

August 11, 2020

Mr. Mark Personius  
Director, Whatcom County Planning &  
Development Services  
5280 Northwest Drive  
Bellingham, WA 98226

Re: Comments on SEPA Determination of Non-Significance SEP2019-00083

Dear Mr. Personius:

This letter is submitted on behalf of the bp Cherry Point Refinery (“Cherry Point”) and the Olympic Pipe Line Company (“Olympic”) regarding the July 28, 2020 issuance of the revised State Environmental Policy Act, RCW 43.21C (“SEPA”), Determination of Non-Significance (“Revised DNS”) for the proposed Comprehensive Plan and County Code Amendments relating to fossil fuel and renewable fuel refineries, storage, transshipment facilities, piers, and other related facilities in the Cherry Point Urban Growth Area (“Cherry Point Amendments”).

Cherry Point and Olympic very much appreciate the efforts by the Whatcom County Planning & Development Services (“PDS”) over the past year. Most recently, at the Planning Commission’s request, Cherry Point has been working with environmental interest groups to jointly propose a number of changes to the Cherry Point Amendments.<sup>1</sup> We are hopeful that the Planning Commission will adopt those changes at the upcoming August 13, 2020 public hearing, and that we will be able to support the Cherry Point Amendments when they are returned to the Whatcom County Council for further public hearings and potential enactment.

Notwithstanding this progress, we are required to submit these comments in response to the County’s Revised DNS. As set forth below, the County’s Revised DNS raises many of the same concerns as the original DNS issued on September 6, 2019 (SEP2019-00083), including not analyzing the potential adverse environmental impacts associated with the originally-proposed August 2019 version of the Cherry Point Amendments (“August 2019 Cherry Point Amendments”).

Accordingly, to ensure compliance with SEPA, we request that the County withdraw the recently issued Revised DNS until there is greater clarity on the proposal that

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<sup>1</sup> Email from Eddy Ury to Mark Personius et al., “Joint code revisions proposal” (Aug. 3, 2020, 4:52 PM), <http://wa-whatcomcounty.civicplus.com/DocumentCenter/View/49324/12d-RE-Sources-Industry-Proposal>.

the County will actually adopt. Assuming, as we hope, that the Planning Commission recommends the proposed amendments set forth in the July 2020 Cherry Point Amendments with the Joint Industry/RE Sources Proposal, the SEPA analysis can focus on the new proposal. This will simplify the SEPA process, help ensure compliance with the law, and bolster the defensibility of the Cherry Point Amendments in their final form.

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In the hopefully unlikely case that the PDS does not withdraw the Revised DNS to await greater certainty on the anticipated code amendments, Cherry Point and Olympic respectfully submit these comments in response to the Revised DNS. In response to the prior issuance of the September 2019 DNS, Cherry Point and Olympic submitted three comment letters that raised concerns with the substance of the DNS.<sup>2</sup> Many of the comments and objections raised in these three letters have not been addressed in the Revised DNS. Accordingly, these three comment letters are hereby incorporated by reference with respect to the Revised DNS.

In addition, we provide the following concerns related to the Revised DNS, including the revised Environmental Checklist.

- **The Revised DNS does not demonstrate that environmental values and information are fully considered.** When issuing a SEPA threshold determination, the County is required to demonstrate that it considered “information reasonably sufficient to evaluate the environmental impact of a proposal.”<sup>3</sup> This analysis is required for Nonproject proposals, like the Cherry Point Amendments, for which the County must address “the probable impacts of any future project action the

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<sup>2</sup> See Letter from Richard L. Settle, Foster Pepper PLLC, to Mark Personius, Director, PDS, re: *Comments on Whatcom County Determination of Non Significance SEP2019-00083* (Sept. 19, 2019) (hereinafter, “Settle SEPA Comments”); Letter from Patrick J. Mullaney, Stoel Rives LLP, to Mark Personius, Director, PDS, re: *Comments on the SEPA Determination of Non-Significance SEP2019-00083* (Sept. 20, 2019) (hereinafter, “Mullaney SEPA Comments”); Letter from Peggy Otum, Arnold & Porter, to Mark Personius, Director, PDS, re: *Comments on the SEPA Determination of Non-Significance SEP2019-00083* (Sept. 20, 2019). In addition, Cherry Point submitted comments to the Whatcom County Planning Commission on September 12, 2019, commenting, *inter alia*, that the August 2019 version of the Cherry Point Amendments could have serious adverse economic and environmental consequences. Those comments are also hereby incorporated by reference and discussed as relevant herein. See Letter from Brian D. Israel, Arnold & Porter, to Whatcom County Planning Commission, re: *Whatcom County Comprehensive Plan and County Code Amendments* (Sept. 12, 2019) (hereinafter, “Israel Cherry Point Amendments Comments”). The above letters are fully incorporated by reference.

