

## **WHATCOM COUNTY PLANNING & DEVELOPMENT SERVICES**

### **Cherry Point Amendments**

#### **DRAFT FINDINGS OF FACT AND REASONS FOR ACTION**

1. The Whatcom County Council approved Resolution 2019-037 on August 7, 2019, forwarding proposed Comprehensive Plan and code amendments to the Planning Commission for review. The subject amendments primarily relate to fossil fuel and renewable fuel facilities in the Cherry Point Area, although some of the amendments apply to various land uses on a countywide basis.
2. The subject amendments include the following:
  - Amending Whatcom County Comprehensive Plan Chapter 2 (Land Use).
  - Amending the State Environmental Policy Act (SEPA) code (WCC 16.08).
  - Amending the Light Impact Industrial District, Heavy Impact Industrial District, Cherry Point Industrial District, Major Project Permits, and Definitions chapters of the Whatcom County Zoning Code (Title 20).
  - Amending the Project Permit Procedures (WCC 22.05).
3. Notice was submitted to the Washington State Department of Commerce on August 15, 2019.
4. The Whatcom County Planning Commission held a town hall meeting on September 12, 2019.
5. The Whatcom County Planning Commission held work sessions on September 26, 2019, October 10, 2019, October 24, 2019, November 14, 2019, December 12, 2019, January 16, 2020, January 30, 2020, February 27, 2020, June 25, 2020, and July 9, 2020.

6. A Determination of Nonsignificance (DNS) was issued under the State Environmental Policy Act (SEPA) on July 28, 2020.
7. Notice of the Planning Commission hearing was sent to citizens, media, cities, and others on the County's e-mail list on July 30, 2020.
8. Notice of the Planning Commission hearing was posted on the County website on August 3, 2020.
9. Notice of the Planning Commission hearing for the subject amendments was published in the Bellingham Herald on August 3, 2020.
10. The Planning Commission held a public hearing on the subject amendments on August 13, 2020.

### **Comprehensive Plan Amendments**

11. The Cherry Point UGA is approximately 7,030 acres. Whatcom County Comprehensive Plan Chapter 2 contains a specific section with text, goals, and policies relating to the Cherry Point UGA (other goals and policies in the Comprehensive Plan also apply).
12. The subject amendments modify text and Policies 2CC-11, 2CC-16, 2CC-17, and 2WW-4 in Whatcom County Comprehensive Plan Chapter 2. The subject amendments also add new Policy 2CC-18 to the Comprehensive Plan.
13. Whatcom County Comprehensive Plan Policy 2CC-11 already states that "It is the policy of Whatcom County to limit the number of industrial piers at Cherry Point to the existing three piers. . ." The subject amendments modify Policy 2CC-11. These amendments include:
  - Recognizing that the vested rights/enforceable agreement for an additional dock/pier no longer exist.
  - Recognizing the importance of preventing harm to habitat of the Cherry Point Herring stock and Southern Resident Killer Whales.
  - Recognizing that implementation of the Shoreline Program is an important way to preserve the natural character, result in long-term benefits, and protect the resources and ecology of the shoreline.
  - Deleting language that is unnecessary or no longer needed.

14. The subject amendments modify Whatcom County Comprehensive Plan Policy 2CC-16. These amendments include:
  - Recognizing that the study and recommendations to address negative impacts from fossil fuel facilities have been completed (see *Reducing Impacts from Fossil fuel Projects Report to the Whatcom County Council*, Cascadia Law Group, Feb. 12, 2018 and Whatcom County Council Resolution 2019-037, August 7, 2019).
  - Stating that the County will, through SEPA and permitting, seek to limit negative impacts from fossil fuel facilities within the Cherry Point UGA.
  - Refining the language relating to notice to the County Council of fossil fuel projects.
  - Deleting language that is unnecessary or no longer needed.
15. The subject amendments modify Whatcom County Comprehensive Plan Policy 2CC-17. These amendments include:
  - Recognizing that limited fossil fuel facility expansions are subject to environmental review, greenhouse gas analysis, and Cherry Point policies in the Comprehensive Plan.
  - Deleting language that is unnecessary.
16. The subject amendments modify Whatcom County Comprehensive Plan Policy 2WW-4 by recognizing that existing marine port facilities and limited expansions are allowed consistent with the State of Washington Department of Natural Resource Cherry Point Aquatic Reserve Management Plan.
17. The subject amendments add new Whatcom County Comprehensive Plan Policy 2CC-18. This new policy recognizes that the following are allowed: The on-going operation, maintenance, and repair of existing facilities, modifications designed to comply with adoption and implementation of new product standards and fuel standards, operational and site safety improvements, environmental improvements, and regulatory compliance projects.
18. Pursuant to WCC 22.10.060(1), in order to approve comprehensive plan amendments the County must find all of the following:

