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Mark Personius
 Director

Memorandum

January 22, 2020

TO: The Whatcom County Planning Commission

FROM: Matt Aamot, Senior Planner *MA*

THROUGH: Mark Personius, Director *MP*

RE: Cherry Point Amendments (PLN2018-00009)

The County Council worked with the Cascadia Law Group to develop proposed Comprehensive Plan and Whatcom County Code (WCC) amendments primarily relating to fossil fuel and renewable fuel facilities in the Cherry Point Area (some of the amendments apply to various land uses on a countywide basis). The Council approved Resolution 2019-037 on August 7, 2019 forwarding the proposed amendments to the Planning Commission for review. The Planning Commission is holding a series of meetings on the proposed amendments, as shown below.

Meeting	Date	Type of Meeting	Comments
1	9/12/19	Town Hall Meeting	Opportunity for the public to speak on the proposal.
2	9/26/19	Work Session	Included discussion with a representative of Cascadia Law Group. Planning Commission approved a motion requesting the Planning and Development Services Department to meet with industry representatives to obtain input.
3	10/10/19	Work Session	Discussion with industry representatives, environmental group representatives, and the Northwest Clean Air Agency. Planning Commission reached consensus to delete the proposed greenhouse gas (GHG) mitigation requirements for renewable fuel facilities that reduce lifecycle GHG emissions.
4	10/24/19	Work Session	Industry presentation relating to GHG regulations. Planning Commission approved a motion that the conditional use permit requirement should be maintained in the proposal for expansions of existing refineries and transshipment facilities (with further discussion on change of use and exempt/permitted uses at a later date). Planning Commission approved a motion to remove the proposed GHG mitigation requirements from the Zoning Code and keep proposed GHG provisions in SEPA (with further discussion on the SEPA language at a later date).

5	11/14/19	Work Session	<p>Industry presentation relating to insurance.</p> <p>Planning Commission approved a motion to insert the following language in proposed WCC 22.05.125: "Permit applicant to provide proof of insurance naming Whatcom County as additional insured." The remainder of the insurance language was deleted.</p> <p>Planning Commission approved a motion to retain the term "expansion" of existing refineries and transshipment facilities in the conditional use section and other sections of the code.</p>
6	12/12/19	Work Session	<p>Planning Commission approved a motion to recommend that new fossil fuel refineries be a prohibited use in the Heavy Impact Industrial zone (proposed WCC 20.68.204).</p> <p>Planning Commission approved a motion that new renewable fuel refineries or renewable fuel transshipment facilities be allowed as a permitted use in the Heavy Impact Industrial zone (proposed WCC 20.68.159 in the conditional use section of the code would be deleted and these uses would be moved to the permitted use section).</p>
7	1/16/20	Work Session	<p>Planning Commission approved a motion to move expansion of renewable fuel facilities from conditional use to permitted use, as long as the expansion is for the increased production of renewable fuels.</p> <p>Planning Commission approved motions to amend proposed WCC 20.68.153 relating to expansion of existing legal fossil fuel refineries or transshipment facilities. The motions defined what activities constitute an "expansion" and when a conditional use permit is required.</p>
8	1/30/20	Work Session	

At the January 30, 2020 meeting, the Planning and Development Services Department would like to continue the discussion on the expansion and change of use language, along with other text amendments recommended in the exhibits.

1. "Expansions"

As discussed at previous Planning Commission meetings, the Council proposal requires a conditional use permit for "expansion" of existing fossil fuel refineries, fossil fuel transshipment facilities, renewable fuel refineries, and renewable fuel transshipment facilities (proposed WCC 20.68.153 and .160). The Council proposal also uses the term "expansion" in other provisions, including the SEPA provisions (proposed WCC 16.08.090). However, "expansion" is not defined. Therefore, staff proposed language in the last packet relating to what constitutes an "expansion." The Planning Commission had a lot of discussion on this issue, and approved several motions, relating to expansion at the January 16 meeting. The current

working draft language is shown below (we understand that the Planning Commission wanted to further discuss this issue).

.153 Expansion of existing legal fossil fuel refineries or expansion of existing legal fossil fuel transshipment facilities. For purposes of this section, an expansion is any fossil fuel refinery and/or transshipment facility development (including otherwise permitted or accessory uses), vested after the effective date of this ordinance, that meets any one of the following thresholds:

- Cumulatively increases its maximum crude atmospheric distillation capacity of fossil fuels by more than 10,000 barrels (or 420,000 gallons) per day based upon an evaluation of physical equipment limitations conducted by a licensed professional engineer; or
- Cumulatively increases the maximum transshipment capacity of the facility by more than 10,000 barrels (or 420,000 gallons) per day; or
- Cumulatively increases fossil fuel storage tank capacity of the facility by more than 200,000 barrels (or 8,400,000 gallons).

If a conditional use permit is obtained, the baseline for determining the cumulative increases is reset.

