

From: [Eddy Ury](#)
To: [PDS Planning Commission](#); [Ashley Ubil](#)
Subject: Re: Cherry Point Amendments
Date: Thursday, June 25, 2020 10:29:23 PM
Attachments: [RE Sources comment re Cherry Point June 25 2020 \(2\).pdf](#)

Thank you for including me in tonight's work session and for accepting my suggestions. I must apologize for an error in my previous written comment that I became aware of during the meeting, mistakenly misspelling Commissioner Maberry's name. This was unintentional and I meant no disrespect. If possible, please use the corrected version attached when posting for public viewing.

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On Thu, Jun 25, 2020 at 6:25 PM Eddy Ury <eddyu@re-sources.org> wrote:

P.S. Please refer to the attached pdf of my comment today. I will be available as an attendee in Zoom to answer any questions or clarify any points.

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On Thu, Jun 25, 2020 at 4:26 PM Eddy Ury <eddyu@re-sources.org> wrote:

Good afternoon Commissioners,

As we resume the Planning Commission's process of review for Cherry Point Amendment tonight, after a four month pause, let's acknowledge the due thoroughness of public review and deliberation that has occurred to date. Through eight work sessions following the Town Hall last September –totaling close to thirty hours of public meetings to date—the council proposal has been rightfully scrutinized. Though we've disagreed with some of the Commission's alterations to the draft, we appreciate the consideration of our input and the opportunities to address the Commission directly as a community stakeholder. With this in mind, we are not suggesting to revisit points of contention that have been addressed and resolved in previous work sessions.

We respectfully recommend that Commissioners reject the motions from Commissioner Mayberry, including the suggested definitions from Western States Petroleum Association (WSPA). Their apparent approach would seem to insert conditional criteria for permitting (and loopholes) within unique definitions of operative terms, rather than making clear rules. Proper definitions can narrow the specific application of the term to its relevant use while remaining consistent with

the common meaning as known and used in the industry.

The term “value added processing” now appears once in the updated draft (20.68.153) as a sub-point specifying wherein a fossil fuel storage tank would qualify as an “expansion,” the benchmark for requiring a conditional use permit (CUP). The term “value added processing” would be more aptly utilized under the conditional criteria for CUP’s rather than as a factor defining expansion. Nonetheless the term should be defined.

WSPA’s suggested definition of “value added processing” expressly exempts export of unrefined crude oil from qualifying as such. Yet striking this segment would negate the functional purpose of the term in code and divorce the term from any relevant meaning. Adjusting vapor pressures as necessary, or any other step that is required to load a shipment of crude oil, does not add commercial value to the commodity. If WSPA’s definition applied to the term (particularly the first, second, and sixth qualifying) as used in the Planning Commission’s current draft WCC 20.68.153, then even storage tanks of unlimited volume whose explicit purpose was to facilitate crude oil export would be a permitted use under Whatcom County Code.

By extension, the definition of “transshipment” as proposed by Commissioner Mayberry is needlessly tied to the disputed definition of “value added processing. Moreover, it inappropriately hinges on the destination of cargo. The definition of transshipment as currently proposed in the draft amendments is consistent with the common meaning of the word, with sufficient specificity.

When Whatcom County makes a decision within its discretionary authority to approve or deny permits for a project that incurs significant adverse impacts and induces severe risks-- to local residents, ecosystems, natural resources and dependent economies—the stated purpose of the facility matters because it presents benefits that factor into the county’s decision.

The notion of export is relevant as context to underscore the necessity of improving development rules, because international market forces drive the direction and quantity of fossil fuel shipments, while immutable geography determines routes through existing transshipment facilities, to the extent of their functional capacity. Rightfully, these amendments cannot be framed around terms delineating the ultimate destination of cargo; however the distinction between outbound and inbound shipments (loading or unloading) is a relevant distinction of use.

The Planning Commission and Council should give due consideration to suggestions from WSPA, and also be wary of their suggested text, since it is likely that WSPA will file legal challenges to the code amendments once passed. If their intention is to litigate the regulations, it could be in WSPA’s interest for the code to include language that will support the basis for their challenges.

We can observe evidently in previous comments threatening litigation that the oil industries best arguments against the constitutionality of Whatcom County’s actions have contradicted oft-repeated claims in public statements from their advocates. Indeed, a letter from the law firm Arnold & Porter, delivered December 3rd, 2019 to Whatcom County Council on behalf of BP Cherry Point, argued that the interim moratorium barring unrefined fossil fuel transshipment

expansions was in violation of the U.S. constitution's dormant commerce clause because:

"The Moratorium bars companies in Cherry Point from constructing or expanding facilities that receive, transfer, or store crude oil, unless the oil will be processed or consumed within Whatcom County. That is, companies are free to construct or expand facilities as long as they use local refineries to process their fuel. The Moratorium thus disfavors companies that wish to transport crude oil through the county for processing elsewhere. And it has the practical effect of steering business toward local refineries, to the detriment of out-of-state competitors."

This angle is consistent with Cascadia Law Group (CLG)'s explanation in their February 2018 report to Whatcom County on the county's authorities to limit the negative impacts of expanded fossil fuel shipments, wherein they advised that the land-use ordinance not treat out-of-state business interests less favorably than in-state interests, may not regulate extra-territorial (out-of-state) conduct, and may not be clearly excessive in relation to the putative local benefits. CLG drafted the council's proposed amendments in accordance with these principles.

