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February 18, 2009

Whatcom County Council
311 Grand Avenue, Suite 105
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Whatcom County Planning
Commission
5280 Northwest Dr.
Bellingham, WA 98226

Matt Aarnott, Senior Planner
Whatcom County
Planning & Development Services
5280 Northwest Dr.
Bellingham, WA 98226

Re: Scoping of EIS for Ten-Year UGA Review¹

Dear Council Members, Planning Commissioners, and Mr. Aarnott:

In response to your SEPA Determination of Significance, Scoping Notice, Scoping Document, and related releases of data by the County, we submit the following written comments on behalf of Caitac USA Corp.

1. Proposed Action and Alternatives

a. Proposed Action

The Scoping Document very generally states that the proposed action or "proposal," is the Ten-Year UGA Review itself, and that specific actions will be proposed as a result of the Ten-Year UGA Review. It is contemplated that, at some future time, actions will be proposed regarding adjustment of UGA boundaries, other comprehensive plan amendments and development regulation amendments involving uses and densities and other aspects of development in order to ensure that the adjusted UGA will accommodate the housing and employment necessary to accommodate the Office of Financial Management (OFM) twenty-year population growth projection. However, the County does not identify specific proposed action(s), or even indicate what action(s) might be proposed, during the preparation process or after the completion of the EIS. It also does not identify a preferred alternative at this time.

Because the County has stated only an overall objective of conducting the twenty-year UGA review process without articulating any specific proposed actions, the reasonableness of alternatives must be determined on the basis of the overall objective rather than any specific proposal. Thus, it is especially important that:

¹ The County's documents inconsistently refer to population projections for 2009 or 2031 without explaining the discrepancy. 2029 is the deadline for the ten-year UGA review, while, 2031 is the deadline for the seven-year comprehensive plan review. The County should clarify the confusion about the end-point of the ten-year UGA review.

1. the EIS comparatively analyze the environmental impacts of a range of alternatives that encompasses the potential future proposed actions that would comply with GMA requirements; and
2. the analysis of the alternatives include all of the significant variables related to the GMA requirement that UGAs be sufficient in size and development capacity to allow development of housing and employment necessary to accommodate the twenty-year OFM population projection.

Furthermore, the analysis of the alternatives must include not only the environmental impacts if projected growth is accommodated in the adjusted UGA but also the environmental impacts if projected growth is not accommodated in the UGA but instead occurs in the form of sprawling rural growth.

b. No Action Alternative(s)

The no action alternative initially identified in County releases was to be a “continuation of the adopted [2002] Comprehensive Plan extended to 2031” See Scoping Document at 2. The initially proposed no action alternative subsequently was changed to a two-part no action alternative, according to which: Part (a) would be based on the continuation of the 2002 comprehensive plan with an extension of the 2002 population projection of 234,000 persons to 2031, by greatly decreasing the assumed annual growth rate in the 2002 plan, and; Part (b) would be based on the continuation of the 2002 comprehensive plan with an extrapolation of the population growth projection to 258,448 in 2031. See February 11, 2009, Memorandum from Lisa Grueter to David Stalheim on “Whatcom 2031 Proposed SEPA Alternatives—Suitability Analysis Approach.”

As for Part (a), it appears the County interpreted the concept of “continuation of the adopted [2002] Comprehensive Plan extended to 2031” to mean that nothing would be changed in the comprehensive plan or development regulations relating to the UGA, but that the *impacts* of no change would be analyzed on the basis of the assumption that the 2022 population projection of 234,000 in the 2002 comprehensive plan would not be reached for an additional seven to nine years in 2029 or 2031.

This would not be a legally valid or practically useful no action alternative. It would not be legally valid because it *does* involve action—changing the 2022 population projection of 234,000 to a 2029 (or 2031) projection of 234,000. In short, the annual growth rate upon which the 2002 plan was based, in effect, would be greatly reduced in order to extend the same population projection to 2029 (or 2031). This could be an action alternative, but it is not a no-action alternative. A no action alternative based on the continuation, without change, of the 2002

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comprehensive plan, would apply the same annual growth rate assumption used in the 2002 plan and extend the population projection to 2029 (or 2031) based on that same annual growth rate.