- The amendment conforms to the requirements of the Growth Management Act, is internally consistent with the county-wide planning policies and is consistent with any interlocal planning agreements.
- Further studies made or accepted by the Department of Planning and Development Services indicate changed conditions that show need for the amendment.
- The public interest will be served by approving the amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:
  - i. The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan.
  - ii. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
  - iii. Anticipated impact upon designated agricultural, forest and mineral resource lands.
- The amendment does not include or facilitate spot zoning.

### **Growth Management Act**

19. The Growth Management Act (GMA) establishes planning goals in Revised Code of Washington (RCW) 36.70A.020 to guide adoption of comprehensive plan amendments.
20. GMA planning goal # 1 is to: "Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."
21. GMA planning goal # 5 is to:

Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and

for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

22. The subject Comprehensive Plan amendments, when viewed in the context of the other Comprehensive Plan goals and policies, continue to encourage development in the Cherry Point industrial area while also addressing public safety and environmental protection. The amendments recognize that the existing industries provide significant employment and have shipped refined fossil fuel products for decades. The amendments also recognize that existing operations of fossil fuel facilities, along with limited expansions, are allowed with appropriate environmental review and analysis.
23. GMA planning goal # 9 is to: "Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities."
24. GMA planning goal # 10 is to: "Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water."
25. The State Shoreline Management Act policies, which are incorporated as a GMA goal pursuant to RCW 36.70A.480, indicate that:

. . . It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto. . . (RCW 90.58.020)
26. Fossil fuel refineries and transshipment facilities have potential for accidents, which can release pollutants into the environment and impact fish habitat, wildlife habitat, water quality, and air quality. The subject amendments seek to limit negative impacts on public health, safety, and the environment.

## Countywide Planning Policies

27. Countywide Planning Policy E-3 states:

Cherry Point shall be designated as an unincorporated industrial urban growth area in recognition of existing large scale industrial land uses. Additional large scale development shall be encouraged consistent with the ability to provide needed services and consistent with protecting critical areas along with other environmental protection considerations. The 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.

28. Countywide Planning Policy I-2 indicates "New business development and expansion of existing businesses are key factors in providing 'family wage' jobs and a strong tax base. Economic development that pays family wage rates should be encouraged. . ."

29. Countywide Planning Policy I-8 states:

Economic development should be encouraged that:

- a. Does not adversely impact the environment;
- b. Is consistent with community values stated in local comprehensive plans;
- c. Encourages development that provides jobs to county residents;
- d. Addresses unemployment problems in the county and seeks innovative techniques to attract different industries for a more diversified economic base;
- e. Promotes reinvestment in the local economy;
- f. Supports retention and expansion of existing businesses.

30. Countywide Planning Policy N-2 states that "The Cities and the County in cooperation with other municipal corporations and tribal governments shall adopt zoning regulations and development standards to protect water resources. . ."

31. Countywide Planning Policy N-3 states that "Jurisdictions shall cooperate to protect and restore water resources and fish habitat within UGA's and across jurisdictional boundaries to maintain quality of life and economic health in Whatcom County."

32. The Countywide Planning Policies recognize the significance of the Cherry Point UGA for industry, transportation, and good jobs. The Countywide Planning Policies also recognize the importance of environmental protection.

33. The Comprehensive Plan, including the subject amendments, allows a variety of industrial uses in the Cherry Point UGA, while encouraging review processes that will facilitate a full evaluation of fossil fuel development proposals and mitigation of negative impacts.

