

**WHATCOM COUNTY**  
 Planning & Development Services  
 5280 Northwest Drive  
 Bellingham, WA 98226-9097  
 360-778-5900, TTY 800-833-6384  
 360-778-5901 Fax



**Mark Personius**  
 Director

Memorandum

January 7, 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	

At the January 16, 2020 meeting, the Planning and Development Services Department would like to continue the discussion on expansion and change of use language, along with other text amendments recommended in the exhibits.

### **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 .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.

#### Alternative A

The concept of considering "Energy Facility Site Evaluation Council" (EFSEC) threshold language (with different numerical values) was discussed at the December 12, 2019 Planning Commission meeting. State law defines energy facilities that are subject to certification from EFSEC (RCW 80.50.020(12) and RCW 80.50.060), including the following:

- Facilities which will have the capacity to receive more than an average of fifty thousand (50,000) barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction.

- Facilities capable of processing more than twenty-five thousand (25,000) barrels per day of petroleum or biofuel into refined products except where such biofuel production is undertaken at existing industrial facilities. [The [EFSEC website](#) clarifies this threshold applies to any new refinery and any existing refinery that “. . . *increases* its processing of petroleum into refined product by more than 25,000 barrels per day. . .” (italics added for emphasis)].

Additionally, the State’s SEPA Rules indicate:

For proposals to construct any new oil refinery, or an expansion of an existing refinery that shall increase capacity by ten thousand (10,000) barrels per day or more not under the jurisdiction of EFSEC, the lead agency shall be the department of ecology (WAC 197-11-938(10)).

For purposes of comparison, the Phillips 66 website indicates that the Ferndale Refinery has a “crude capacity” of 105,000 barrels per day and the BP website indicates that “Cherry Point can process approximately 250,000 barrels of crude oil per day on average.”

After reviewing the above EFSEC and SEPA rules, staff has drafted language changes to proposed WCC 20.68.153 relating to when an “expansion” requires a conditional use permit, for consideration by the Planning Commission. Please note that the numbers in yellow are for illustrative purposes and may be modified by the Planning Commission.

.153 Expansion of existing legal fossil fuel refineries or expansion of existing legal fossil fuel transshipment facilities.7. 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 processing of fossil fuels into refined product by more than 10,000 barrels (or 420,000 gallons) per day; or
- 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; or
- Cumulatively increases fossil fuel storage tank capacity of the facility by more than 50,000 barrels (or 2,100,000 gallons).

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 activities 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. No further changes to the approval criteria for these conditional uses are proposed in 20.68.153.

The rationale for the numbers highlighted in yellow in proposed WCC 20.68.153 is shown below:

- The State Department of Ecology assumes lead agency status for SEPA for any expansion of an existing refinery that increases capacity by 10,000 barrels per day or more (WAC 197-11-938(10)). A barrel of petroleum or related product is 42 U.S. gallons (U.S. Energy Information Administration). Therefore, 10,000 barrels is equivalent to 420,000 gallons. Additionally, the EFSEC assumes jurisdiction for facilities that increase processing of petroleum into refined products by

more than 25,000 barrels per day. The 10,000 barrel threshold, which is almost half way to the EFSEC review threshold, is a reasonable place to start the discussion for requiring a County conditional use permit. It attempts to balance industry needs for operational flexibility with concerns about potentially significant increases or changes in refinery operations that have been expressed in many public comments. The proposed 10,000 barrel threshold triggering a conditional use permit would also apply to increases in transshipment activity.

- The example 50,000 barrel (2,100,000 gallon) storage tank expansion threshold for a conditional use permit would provide some ability for the refineries to add storage capacity as a permitted use, while requiring larger projects that increase the capacity to store hazardous liquids to obtain a conditional use permit. 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). Under existing code, both tanks are outright permitted uses in the Heavy Impact Industrial zone, but would require a conditional use permit under the example approach described above.

Under this approach, the Planning and Development Services Department would have to evaluate every future permit application from the industry to determine whether the proposal would exceed any adopted thresholds, including uses identified as permitted or accessory uses in proposed WCC 20.68.068. We would do so by requiring the applicants to specifically address whether any of the thresholds would be exceeded by the proposal. If Planning and Development Services determined that the proposal was an outright permitted use—and did not meet the definition of an “expansion” — conditions ensuring that those expansion thresholds would not be exceeded in the implementation of the project could be added to the permit.

The proposed conditional use threshold language addresses cumulative increases in processing, transshipment, and storage capacity. If adopted, this language would require the County to track and review all industry permits issued after the effective date of the final adopted ordinance to determine whether any individual future permit application, when looked at in combination with previous permits, would exceed the expansion thresholds described above.

Finally, we would note that the conditional use permit would be required for “development” that meets the above thresholds. “Development” is defined in WCC 20.97.099 as “. . . any activity that requires federal, state, or local approval for the use or modification of land or its resource. . .”

### Alternative B

Staff previously proposed 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, structures, process piping, and booster pumps.
- (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 projects and bridges.
- (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 and upgrading 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.

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.

## **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.

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 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?

### Alternatives

Staff believes that there are a couple ways to address the above challenges/issues.

If the Planning Commission recommends Alternative A for “Expansions,” the proposed change of use provisions (WCC 20.74.110) may be unnecessary. This is because a conditional use permit would be triggered if processing, transshipment, or storage of petroleum exceeded certain thresholds.

If the Planning Commission does not recommend Alternative A 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 are simple and clear. Therefore, if the 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. Expansion of Renewable Fuel Facilities**

At the December 12 meeting, the Planning Commission approved a motion that new renewable fuel facilities should be allowed as a permitted use (instead of a conditional use, as proposed by Council). However, expansion of existing renewable fuel facilities is still listed as a conditional use (proposed WCC 20.68.160, Exhibit C, p. 16). Since new renewable facilities would be a permitted use, does the Commission want to consider whether expansions should also be a permitted use?

### **4. 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.