If the annual growth rate were greatly decreased to assume that the previously projected 2022 population of 234,000 would not occur until 2029 (or 2031), that change would significantly affect the environmental impacts of no action. I.e., the environmental impacts of continuation of the present plan, with a much reduced annual growth rate, would be much less than continuation of the present plan with the plan's assumed annual growth rate.

In fact, this so-called 'no action' alternative would be an action alternative. But even as an action alternative, it would provide no practically useful information because there is no factual justification for the radical reduction in annual growth rate from that assumed in the 2002 plan. As an action alternative, relying on an artificially low annual growth rate without any factual justification it would not be a reasonable alternative because it would not attain the objectives of the ten-year UGA review; i.e., ensuring the accommodation of the OFM twenty-year population growth projection. Moreover, analysis of this unrealistic alternative would provide no useful information because it would grossly understate impacts and violate the rule of reason.

If this so-called no action alternative were, nonetheless, included as a third action alternative, it should be balanced by a fourth action alternative based on a growth assumption that is proportionately higher than the middle-range OFM projection. Under state law, and as the County acknowledges, the middle-range projection is what is most likely to occur, and the high and low ends of the range are not projections but bookends on the range of uncertainty in the OFM middle-range projection. If a low-end alternative is analyzed, a high-end alternative must also be analyzed unless the County has data justifying an assumption that any deviation from the middle range could only be on the low end.

As for Part (b), it would be a valid no action alternative. It would analyze the environmental impacts of continuing present planning and regulatory policies for the next twenty years on the assumption of a realistic 2029 population growth projection, essentially a continuation of the annual growth rate that was the basis for 2002 plan's assumed 2022 population of 234,000.

The analysis of the no action alternative, as described in Part (b), should include the environmental impacts that would occur if the actual population growth turns out to be different than a continuation of the annual growth rate assumed in the 2002 plan. I.e., analysis of the impacts of continuation of present policies and regulations under alternative actual population growth scenarios.

In summary, the no action alternative should be Part (b). Part (a) should not be included because it is not a no action alternative and the environmental analysis would serve no useful purpose. It would be a waste of time and taxpayer money, and should be abandoned.

c. Action Alternatives

Both action alternatives, "X" and "Y," are based on the realistic 2031 middle-range projection, reduced by extrapolation to a 2029 projection of 258,448. If a third action alternative based on a 234,000 projection (as described in subsection b. above) is included, a fourth action alternative of about 282,000 must also be analyzed, unless data justifies the assumption that any deviation from the middle-range OFM projection will only be on the low end. Alternatively, the X and Y alternatives could analyze a range of actual future population growth, above and below the assumed middle-range projection, as indicated in the list of variables below.

There is a serious flaw in the X and Y alternatives in that they are based on different assumptions regarding relevant variables. For example, X is based on "planned densities," while Y is based on "achieved densities." Given the lack of historical data showing that planned densities will, in fact, be achieved, the analysis of environmental impacts of the two alternatives must be based on both achieved and planned densities. E.g., what environmental impacts will occur if planned densities are achieved and what environmental impacts will occur if planned densities are not achieved?

To provide meaningful comparative analysis of environmental impacts, the action alternatives must include all of the important variables, including but not limited to:

- The various potential adjustment of existing UGAs (expansions and contractions);
- A realistic range of all of the important variables in the land-capacity analysis (LCA), such as market factors, vacancy rates, average household size, developable parcels, partially developable parcels, deductions for critical areas, including floodplains and wetland buffers, deductions for public uses, and deductions for odd-shaped parcels;
- A range of potential adjustments by cities, as invited and expected by the County, of the components of the County's land-capacity analysis, unless EIS preparation is deferred until cities' recommended adjustments of the County LCA have been taken into account and the County has adjusted its LCA; and
- A range of potential, actual population growth above and below the assumed middle-range projection.