### **Interlocal Agreements**

34. There are no interlocal agreements relating to the Cherry Point UGA.

### **Further Studies/Changed Conditions**

35. The GMA, originally adopted in 1990, included a requirement to designate Urban Growth Areas (UGAs).
36. The Cherry Point UGA was adopted in 1997 when the Whatcom County Comprehensive Plan was adopted.
37. The Washington State Department of Natural Resources (DNR) originally issued the *Cherry Point Environmental Aquatic Reserve Management Plan* in November 2010, and amended the Plan in January 2017.
38. The primary focus of the *Cherry Point Environmental Aquatic Reserve Management Plan* is to:
  - . . . protect, enhance and restore habitats used by Cherry Point herring stock, salmon, migratory and resident birds, Dungeness crab, groundfish rearing areas and marine mammals, as well as the protection of submerged aquatic vegetation and water quality. . . (p. 4).
39. The *Cherry Point Environmental Aquatic Reserve Management Plan* states:
  - . . . the aquatic environment of Cherry Point: provides essential habitat and irreplaceable biological and ecological functions; is a portion of Treaty-protected usual and accustomed (U&A) grounds and stations of local Native American Indians; and provides significant economic benefits, recreational opportunities and other social values. . . (pp. 4 and 5).
40. The *Cherry Point Environmental Aquatic Reserve Management Plan* recognizes that:
  - . . . A number of species and habitats addressed in this plan have experienced declines over the past 40 years, such as the Cherry Point herring stock, which has shrunk from approximately 15,000 tons to between 800 and 2,100 tons over the last ten years. Other key species in decline include Puget Sound Chinook salmon, bull trout, and

certain species of rockfish, surf scoter, and Southern Resident orca whales . . . (pp. 1 and 2).

41. The *Cherry Point Environmental Aquatic Reserve Management Plan* specifically excludes certain areas, including the three existing industrial piers, from the Reserve (pp. 10 and 11).
42. The *Cherry Point Environmental Aquatic Reserve Management Plan* constitutes a further study that indicates a need for the subject amendments.
43. Other areas of the U.S. and Canada have experienced community impacts and environmental degradation associated with fossil fuel industry accidents since the adoption of the Cherry Point UGA in 1997.

### **Public Interest**

44. The Cherry Point area contains valuable fish and wildlife habitat (*Cherry Point Environmental Aquatic Reserve Management Plan*, DNR, amended 2017).
45. The Cherry Point UGA is a unique location, with important attributes, for industry (Whatcom County Comprehensive Plan, pp. 2-54 to 2-56). Existing industries provide high wage jobs and a substantial tax base (*Employment at Cherry Point*, Hodges, Rucker, and McCafferty, 2019).
46. The Cherry Point UGA text, goals and policies in the Whatcom County Comprehensive Plan, including the subject amendments, recognize the value of existing industrial uses and the importance of marine waters, fish and wildlife habitat, and air quality.
47. The subject comprehensive plan amendments should not adversely affect the overall rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan. The Whatcom County Comprehensive Plan allocated an additional 890 jobs for the Cherry Point UGA for the 2013-2036 planning period. The *Employment at Cherry Point* report from 2014 estimated that there were 2,100 – 2,200 jobs in the Cherry Point industrial area at that time (p. 3). The *Employment at Cherry Point* report from 2019 estimates 3,318 jobs and indicates that, between 2014-2019, “. . . roughly 1,100 jobs have been added . . .” (pp. 6 and 14). However, most of the 700 jobs at Alcoa Intalco Works, along with related jobs, will be lost with the shutdown of the aluminum smelter. Growth projections will be updated in the next periodic update of the Comprehensive Plan (due by June 2025). These updated projections will take into account conditions at that time and expectations for the future.



48. The subject comprehensive plan amendments should not adversely affect ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities. The subject amendments do not expand the allowed uses that would be served by Fire District 7, which encompasses the Cherry Point UGA. Additionally, new residential uses are not allowed in the Cherry Point industrial area and, therefore, new students will not be generated by development in this area.
49. The closest designated Agricultural lands are over .80 of a mile to the southeast, the closest Mineral Resource designation is approximately .06 of a mile to the east, and the closest designated Forestry lands are over 4 miles to the southeast. There is no evidence in the record that the subject comprehensive plan amendments would adversely impact designated agricultural, forestry, or mineral resource lands.
50. The Cherry Point UGA goals and policies, including subject amendments, continue to allow industrial uses in the Cherry Point UGA that provide family wage jobs and contribute to the tax base of the County and special purpose districts, while addressing impacts to public safety and the environment. Such planning is in the public interest.