Such expansions shall be subject to the conditional use criteria below:

- (1) The conditional use permit approval criteria listed under WCC 20.84.220 are met;
- (2) Within shorelines, if applicable, County approval shall be contingent upon approval of a shoreline permit;
- (3) The applicant has documented to the satisfaction of the County decision maker all of the anticipated types and volumes of substances transferred in bulk at the facility. The permit shall be limited exclusively to those types and volumes of materials or products as documented and approved.
- (4) Insurance requirements meet the provisions of WCC Section 22.05.125.
- (5) Mitigation of transportation impacts consistent with Chapter 20.78 WCC, Transportation Concurrency Management, and Chapter 16.24 WCC, Commute Trip Reduction.
- (6) Mitigation of impacts to other services including fire and emergency response capabilities, water supply and fire flow, to address risks created by expansions.
- (7) Plans for stormwater and wastewater releases have been approved.

(8) Prior to commencement of any site preparation or construction activities, all necessary state leases shall be acquired for any piers or aquatic lands improvements, and it shall be demonstrated to the satisfaction of the zoning administrator that the project applicant has met any federal or state permit or consultation requirements, including properly addressing tribal treaty rights or the provisions of the Magnuson Amendment through state and federal permitting decisions; and

(9) Demonstration that the proposal will retain or add living-wage jobs or contribute to the Whatcom County economy.

This approach would provide numerical thresholds for increases in processing, transshipment, or storage capacity that would trigger a conditional use permit (it would *not* prohibit these uses). It would provide opportunity for more public input through the conditional use permit process, which includes public notice and a public hearing before the Hearing Examiner.

Several comments relating to the Planning Commission's three bullet points defining an "expansion" that would require a conditional use permit (in proposed WCC 20.68.153) are set forth below:

- *Bullet # 1 (Atmospheric Distillation Capacity)* - Industry representatives recommended the atmospheric distillation capacity method at the January 16 meeting. They indicated that it can be quantified in an objective manner. Industry representatives will provide a proposed definition of atmospheric distillation capacity. However, it should be noted that industry representatives indicated the refineries may have to submit confidential business information under this approach. Review by the County's legal counsel and Public Records Officer would be needed to determine whether such information is subject to public disclosure once submitted to the County. This legal review would have one of two outcomes:
 - If the confidential business information is not exempt from public disclosure, it would be available for public review and copying. This may not be ideal from an industry perspective.
 - If the confidential business information is exempt from public disclosure, the information used to determine whether the atmospheric distillation capacity triggers a conditional use permit would not be available to the public. This may not be ideal from a public transparency perspective.
- *Bullet # 2 (Transshipment)* – As you know, some of the public comment letters have expressed concern about changing an existing transshipment facility associated with a refinery to a crude oil shipping facility. This concern has arisen because, in December 2015, the US Congress lifted a ban on exporting most crude oil. The export ban had been in place since 1975. Additionally, the County Council's interim moratorium (Ordinance 2019-083) is concerned with the increased shipment of unrefined fossil fuels (e.g. crude oil), not processed at

Cherry Point. The Council proposal addresses this issue with the change of use provisions (proposed WCC 20.74.110).

Planning Commission Bullet 2 consolidated two bullets proposed by staff relating to transshipment in the January 16 memo. The two original bullets would require a conditional use permit if a proposal:

- Cumulatively increases the transshipment of fossil fuels into the facility by more than 10,000 barrels (or 420,000 gallons) per day; or
- Cumulatively increases the transshipment of unrefined fossil fuels from the facility by more than 10,000 barrels (or 420,000 gallons) per day.

With the staff language, the proposed change of use provisions (WCC 20.74.110) may be unnecessary. This is because a conditional use permit would be triggered if transshipment of petroleum exceeded certain thresholds. Specifically, transshipment of unrefined crude oil into and then out of the facility would require a conditional use permit if it exceeded a certain level.

The Planning Commission streamlined the two staff bullets into a single bullet which would require a conditional use permit if the facility:

“Cumulatively increases the maximum transshipment capacity of the facility by more than 10,000 barrels (or 420,000 gallons) per day.”

The Planning Commission’s language addresses an increase in *overall* transshipment capacity. If a refinery can transship “X” barrels per day at the present time, it can increase this to “X” + 9,999 barrels without triggering a new conditional use permit. Once capacity is increased by 10,000 barrels, a conditional use permit is required.

However, this language does not address shifting from refined product to unrefined crude oil, if overall transshipment capacity is increased less than 10,000 barrels per day. In other words, if an existing facility shipped out crude oil instead of shipping out refined product (with little or no increase in overall transshipment capacity), it would not trigger the conditional use permit requirement. This doesn’t appear to address the County Council’s concern relating to potential transshipment of crude oil from existing facilities at Cherry Point. Therefore, with the Planning Commission’s proposed language, the change of use provisions (proposed WCC 20.74.110) may still be necessary to address Council’s intent.

- *Bullet # 3 (Storage)* – The Planning Commission’s third bullet would require a conditional use permit if the facility:

Cumulatively increases fossil fuel storage tank capacity of the facility by more than 200,000 barrels (or 8,400,000 gallons).

