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**Mark Personius**  
 Director

**Memorandum**

December 3, 2019

**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	

At the November 14, 2019 meeting, the Planning Commission asked the Planning and Development Services Department to develop alternatives for expansion and change of use language. At the December 12, 2019 work session, we would like discuss the information and alternatives set forth below.

**1. "Expansions"**

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 .159). 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.

At the November 14, 2019 meeting, the 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 (and not use the term "improvement" as suggested by staff).

The Commission discussed limiting conditional use permits to fossil fuel refinery and transshipment expansions, which are defined as projects that create net facility greenhouse gas (GHG) emission increases above a GHG project threshold (which is a number that would be defined later). However, the Commission did not act on this concept at the meeting. The Planning Commission asked staff to develop alternative language for expansions. Several alternatives are set forth below.

*Alternative A (GHG Threshold: 25K or 75K)*

Add the following language to the "Definitions" section of the Whatcom County Zoning Code (WCC 20.97):

"Expansion" of existing fossil fuel or renewable fuel refineries or transshipment facilities means proposed development that generates a net increase of [25,000 or 75,000] metric tons or more of carbon dioxide equivalent per year. The metric tons are calculated based upon carbon dioxide equivalent generated solely from the proposed development itself, and not from existing facilities that may be related

to the proposed development. Expansion does not include routine maintenance and repair, replacement of existing equipment, safety upgrades, heating systems, cooling systems, or accessory uses.

*Rationale for 25K Threshold:* The Northwest Clean Air Agency (NWCAA) letter of September 25, 2019 summarizes past NWCAA regulation of GHG emissions as follows:

. . . Historically, if the amount of GHG emissions have been between 75K tons and 25K tons per year, NWCAA has required mitigation for GHG emissions relying on its SEPA authority – implemented and enforced through a NWCAA issued permit. If the amount of GHG emissions is less than 25K tons, the NWCAA has not historically required mitigation under its SEPA authority. . . (p. 1).

*Rationale for 75K Threshold:* The NWCAA letter of September 25, 2019 summarizes State Department of Ecology regulation of GHG emissions as follows:

. . . Ecology regulates GHG emissions when a project triggers the requirement for a Prevention of Significant Deterioration permit for another regulated air pollutant and the GHG emissions exceed 75K tons per year. WAC 173-400-110(5)(b). In such instances, Ecology establishes the Best Available Control Technology (BACT) for the GHG emissions. . . (p. 1).

In summary, the proposal could define an “expansion” as new development emitting more carbon dioxide equivalent than established in a threshold (e.g. 25,000, or 75,000 tons/year). However, as drafted, expansions would not include routine maintenance and repair, replacement of existing equipment, etc. regardless of the GHGs produced. Therefore, such improvements would not require a conditional use permit even if they exceeded the GHG threshold.

*Challenges/Issues:*

- As previously mentioned, the Planning Commission approved a motion on October 24, 2019 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). Alternative A would re-insert GHG issues into the Zoning Code.
- This approach would require the Planning Commission and, ultimately, the County Council, to define the GHG threshold for proposed development that is permitted outright and proposed development that requires a conditional use permit.
- Alternative A would also present difficulties from an administrative perspective. The Planning and Development Services Department does not have expertise in GHG models or analysis. In the SEPA review process, the County can consult with other agencies with expertise (WAC 197-11-335, .502, .570). However, there is no legal

requirement that an agency with expertise must assist a local government in determining the permitting path for a given project. Therefore, the County may need to hire a third party to review the proposal at the pre-application stage (this scenario may result in a modification of the fee schedule to cover third party review costs).

- There are inherent questions when modelling GHG emissions, including: Is modelling required for maximum operation of the facility (full capacity, 24 hours a day, 7 days a week) or some other level?
- Finally, the GHG threshold approach would be one-dimensional as it would only require a conditional use permit when modeled GHG emissions reach a certain level. It would not require a conditional use permit (which includes public notice, a public hearing, and hearing examiner decision), if GHGs are below the established level.