### **Spot Zoning**

51. "Illegal spot zoning" means a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from, and inconsistent with, the classification of surrounding land and not in accordance with the Comprehensive Plan. Spot zoning is zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole (WCC 20.97.186).
52. The subject proposal does not involve nor facilitate illegal spot zoning.

### **Development Regulation Amendments**

53. The subject amendments modify text of the Whatcom County SEPA rules (WCC 16.08), the Zoning Code (WCC 20), and Project Permit Procedures (WCC 22.05)
54. Pursuant to WCC 22.10.060(2), in order to approve development regulation amendments the County must find that the amendments are consistent with the Whatcom County Comprehensive Plan.

### ***SEPA Code Amendments***

55. Whatcom County Comprehensive Plan Policy 10A-6 states "Aim to meet or exceed national, state, and regional air quality standards. Work with the Northwest Clean Air Agency to ensure compliance with applicable air quality standards."
56. Whatcom County Comprehensive Plan Policy 10A-9 is to "Cooperate with state and federal agencies and neighboring jurisdictions to identify and protect threatened and endangered fish and wildlife species and their habitats."
57. Whatcom County Comprehensive Plan Goal 10D is to "Strengthen the sustainability of Whatcom County's economy, natural environment, and built communities by responding and adapting to the impacts of climate change."
58. Whatcom County Comprehensive Plan Goal 10L is to "Protect and enhance ecosystems that support native fish and wildlife populations and habitat."
59. The Washington State Department of Ecology adopted a "Clean Air Rule," which included greenhouse gas emission limits, in 2016 (Washington Administrative Code or WAC 173-442). The Clean Air Rule was developed under the authority granted in RCW 70.94 (Washington Clean Air Act) and RCW 70.235 (Limiting Greenhouse Gas Emissions). The Clean Air Rule was challenged and the Thurston County Superior Court issued a ruling in March 2018 that prevented Ecology from implementing the Clean Air Rule regulations. However, the Washington Supreme Court reversed the Superior Court in part on January 16, 2020, upholding the Clean Air rule as it relates to regulating stationary sources (Case No. 95885-8).
60. A [Directive of the Governor](#) (# 19-18), dated December 19, 2019, states:

. . . I hereby direct the Department of Ecology to adopt rules by September 1, 2021, to strengthen and standardize the consideration of climate change risks, vulnerability, and impacts in environmental assessments for major projects with significant environmental impacts.

. . .

The rules should be uniform and apply to all branches of government, including state agencies, political subdivisions, public and municipal corporations and counties. The rules should cover major industrial projects and major fossil fuel projects; and establish uniform methods, processes, procedures, protocols or criteria that ensure a comprehensive assessment and quantification of direct and indirect greenhouse gas emissions resulting from the project.

Rules for cumulative environmental assessments and reporting should include . . . Methods, procedures, protocols, criteria or standards for mitigation of greenhouse gas emissions, as necessary to achieve a goal of no net increase in greenhouse gas emissions . . .

61. The Washington State Department of Ecology sent an e-mail "Notice of Rulemaking for Proposed New Chapter 173-445 WAC – Greenhouse Gas Assessment for Projects Rulemaking" on May 1, 2020. An associated document entitled "[Preproposal Statement of Inquiry](#)" on Ecology's website stated:

The Department of Ecology (Ecology) is beginning rulemaking as per the Directive of the Governor #19-18. The purpose of this rulemaking is to create a new rule under Chapter 173-445 WAC Greenhouse Gas Assessment for Projects. This rule will address analysis and mitigation of greenhouse gas emissions for environmental assessments of industrial and fossil fuel projects.

62. The subject amendments modify the County's SEPA rules to require applicants for certain fossil fuel and renewable fuel projects to submit additional information on a number of topics including greenhouse gas and other emissions, tanker and barge traffic, stormwater, wastewater, and risk of spills and explosions. These provisions are intended to provide the SEPA Responsible Official with more information in order to make reasoned decisions on threshold determinations.
63. The subject amendments include provisions on SEPA's relationship to federal, state, and regional regulations (see WAC 197-11-158(4)).
64. The subject amendments modify the County's SEPA rules by adding provisions relating to air quality & climate and plants & animals. These topics are specifically listed as "elements of the environment" under the State SEPA Rules (WAC 197-11-444).
65. The subject amendments include provisions that the decision maker may condition or deny projects (conditioning includes mitigating measures). This authority is already granted under RCW 43.21C.060, which states ". . . Any governmental action may be conditioned or denied pursuant to this chapter. . ." (the State Environmental Policy Act).
66. While State government is taking action to address air quality and greenhouse gas emissions, the County finds that the subject amendments will also provide assistance at the local government level in fulfilling responsibilities under SEPA.