As indicated above, the County's LCA is tentative on numerous variables and generally acknowledges that development capacity of cities is overstated until cities assess the County LCA and propose adjustments. The analysis of action alternatives should not be done until the County has considered cities' recommendations and adjusted the LCA accordingly.

3. Impacts

a. Data Used for Analysis of Impacts

The County does not explain why the data it uses in its LCA, and plans to use for its EIS, is based on a measure of the County's growth inside and outside of UGAs from 2000-2008. The relevant period should instead be from the date of the County's initial adoption of the UGAs in 1997, until the present ten-year UGA review. Because the County did not complete its ten-year review on time and is noncompliant with the ten-year UGA review requirement of RCW 36.70A.130(3), the extended period of review would be longer than ten years.

In the County document entitled "Review of Growth," the County says that it is using data from the time period April 1, 2000 to April 1, 2008, because "[t]hese dates correspond to the dates used by the Office of Financial Management (OFM) for annual estimates of population." What the County means by this statement is unclear. Is the County saying that the OFM did not provide data for 1998 and 1999? If so, it is incorrect, as the OFM provides data for those and other years on its website at <http://www.ofm.wa.gov/pop/cociseries/default.asp>. Regardless of what population data is available from OFM, the requirement of RCW 36.70A.130(3), that the County determine the extent to which growth has occurred inside and outside of the UGAs as of the date of the County's prior UGA designation, would not depend on OFM data.

b. Rural Growth

As the County recently has acknowledged, the rural growth rate during the 2000-2008 period was several hundred percent higher than expected—over 26% of the County's overall growth during that period, and development rights for over 26,000 residential units remain in rural and resource lands. See "Review of Growth."

Such high rates of rural growth, if they continue, will have numerous, significant adverse impacts that must be analyzed in the EIS for each of the alternatives. High rural growth rates have significant, adverse impacts on: land use and shoreline plans; transportation, given the much greater reliance on single-occupancy vehicles and much longer average commute distances, both of which cause increased congestion; related air quality and climate change impacts resulting from increased vehicle miles traveled (VMTs), increased greenhouse gas (GHG) emissions; and other significant adverse public facility impacts because of limited public facilities in rural areas.

c. Unrealistic Land Capacity Analysis Assumptions

The County's Land Capacity Analysis is based on unrealistic assumptions about the availability and development capacity of land in cities and UGAs. The unrealistic assumptions relate to the land characterized as undeveloped or partially undeveloped, the availability of such

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land for development, deductions for critical areas that do not include wetland buffers and floodplains, deductions for public uses, market demand for such development at planned densities, occupancy rates of such development, average household size that will be housed in such development, and market factor. The County invites unrealistic assumptions in LCA to be revised by cities. However, it is unknown whether, or to what extent, proposed revisions of LCA assumptions and data by cities will be developed by the cities and accepted by the County.

To the extent that the assumptions of the County LCA are unrealistic, the LCA overstates development capacity. The EIS, for each alternative, must analyze the adverse environmental impacts that will occur depending on the extent to which the County has overstated development capacity. Such impacts that must be analyzed would include: affordable housing impacts; rural sprawl impacts; transportation and GHG emissions impacts resulting from rural sprawl; and endangered species impacts as a result of assumptions regarding developability of floodplains.

d. Climate Change Impacts

The County's documents relating to the Ten-Year UGA Review EIS barely mention climate-change impacts and contain no elaboration on what such analysis would include. The SEPA Implementation Working Group of the State Climate Action Team reported to the Climate Action team in October, 2008, and the Climate Action Team incorporated the recommendations of the SEPA IWG in the Climate Action Team's Final Report to the Legislature in December, 2008.

These Reports conclude that SEPA requires the analysis of two distinct types of climate change impacts: (1) GHG emissions causing global warming and related regional impacts; and (2) Accommodation or Vulnerability impacts where environmental effects of climate change interact with project and nonproject proposals. An example of GHG emissions impacts would be a county's nonproject actions relating to UGA size and development capacity that cause increased rural development, increased average commute distance, increased VMTs, and, consequently, increased GHG emissions. An example of accommodation/vulnerability impacts would be nonproject actions relating to UGA size and development capacity that allow development of land that would be inundated by sea-level rise causing adverse impacts to such structures, the public facilities that serve them, and water quality, as pollutants resulting from submerged structures and public facilities enter bodies of water or development of floodplains that become subject to much more extreme flooding as a result of changes in flooding patterns and extremes as a result of climate change.