Alternative B (Staff Recommendation)

Staff is proposing an alternative that would specifically define the permitted uses in the Heavy Impact industrial zone (new WCC 20.68.068) to include the following:

- (1) Accessory buildings.
- (2) Office space.
- (3) Parking lots.
- (4) Radio communications facilities.
- (5) Security buildings, fire stations, and operation centers.
- (6) Storage buildings.
- (7) Routine maintenance and repair.
- (8) Environmental improvements and other projects, excluding storage tanks, that are required on the subject site by federal, state, regional, or local regulations.
- (9) Road widening projects.
- (10) Temporary trailers.
- (11) Heating and cooling systems.
- (12) Cable installation.
- (13) Information technology improvements.
- (14) Continuous emissions monitoring systems or analyzer shelters.
- (15) Wastewater and stormwater treatment facilities.

- (16) Replacement of existing equipment.
- (17) Safety upgrades.
- (18) Storage tanks less than ??? gallons.
- (19) Other similar structures or activities.

The proposal would require a conditional use permit for “expansions” of refineries or transshipment facilities that are not covered in the list of permitted uses.

*Rationale:* This alternative would allow routine maintenance and repair, replacement of existing equipment, safety upgrades, and other minor to mid-size projects as permitted outright uses. It would require a conditional use for more substantial projects, including tanks over a certain size (to be determined). From an administrative perspective, this alternative would provide relatively clear code language relating to whether proposed development is permitted outright or requires a conditional use permit.

*Challenges/Issues:*

- As with many zoning provisions, there could be differences in interpreting various uses that are permitted outright. However, the language is relatively straightforward and there is an appeal process where an applicant may appeal zoning interpretations made by Planning and Development Services to the Hearing Examiner (WCC 22.05.020 and .160).
- This approach would require the Planning Commission and, ultimately, the County Council, to define the size of tanks that are permitted outright and the size of tanks that require a conditional use permit. It should be noted that, on industrial lands, SEPA review is not required for the installation of tanks with a total capacity of 60,000 gallons or less (WAC 197-11-800(2)(h)), except when a “license governing emissions to air” is required (e.g. a permit from NWCAA or State Department of Ecology).

## **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.

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. In any event, 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.

Several alternatives are presented below. Staff would note that additional review by legal counsel may be appropriate to clarify the change of use language and address potential legal issues regarding the extent to which the County may regulate exports.

#### Alternative A (Change of Use Permit Only When No Other Permits Required)

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).

*Rationale:* 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.

*Challenges/Issues:*

- In a hypothetical example, if an existing refinery currently shipped out 2% 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?

*Alternative B (RE Sources Proposal)*

The organization RE Sources for Sustainable Communities submitted the following language proposal (underlining and strikethroughs added to show differences from Council’s proposal):

A change of use occurs when a facility is altering its primary operational purpose, deviating from what was described in the original permit and SEPA applications, such that new foreseeable adverse impacts arise. A conditional use permit will be required for changes of use of existing structures in addition to any other required permits or constructions. ~~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

*Rationale:* This modification is intended to further define what constitutes a change of use.

*Challenges/Issues:*

- The proposed language addresses a facility’s “primary operational purpose” but does not define this term.
- The proposal indicates that a conditional use permit is required for certain changes of use. A conditional use is a Type III permit that requires notice, public hearing, and decision by the hearing examiner. However, the proposal also indicates that it will be processed as a Type I permit, which is administratively approved by staff and does not require notice or a public hearing (WCC 22.05.020).

- The Whatcom County Comprehensive Plan states that General Petroleum constructed the Ferndale Refinery [now Phillips 66] in 1954, Alumax/Pechiney/Howmet constructed the Aluminum Smelter [now Alcoa Intalco] in 1966, and the Atlantic Richfield Company constructed the Cherry Point Refinery [now BP] in 1971 (Chapter 2, p. 2-54). The State Environmental Policy Act or SEPA (RCW 43.21C) was adopted in 1971. County Zoning was originally adopted in 1972. Therefore, three major industries at Cherry Point were not subject to SEPA or Zoning when originally constructed. Additionally, building permit records prior to the early 1970s were apparently not retained by the County. Therefore, determining a facility's primary operational purpose as "described in the original permit and SEPA applications" may not be possible.

### Staff Recommendation

As discussed above, change of use can be a complicated issue in the context of an existing refined fossil fuel refinery/transshipment facility changing to an unrefined fossil fuel transshipment facility. 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 are simple and clear. While we think Alternative A would improve the language, the basic issues of interpretation highlighted above would remain. Therefore, the Planning Commission may want to consider a motion that Council request Cascadia Law Group to clarify the change of use 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.