### ***Zoning Code Amendments***

67. The Cherry Point UGA is zoned Light Impact Industrial (LII) and Heavy Impact Industrial (HII). There are approximately 470 acres in the LII zone and 6,560 acres in the HII zone.
68. The subject amendments modify the LII zone, HII zone, Cherry Point Industrial District, Major Project Permits, and Definitions sections of the Whatcom County Zoning Code (Title 20).
69. Whatcom County Comprehensive Plan Goal 2H is to "Preserve private property rights while recognizing the importance of the rights of the community, including protecting the natural environment and conserving resources."
70. Whatcom County Comprehensive Plan Goal 7A is to "Promote a healthy economy providing ample opportunity for family-wage jobs for diverse segments of the community, which is essential to the quality of life in the area."
71. Whatcom County Comprehensive Plan Policy 7A-2 is to "Foster a diverse, private-sector job base, which will provide family-wage jobs at the state median income level or greater, and facilitate the retention and expansion of existing businesses."
72. Whatcom County Comprehensive Plan Policy 7J-1 is to "Support creation of job opportunities for local residents, especially family wage jobs to decrease unemployment and underemployment.
73. The Zoning Code, as modified by the subject amendments, preserves private property rights and fosters economic development by continuing to allow a wide array of industrial land uses in the Cherry Point UGA. In the LII zone, allowed uses include manufacturing (except new fossil fuel refineries), fabrication, printing, storage, boat building and repair, communications, and other similar uses. In the HII zone, allowed uses include manufacturing (except new fossil fuel refineries), fabrication, printing, storage, boat building and repair, power plants (except coal-fired plants), and solid waste handling facilities.
74. Additionally, the HII zone amendments allow continued operation, maintenance, and certain improvements to existing refineries and transshipment facilities (WCC 20.68.068).
75. Whatcom County Comprehensive Plan Goal 2G is to "Encourage citizen participation in the decision making process." Policy 2G-1 is to "Examine and improve methods to notify affected property owners of proposed land use changes."

76. The subject Zoning Code amendments provide greater public review of certain land uses that could impact public safety, transportation, and the environment. Specifically, the expansion of existing fossil fuel refineries and existing fossil fuel transshipment facilities requires a conditional use permit in the HII zone (WCC 20.68.153). The conditional use permit process requires notice, a public hearing, evaluation of the proposal for compliance with the approval criteria, and a decision by the hearing examiner.
77. Whatcom County Comprehensive Plan Policy 2CC-16 was adopted in 2017 (Ordinance 2017-027). This Policy, which is being modified by the subject amendments, stated:

The County shall undertake a study to be completed if possible by December of 2017 to examine existing County laws, including those related to public health, safety, development, building, zoning, permitting, electrical, nuisance, and fire codes, and develop recommendations for legal ways the County may choose to limit the negative impacts on public safety, transportation, the economy, and environment from crude oil, coal, liquefied petroleum gases, and natural gas exports from the Cherry Point UGA . . . Based on the above study, develop proposed Comprehensive Plan amendments and associated code and rule amendments. . .

78. The subject amendments prohibit new fossil fuel refineries and new fossil fuel transshipment facilities (WCC 20.66.204, 20.68.204 and .205). Potential impacts from new refineries and associated transshipment facilities may include: Increased pollutant emissions to the air, increased chance of crude oil or refined product spills, increased chance of fire or explosion, increased rail traffic that can impact other modes of transportation (e.g. hold up motor vehicle, school bus, or emergency vehicle traffic at railroad crossings), increased chance of derailment, and increased vessel traffic.
79. The Whatcom County Comprehensive Plan states "Whatcom County lies within the influence of the convergent plate margin between the Pacific and North American Plate termed the Cascadia Subduction Zone. Regionally-extensive and damaging earthquakes, termed mega-thrusts, are possible when stress generated between the subducting Pacific Plate and over-riding North American Plate is released. . ." (Chapter 10, p. 10-12). Because new refineries and transshipment facilities would transport and process flammable and toxic materials there is heightened concern, based upon the geology of the region, that these facilities could increase risk to both public safety and the environment.