<sup>3</sup> WAC 197-11-335. See also WAC 197-11-100(2); Settle SEPA Comments, *supra* note 2, at 4; Mullaney SEPA Comments, *supra* note 2, at 2–3.

proposal would allow.”<sup>4</sup> Agencies have greater flexibility when completing the Environmental Checklist for Nonproject proposals; however, they may refrain from responding to questions in Part B (“Environmental Elements”) only where they determine and explain that a response to a question would “not contribute meaningfully to the analysis of the proposal.”<sup>5</sup> The County has answered “N/A” a number of times, but has not explained why a response to the question would not contribute to the analysis of the proposal.

- **The Revised DNS does not adequately address adverse impacts.** A SEPA DNS must be based on consideration of direct, indirect, and cumulative impacts of the proposed action, and shall not limit its consideration of impacts to only those aspects within its jurisdiction.<sup>6</sup> In addition, agencies cannot rely on the assumption that a proposed action will achieve claimed environmental benefits.<sup>7</sup> Rather, Washington Department of Ecology’s (“Ecology’s”) SEPA rules acknowledge that “proposals designed to improve the environment . . . may also have significant adverse environmental impacts.”<sup>8</sup>

The Revised DNS does not adequately address the issue of leakage of greenhouse gas (“GHG”) emissions resulting from the Cherry Point Amendments.<sup>9</sup> As described in previous comments, increased GHG emissions resulting from carbon leakage is a probable, significant adverse impact from the August 2019 Cherry Point Amendments.<sup>10</sup> Given that the Cherry Point Amendments will have no effect on demand for fuels produced by industry in the Cherry Point Urban Growth Area,

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<sup>4</sup> *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wash. App. 555, 579 (2013).

<sup>5</sup> WAC 197-11-960 (“For nonproject proposals complete this checklist and the supplemental sheet for nonproject actions (Part D). The lead agency may exclude any question for the environmental elements (Part B) which they determine do not contribute meaningfully to the analysis of the proposal.”). See *SEPA Checklist Guidance*, Wash. State Dep’t of Ecology, <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/SEPA-checklist-guidance> (last visited Aug. 11, 2020) (“It is not acceptable to reply “not applicable” or “does not apply” — unless the proponent can *explain* why the question does not apply, not just because an answer is unknown.”) (emphasis added); see also WAC 197-11-960; *FOSV v. King County*, GHMB Case No. 20-3-0004c, Order on Dispositive Motions, at 10–12 (May 26, 2020) (invalidating a King County ordinance, in part, because the County’s non-project SEPA checklist contained numerous “not applicable” responses); Mullaney SEPA Comments, *supra* note 2, at 4.

<sup>6</sup> WAC 197-11-060(4); WAC 197-11-330(4)(b). See also Settle SEPA Comments, *supra* note 2, at 4.

<sup>7</sup> See Mullaney SEPA Comments, *supra* note 2, at 4.

<sup>8</sup> WAC 197-11-330; see also Mullaney SEPA Comments, *supra* note 2, at 4.

<sup>9</sup> SEP2019-00083 (July 28, 2020), PDF p. 31.

<sup>10</sup> See Mullaney SEPA Comments *supra* note 2, at 9–10, 12; Israel Cherry Point Amendments Comments, *supra* note 2, at 21–24; Settle SEPA Comments, *supra* note 2, at 5.

it is foreseeable that adding costs and regulatory uncertainty could cause production to shift to less efficient refineries—resulting in higher, not lower, GHG emissions.<sup>11</sup> Indeed, the Governor of Washington has directed Ecology to establish criteria for assessing carbon leakage under the GHG Assessment for Projects rule.<sup>12</sup>