The applicable definition of "Value Added Processing" is important because its operational use in proposed permitting rules is primarily a factor that weighs local benefits to Whatcom County for conditionally permitting an industrial expansion or change of use. The local economic benefits value added processing facilities (and bulk transshipment in service thereof, by extension) are drastically divergent from a facility regularly transferring pass-through shipments without processing or consumption. The sizable benefits of value added processing to the county's interests may justify a discriminatory effect of code criteria that disfavor out-of-state business interests, and conversely justify the county's decision to assume the burden of risk and adverse impact from allowing the transshipment of hazardous materials within its jurisdiction.

Thank you for your thoughtful deliberations on these matters and continued service to our County,

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June 25th, 2020

Whatcom County Planning Commissioners,

As we resume the Planning Commission's process of review for Cherry Point Amendment tonight, after a four month pause, let's acknowledge the due thoroughness of public review and deliberation that has occurred to date. Through eight work sessions following the Town Hall last September – totaling close to thirty hours of public meetings to date—the council proposal has been rightfully scrutinized. Though we've disagreed with some of the Commission's alterations to the draft, we appreciate the consideration of our input and the opportunities to address the Commission directly as a community stakeholder. With this in mind, we are not suggesting to revisit points of contention that have been addressed and resolved in previous work sessions.

We respectfully recommend that Commissioners reject the motions from Commissioner Maberry, including the suggested definitions from Western States Petroleum Association (WSPA). Their apparent approach would seem to insert conditional criteria for permitting (and loopholes) within unique definitions of operative terms, rather than making clear rules. Proper definitions can narrow the specific application of the term to its relevant use while remaining consistent with the common meaning as known and used in the industry.

The term "value added processing" now appears once in the updated draft (20.68.153) as a sub-point specifying wherein a fossil fuel storage tank would qualify as an "expansion," the benchmark for requiring a conditional use permit (CUP). The term "value added processing" would be more aptly utilized under the conditional criteria for CUP's rather than as a factor defining expansion. Nonetheless the term should be defined.

The applicable definition of "Value Added Processing" is important because its operational use in proposed permitting rules is primarily a factor that weighs local benefits to Whatcom County for conditionally permitting an industrial expansion or change of use. The local economic benefits of value added processing facilities (and bulk transshipment in service thereof, by extension) are drastically divergent from a facility regularly transferring pass-through shipments without processing or consumption. The sizable benefits of value added processing to the county's interests may justify the county's decision to assume the burden of risk and adverse impact from allowing the transshipment of hazardous materials within its jurisdiction.

When Whatcom County makes a decision within its discretionary authority to approve or deny permits for a project that incurs significant adverse impacts and induces severe risks-- to local residents, ecosystems, natural resources and dependent economies—the stated purpose of the facility matters because it presents benefits that factor into the county's decision.

WSPA's definition (particularly the first, second, and sixth qualifying points) deviates from the common meaning of value added processing. Adjusting vapor pressures as necessary, or any other step that is required to load a shipment of crude oil, does not add commercial value to the commodity. If WSPA's definition applied to the term as used in the Planning Commission's current draft WCC 20.68.153, then even storage tanks of unlimited volume whose explicit purpose was to

facilitate crude oil export would be a permitted use under Whatcom County Code, if not for the language that expressly exempts export of unrefined crude oil from qualifying as such. This specification about export cannot be included for reasons I'll explain below, yet striking this segment would negate the functional purpose of the term in code and divorce the term from any relevant meaning.

By extension, the definition of "transshipment" as proposed by Commissioner Maberry is needlessly tied to the disputed definition of "value added processing. Moreover, it inappropriately hinges on the destination of cargo. The definition of transshipment as currently proposed in the draft amendments is consistent with the common meaning of the word, with sufficient specificity.

Cascadia Law Group (CLG) advised in their February 2018 report to Whatcom County that the land-use ordinance must not treat out-of-state business interests less favorably than in-state interests, may not regulate extra-territorial (out-of-state) conduct, and may not be clearly excessive in relation to the putative local benefits. CLG drafted the council's proposed amendments in accordance with these principles, and explained these parameters to the Planning Commission on September 26th.

Affirming the importance of CLG's guidelines, a letter from the law firm Arnold & Porter, delivered December 3rd, 2019 to Whatcom County Council on behalf of BP Cherry Point, argued that the interim moratorium barring unrefined fossil fuel transshipment expansions was in violation of the U.S. constitution's dormant commerce clause because:

"The Moratorium bars companies in Cherry Point from constructing or expanding facilities that receive, transfer, or store crude oil, unless the oil will be processed or consumed within Whatcom County. That is, companies are free to construct or expand facilities as long as they use local refineries to process their fuel. The Moratorium thus disfavors companies that wish to transport crude oil through the county for processing elsewhere. And it has the practical effect of steering business toward local refineries, to the detriment of out-of-state competitors."

Therefore as made further evident in the previous comments of record, these amendments cannot be framed around terms delineating the ultimate destination of cargo; however the distinction between outbound and inbound shipments (loading or unloading) is still relevant to defining the use of the facility within the county's jurisdiction.

Thank you for your thoughtful deliberations on these matters and continued service to our County,

Eddy Ury
Climate & Energy Policy Manager
RE Sources for Sustainable Communities