80. There are currently five oil refineries in Washington State. Two are in Whatcom County, two are in Skagit County, and one in Pierce County. Whatcom County has approximately 3% of the State's population, but 40% of the State's refineries. The County has accepted its fair share of such facilities in the state and region and wants to limit the local impacts on the community and environment of further concentration of such facilities.
81. The subject amendments prohibit new coal fired power plants in the HII zone (WCC 20.68.207).
82. According to the National Institute of Health's National Library of Medicine website (<https://toxtown.nlm.nih.gov/sources-of-exposure/power-plants>):
  - . . . Air pollution from coal-fired power plants cause serious risk to human health. Coal-fired power plants emit 84 of the 187 hazardous air pollutants identified by the U.S. Environmental Protection Agency. These pollutants may cause cancer, according to the National Toxicology Program.
  - Hazardous air pollution released by coal-fired power plants can cause a wide range of health effects, including heart and lung diseases. Exposure to coal power plant pollution can damage the brain, eyes, skin, and breathing passages. It can affect the kidneys, lungs, and nervous and respiratory systems. Exposure can also affect learning, memory, and behavior.
  - . . . Coal-fired power plants are the biggest industrial sources of mercury and arsenic in the air. Mercury pollutes lakes, streams, and rivers, and builds up in fish. People who eat large amounts of fish from contaminated lakes and rivers are at the greatest risk of exposure to mercury.
  - . . . People who work at or live near coal-fired power plants have the greatest health risks from coal pollution. . .
83. The subject amendments continue to allow other types of power plants in the HII zone, but would prohibit coal-fired power plants because of the risks to the local community, public health, and environment.
84. Whatcom County Comprehensive Plan Policy 10D-10 is to "Create updates to Whatcom County land use policies and development regulations to support renewable energy development goals."
85. The subject amendments allow renewable fuel refineries as a permitted use in the HII zone (WCC 20.68.070 and .071).

86. The Whatcom County Comprehensive Plan states that “. . . Cherry Point is also important historically and culturally to the Coast Salish people, and part of the usual and accustomed fishing area for five treaty tribes, reserved under the Treaty of Point Elliot of 1855. . .” (Chapter 2, p. 2-54). Comprehensive Plan Policy 2CC-11 states:

It is the policy of Whatcom County to limit the number of industrial piers at Cherry Point to the existing three piers, taking into account the need to . . . Recognize federal actions upholding treaty rights. . .

87. The United States Department of the Army, Corps of Engineers denied a permit for a new pier under Section 10 of the Rivers and Harbors Act on May 9, 2016 because “. . . the proposed project would violate the Lummi Indian Nation’s tribal Treaty Rights to access and utilize usual and accustomed fishing areas. . .”
88. The subject Zoning Code amendments implement the Comprehensive Plan by prohibiting new piers, docks, and wharves in the HII zone (WCC 20.68.206 and WCC 20.74.055).

### ***Project Permit Procedure Amendments***

89. Whatcom County Comprehensive Plan Goal 2D is to “Refine the regulatory system to ensure accomplishment of desired land use goals in a fair and equitable manner.”
90. Whatcom County Comprehensive Plan Policy 7G-1 is to “Recognize the natural environment as a major asset and manage environmental resources accordingly. We need both economic prosperity and environmental sustainability.”
91. Whatcom County Comprehensive Plan Policy 10A-2 is to:

Protect the environment through a comprehensive program that includes voluntary activity, education, incentives, regulation, enforcement, restoration, monitoring, acquisition, mitigation, and intergovernmental coordination.

92. RCW 88.40 is entitled “Transport of Petroleum Products – Financial Responsibility.” This State law, at RCW 88.40.005, indicates:

The legislature recognizes that oil and hazardous substance spills and other forms of incremental pollution present serious danger to the fragile marine environment of Washington state. It is the intent and purpose of this chapter to define and prescribe financial responsibility requirements for vessels that transport petroleum products as cargo or as fuel across the waters of the state of Washington and for facilities

that store, handle, or transfer oil or hazardous substances in bulk on or near the navigable waters.