The County also acknowledges the potential for transportation impacts in the Revised DNS, but appears to defer the analysis of those impacts to subsequent project-specific reviews.<sup>13</sup> The Washington Supreme Court has held proposed land-use related actions are not insulated from full environmental review simply because there are not yet project-specific proposals.<sup>14</sup> In addition, agencies cannot defer consideration of impacts to subsequent project-specific reviews where doing so would “avoid discussion of cumulative impacts.”<sup>15</sup>

- **The Revised DNS does not meaningfully analyze the Cherry Point Amendments alternatives.** To fulfill SEPA’s mandate to “study, develop, and describe appropriate alternatives,” the County is to conduct an analysis of alternative methods that could have less adverse environmental impacts and could achieve the County’s objectives of reducing GHG emissions and protecting public safety.<sup>16</sup> Analysis of alternatives requires that agencies conduct comparative analysis of those alternatives for the purpose of assisting the ultimate decision-

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<sup>11</sup> See IPCC, *Climate Change 1995: IPCC Second Assessment Report* 46 (June 1996) <https://www.ipcc.ch/site/assets/uploads/2018/06/2nd-assessment-en.pdf>; Cong. Rsch. Serv., “Carbon Leakage” and Trade: Issues and Approaches (Dec. 19, 2008), <https://fas.org/sgp/crs/misc/R40100.pdf>; Meredith Fowlie & Danny Cullenward, *Report on Emissions Leakage and Resource Shuffling* (Sept. 10, 2018), [https://calepa.ca.gov/wp-content/uploads/sites/6/2018/09/6e.-IEMAC\\_Meeting\\_Materials\\_9-21-18\\_Fowlie\\_and\\_Cullenward\\_Report\\_on\\_Emissions\\_Leakage.pdf](https://calepa.ca.gov/wp-content/uploads/sites/6/2018/09/6e.-IEMAC_Meeting_Materials_9-21-18_Fowlie_and_Cullenward_Report_on_Emissions_Leakage.pdf). See, e.g., *Allowance Allocation*, California Air Resources Board, <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/allowance-allocation> (last visited Aug. 1, 2020) (allocating emissions allowances to industrial facilities “[t]o minimize industrial emissions leakage, where industrial emissions reductions in California are counterbalanced by emissions increases outside the State”).

<sup>12</sup> Directive of the Governor 19-18, *Environmental Assessment of Greenhouse Gas Emissions* (Dec. 19, 2019), <https://www.governor.wa.gov/sites/default/files/directive/19-18%20-%20ECY%20Climate%20Rules%20%28tmp%29.pdf>.

<sup>13</sup> SEP2019-00083 (July 28, 2020), PDF p. 35.

<sup>14</sup> *King Cty. v. Wash. State Boundary Review Bd. for King Cty.*, 122 Wash. 2d 648, 664 (1993).

<sup>15</sup> *Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wash. App. 787, 804 (2013). See also *FOSV v. King County*, GHMB Case No. 20-3-0004c, Order on Dispositive Motions, at 9–10 (May 26, 2020) (“While project level impacts may properly be deferred to the permitting stage, the jurisdiction must evaluate the impacts allowed under the changed designation at the time of that nonproject action.”).

<sup>16</sup> RCW 43.21C.030(2)(e); see also Settle SEPA Comments, *supra* note 2, at 9–10.

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making process.<sup>17</sup> The County has identified two alternatives, the August 2019 Cherry Point Amendments and the July 2020 Cherry Point Amendments.<sup>18</sup> However, the County did not conduct an analysis comparing the potential impacts of the alternatives.

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As stated above, Cherry Point very much appreciates the efforts undertaken by the Planning Commission and the PDS to revise the Cherry Point Amendments and to incorporate comments from all stakeholders in this important process. We are hopeful that this process will continue on a positive path, and that the Planning Commission's upcoming meeting will lead to additional constructive dialogue. Please feel free to contact me at [brian.israel@arnoldporter.com](mailto:brian.israel@arnoldporter.com) or 202.942.6546 to discuss further.

Sincerely,



Brian D. Israel

cc: Pam Brady, Director, Government and Public Affairs, bp America  
Christina Landgraf, Counsel, bp America  
Terry Zimmerman, President, Olympic Pipe Line Company LLC  
Ethan Shenkman, Arnold & Porter

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<sup>17</sup> Richard L. Settle, *The Washington State Environmental Policy Act, A Legal and Policy Analysis* § 14.01 (2019 Ed.).

<sup>18</sup> SEP2019-00083 (July 28, 2020), PDF p. 26–30.