The tank capacity was set by Planning Commission after a discussion with industry representatives relating to practical storage considerations. For comparison, the Phillips 66 Logistics Flexibility project proposes to construct two new oil storage tanks—one 80,000 barrel capacity and one 300,000 barrel capacity (SEPA file # 2019-00033).

2. Change of Use Provisions

The Council proposal includes two new “Change of Use” provisions in the Cherry Point Industrial District, as follows:

20.74.110 Change of Use

A change of use occurs when the occupancy of a building or a site use changes from one use to another in whole or in part. A change of use permit is required to document a change of use, even where no alterations are planned or required by the code. This shall be processed as a Type I permit in Chapter 22.05 WCC. The new use shall ensure:

- (1) Applicable building and construction codes are met per Title 15;
- (2) Consistency with the requirements of the CP Industrial District, Chapter 20.74, and base zone; and
- (3) Transportation concurrency requirements are met per Chapter 20.78.

20.74.115 Change of Use of Renewable Fuels Facilities.

A change of use of a Renewable Fuel Refinery or Renewable Fuel Transshipment Facilities to a fossil fuel facility inside the boundary of an existing legal fossil fuel refinery requires a conditional use permit subject to WCC 20.68.153. Other changes of use from Renewable Fuel Refinery or Renewable Fuel Transshipment Facilities to fossil fuel facilities are prohibited.

As previously mentioned, some of the public comment letters have expressed concern about changing an existing transshipment facility associated with a refinery to a crude oil shipping facility. There are several ways the zoning provisions of proposed WCC 20.74.110 could be interpreted for this scenario:

- It could be considered a “new fossil fuel transshipment facility” that is prohibited under proposed WCC 20.68.205.
- It could be considered an “expansion” of an existing transshipment facility that requires a conditional use permit under proposed WCC 20.68.153. A conditional use permit is a Type III permit that requires a hearing

examiner decision with public notice and a public hearing (WCC 22.05.020).

- It could be simply considered a “change of use” that requires only a Type I permit, administratively approved by staff with no public notice or hearing (WCC 22.05.020).

The “change of use” zoning provisions would be unique to the Cherry Point area, as such provisions do not exist in other zoning districts. In other zoning districts, when a change of use is proposed, staff would review the zoning regulations to determine if the new use is a permitted use, an accessory use, allowed as an administrative approval use, allowed with a conditional use permit, or prohibited. The proposed change of use provisions, as currently written, would create an added degree of uncertainty over how the regulations would be applied to the Cherry Point area.

Staff originally suggested modifying proposed WCC 20.74.110 as follows: “. . . A change of use permit is required to document a change of use, if no other County project permits are required . . .” (Exhibit C, p. 26).

This modification would streamline the process and clarify that a Type I “change of use permit” would only be required if no other County permit is needed that documents the change of use. However, it still has the following challenges/issues:

- In a hypothetical example, if an existing refinery currently shipped out 1% of the crude oil it receives, would it be a change of use to increase this to 10%, 25%, or 51%?
- Would the County even be aware that such a transition is happening, if no construction permits were required?

Alternatives

There are a couple ways to address the above challenges/issues.

If the Planning Commission recommends the original staff language for “Expansions,” which specifically addresses the transshipment of crude oil from a facility, the proposed change of use provisions (WCC 20.74.110) may be unnecessary. This is because a conditional use permit would be triggered if transshipment of unrefined crude exceeded a certain threshold.

If the Planning Commission does not recommend the staff language for “Expansions,” the complicated issues associated with changing an existing fossil fuel refinery/transshipment facility to an unrefined fossil fuel transshipment facility would remain. The Cascadia Law Group’s *Reducing Impacts from Fossil Fuel Projects Report to the Whatcom County Council* (February 12, 2018) addresses change of use as follows:

Many jurisdictions’ ordinances provide a process so that any proposed change of use or occupancy at existing facilities is reviewed for consistency with current codes and ordinances, for flagging needed discretionary land use permits, and for ensuring SEPA review where

needed to address adverse environmental impacts. We recommend the County consider adopting a provision to allow a simple, ministerial planning staff approval of a change of occupancy or use where such new use remains consistent with current code provisions and is below SEPA review thresholds. This same provision should also create a clear obligation to review and properly address or mitigate impacts of change of occupancy or use that are above SEPA thresholds or otherwise require a discretionary review (p. 30, underlining added for emphasis).

From an administrative perspective, the Planning and Development Services Department questions whether the proposed change of use provisions (proposed WCC 20.74.110) are simple and clear. Therefore, if these change of use provisions are maintained, the Planning Commission may want to consider a motion that Council request Cascadia Law Group to clarify the language, specifically defining what constitutes a change of use.

3. Other Modifications

There are also a number of other proposed changes in the Exhibits, shown in yellow, for Planning Commission consideration.

Thank you for reviewing these issues. We look forward to discussing them with you.