposed Policy 2CC-10 contains a number of modifications to the Preliminary Draft that are contrary to law and without any basis in the record.

² The Cherry Point Aquatic Reserve Management Plan stated that a Technical Advisory Group, which was an independent group of scientists who evaluated the Cherry Point site against DNR aquatic reserve criteria, noted that "while initially disturbing, industrial development associated with the piers appears to be compatible with aquatic reserve status and noted the opportunity to facilitate multiple uses as an example where commercial activities and environmental resources can exist." (Management Plan, p. 7.)

a. The proposed policy purports to limit the number of industrial piers at Cherry Point to the three existing piers (B.P., Intalco, and Phillips 66), but it is contrary to and effectively overrules WCC 23.100.17.A.1, which states that “it is the policy of Whatcom County to limit the number of piers to one (1) pier, in addition to those in operation or approved as of January 1, 1998.” This change to a Whatcom County ordinance is without any supporting factual basis in the record.

b. The proposed policy would require adherence to an unspecified “best available science” documenting species decline without articulating any methodology for determining what constitutes “best available science” and how it might apply to any proposal for expansion or new development at Cherry Point.

c. The Proposal also specifies that the policy would take precedence and is controlling over conflicting policy or regulation. RCW 36.70A.480, however, provides that “the shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW [Shoreline Management Act] rather than the goals, policies, and procedures set forth in [the GMA] for the adoption of a comprehensive plan or development regulations.” RCW 36.70A.480(2). Furthermore, the “policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.64.105.” RCW 36.70A.480(3). The Washington Supreme Court has affirmed a decision that the provisions of the Shoreline Management Act, RCW 90.58, take priority over the GMA as long as the provisions are internally consistent with specified statutes. *Biggers v. City of Bainbridge Island* 163 Wash.2d 683, 700, 169 P.3d 14 (2007), *citing and affirming*, 124 Wash.App. 858, 103 P.3d 244 (2006).

The Court in *Biggers* also stated that the process for adopting shoreline master programs is different from the process for adopting GMA comprehensive plans and that local government is not vested with exclusive planning authority under the Shoreline Management Act. “Instead, the SMA provides for *state* checks and balances on local authority, including the requirement that the Department of Ecology approve all local shoreline master plans before they become effective.” 163 Wash.2d, at 701.

Because the Proposal imposes policies such as 2CC-10 that are inconsistent with and would conflict with the SMP, its adoption as binding on all facets of County review would be arbitrary and capricious as an impermissible intrusion on the SMP.³

³ The Proposal also is contrary to the recently adopted Whatcom County Comprehensive Economic Development Strategy.

5. No Evidence Supporting Conclusions. The Proposal also guts statements in the Preliminary Draft regarding the unique set of characteristics that make land in the Cherry Point area locally and regionally important for siting major industrial developments. Without any supporting record, the Proposal takes the existing Comprehensive Plan statement about the unique industrial characteristics and inserts wholesale changes that undermine the original intent of the Preliminary Draft and shift its focus entirely. The Proposal's conclusory references to "the public record" developed during the Comprehensive Plan Review and "best available science" do not support such drastic modification of the Preliminary Draft. Absent any demonstrable evidence for these modifications, adoption of the Proposal would be arbitrary and capricious.

The Preliminary Draft section regarding Cherry Point's proximity to Canada, Alaska and Foreign Ports (pg 2-77) likewise is negated by the modifications in the Proposal (at pg. 2-4). The Preliminary Draft stated that Cherry Point occupies a unique location for the siting of industry because of its close proximity to Canada and because of its shorter travel distance than other regional port facilities for shipping to Alaska and to other Pacific Rim locations. The Proposal inserts a statement that the "large acreage, good rail access, and proximity to Washington State and Canadian ports makes [sic] the remaining upland area at Cherry Point suitable for major sustainable, clean energy manufacturing or production of other commercial or products." (Proposal, p. 2-4.) There is, however, nothing in the Comprehensive Plan that supports this statement; it is a non sequitur.

6. The Proposal Improperly Imposes a De Facto Moratorium. RCW 36.70A.390 provides that a moratorium adopted by a county without a public hearing shall hold a public hearing on the adopted moratorium within 60 days of its adoption, whether or not the governing body received a recommendation from the planning commission or department. In *Biggers*, the Washington Supreme Court overruled a moratorium by the City of Bainbridge Island that imposed a multi-year freeze on private property development in shoreline areas. The court ruled that the Shoreline Management Act did not allow a local government to adopt a moratorium that effectively amended the SMA by implication. 162 Wn.2d at 687.

The Proposal, specifically Policy 2CC-13 creates a de facto moratorium because the County would deny any "easement, vacation of right-of-way, permit, license, or any authorization or entitlement of any kind under County authority that would have the effect of facilitating construction, renovation, modification, or alteration of any terminal, dock, or other facility in, on, adjacent to, or affecting the navigable waters of the Salish Sea (Puget Sound), which may result in any increase in the volume of crude oil capable of being handled at any such facility, other than oil to be refined at that facility for consumption in the State of Washington." Because the Shoreline Management Act does not allow a local government, such as the County, to adopt a moratorium that effectively amends the SMA by implication, this Proposal violates the law.

Furthermore, Policy 2CC-14 in the Proposal would impose this moratorium *before* any study is conducted to examine the bases for such a moratorium and, in fact, mandates an outcome of developing “recommendations for legal ways the County can work to limit fossil fuel exports.” Finally, Policy 2CC-14 would limit the input of stakeholder interests to “legal advice” by “legal experts,” implicitly excluding the solicitation of any factual or scientific input by stakeholders. Adoption of this Proposal would be arbitrary and capricious and violate the GMA and Shoreline Management Act.

Conclusion

The Proposal represents a wholesale substantive change to the Cherry Point portion of the Comprehensive Plan without proper legal or Planning Commission review and no analysis to ensure internal consistency in the Comprehensive Plan and with other regulatory documents, in violation of the GMA, which incorporates the SMA. The Proposal would prohibit development of property and expansion of existing industrial uses on property zoned for industrial use and, in doing so, usurps underlying zoning laws. The language is overly broad and would essentially prohibit any new development on existing land zoned for industrial use. The proposal guts the vested rights of existing applications and purports to trump state laws and County code related to vested rights. The proposed language would have the effect of drastically reducing the value of existing industrial land, which would have a significant impact on the County’s tax base that depends on the assessed value of the industrial land in Cherry Point. There has been no economic analysis or fiscal statement prepared as to the actual economic impacts this proposal would have on Whatcom County.

Petrogas appreciates the opportunity to provide comments to the Proposal, although it believes that the process has been unreasonably foreshortened. Petrogas reserves the right to submit additional comments in light of other public comment and Council action prior to adoption.

Very truly yours,

LANE POWELL PC

/s/ Michael A. Nesteroff

Michael A. Nesteroff

MAN:all