93. This State law requires a tank vessel that carries oil as cargo in bulk to demonstrate financial responsibility to “. . . meet state and federal financial liability requirements for the actual costs for removal of oil spills, for natural resource damages, and for necessary expenses” (RCW 88.40.020).
94. WAC 480-62 is entitled “Railroad Companies – Operations.” This State code, at WAC 480-62-300(2), requires any railroad company that transports crude oil in Washington to submit to the Washington Utilities and Transportation Commission a statement that contains:
  - (a) All insurance carried by the railroad company that covers any losses resulting from a reasonable worst case spill.
  - (b) Coverage amounts, limitations, and other conditions of the insurance.
  - (c) Average and largest crude oil train, as measured in barrels, operated in Washington by the railroad company in the previous calendar year.
  - (d) Information sufficient to demonstrate the railroad company's ability to pay the costs to clean up a reasonable worst case spill of oil including, but not necessarily limited to, insurance, reserve accounts, letters of credit, or other financial instruments or resources on which the company can rely to pay all such costs.
95. The State Legislature adopted Engrossed Substitute House Bill (ESHB) 1578 in 2019. This bill amended the “Vessel Oil Spill Prevention and Response” law (RCW 88.46), the “Oil and Hazardous Substance Spill Prevention and Response” law (RCW 90.56), and other provisions of state law.
96. ESHB 1578 states:

The legislature finds that a variety of existing policies designed to reduce the risk of oil spills have helped contribute to a relatively strong safety record for oil moved by water, pipeline, and train in recent years in Washington state. Nevertheless, gaps exist in our safety regimen, especially deriving from shifts in the modes of overwater transportation of oil and the increased transport of oils that may submerge or sink, contributing to an unacceptable threat to Washington waters, where a catastrophic spill would inflict potentially irreversible damage on the endangered southern resident killer



whales. . .Therefore, it is the intent of the legislature to enact certain new safety requirements designed to reduce the current, acute risk from existing infrastructure and activities of an oil spill that could eradicate our whales, violate the treaty interests and fishing rights of potentially affected federally recognized Indian tribes, damage commercial fishing prospects, undercut many aspects of the economy that depend on the Salish Sea, and otherwise harm the health and well-being of Washington residents. . . (Section 1).

97. Tug escorts have been required for larger loaded oil tankers for years. ESHB 1578 amended state law to require certain smaller oil tankers to be under the escort of tugs, require the Department of Ecology to develop and maintain a model to assess current and potential future risks of oil spills from vessels in Washington waters, and modify reporting requirements for railroad cars and pipelines that transport crude oil within the state.
98. While the Washington State legislature has enacted laws relating to the transportation and handling of fossil fuels, there have been a number of accidents involving fossil fuel refineries and transportation of fossil fuels in North America over the years. These accidents, involving flammable and/or toxic materials, have impacted local communities and the environment.
99. Overall, the subject amendments seek to minimize or avoid additional risk to the local community and environment from fossil fuel facilities. The amendments are intended to heighten the level of review or, in certain cases, prohibit uses in order to protect public health, safety & welfare, fisheries industries, fish & wildlife habitat, and the environment.
100. However, in case of accidents, the subject amendments include proof of insurance requirements (WCC 22.05.125), as it is a matter of fairness that responsible parties mitigate the consequences of any accidents.

### ***County Charter and GMA Takings Provisions***

101. Whatcom County Charter Section 1.11 states, "The rights of the individual citizen shall be guaranteed under the Constitutions of the United States and the State of Washington. No regulation or ordinance shall be drafted and adopted without consideration of and provisions for compensation to those unduly burdened."
102. GMA Planning Goal 6, relating to property rights, states "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)).

103. The Whatcom County Prosecuting Attorney's Office has rendered an opinion that the subject Comprehensive Plan and code amendments do not unduly burden property owners and do not take private property for public use.

### **PROPOSED CONCLUSIONS**

1. The subject Whatcom County Comprehensive Plan amendments are consistent with the approval criteria in WCC 22.10.060(1).
2. The subject development regulation amendments are consistent with the approval criteria in WCC 22.10.060(2).

### **PROPOSED RECOMMENDATIONS**

1. Approval of Exhibit A, amendments to the Whatcom County Comprehensive Plan.
2. Approval of Exhibit B, amendments to Whatcom County Code 16.08 (State Environmental Policy Act).
3. Approval of Exhibit C, amendments to the Whatcom County Code Title 20 (Zoning).
4. Approval of Exhibit D, amendments to Whatcom County Code 22.05 (Project Permit Procedures).