Both categories of climate-change impacts must be analyzed for all alternatives in the EIS. In addition, there must be analysis of the adverse environmental impacts of including land as developable in an overstated LCA that is not developable because of rising sea level, changing flooding patterns, reduced availability of water resources, and the like. Such land must either be removed from LCA or the adverse impacts of including such land must be fully analyzed. In

addition, the 2008 statutory requirement that GHG emissions be reduced to 1990 levels by 2020 must be acknowledged in the EIS, and the impacts of the alternatives on that requirement must be analyzed. Whatcom County's high rate of rural growth makes it highly unlikely that it will be able to meet the state statutory requirement. For comprehensive coverage of required SEPA analysis of climate change impacts, see http://www.ecy.wa.gov/climatechange/2008_CAT_docs/ltw_app_v2.pdf.

e. Floodplain Impacts

The County included most floodplains as developable land in its LCA. In doing so, the County ignored severe legal and economic limitations on the development of such land. In September 2008, the National Marine Fisheries Service (NMFS), pursuant to a federal court order, prepared a Biological Opinion under the Endangered Species Act (ESA) that concluded that the National Flood Insurance Program, administered by the Federal Emergency Management Agency (FEMA), jeopardizes threatened or endangered Chinook Salmon, Chum Salmon Steelhead, and Killer Whales. As a result of this determination, development of floodplains that are tributary to Washington's inland waters will be severely constrained. Attached is a letter from Dennis Hunsinger, FEMA's Acting Regional Administrator to the City of Mount Vernon. We understand that most western Washington cities have received such letters and assume that Whatcom County cities have been among the recipients.

Given these severe ESA limitations on floodplain development along with the constraints of climate change adaptation/vulnerability impacts, the assumption of the developability of floodplains is erroneous. The EIS must analyze the adverse environmental impacts that will occur if UGAs are undersized because of overstated developability of floodplains. The EIS also must analyze the potential adverse impacts to the aforementioned threatened or endangered species if the County allows development of such floodplains.

4. Mitigation Measures

The EIS must not only analyze all significant adverse impacts for each of the alternatives, but also identify measures to mitigate such significant adverse impacts. Given the critically important role of the County's high rate of rural growth in causing many of these impacts, measures to mitigate rural development must be comprehensively identified.

Under the County's LCA, residential development of developable land within the City of Bellingham and its UGAs is almost entirely limited to multi-family structures. Given this assumption, if fully implemented by development regulations, as it must be under the Growth Management Act, single-family home development will be available mainly in rural areas and outlying cities and UGAs. The EIS must identify means of overcoming the pressures to develop single-family homes in rural areas that have proven to be irresistible under the County's present plan, UGAs, and development regulations. If the County's alternatives call for a continuation of

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policies that have led to such high rates of rural sprawl, it will be critically important to identify means of mitigating the impacts of high rates of rural development and related transportation, climate change, floodplain and other critical area, listed species, and public facilities impacts.

5. Unavoidable Significant Adverse Environmental Impacts

Unless the County can substantially reduce rural growth and sprawl, significant adverse environmental impacts will be unavoidable and must be disclosed in the EIS. Rural growth and sprawl can be reduced by purchase and transfer of development rights and by providing affordable and desirable housing opportunities in UGAs proximate to jobs. Such measures must be identified as means of mitigating the impacts of rural growth. The impacts on rural growth and sprawl of the continuation of very limited UGAs and very limited housing choices proximate to employment must be analyzed in the EIS. And if the continuation of such policies will result in unavoidable significant adverse environmental impacts resulting from rural growth and sprawl, such unavoidable impacts must be disclosed.

Thank you for the opportunity to submit these comments on the scope of the EIS for the Ten-Year UGA Review. We look forward to working with the County in preparing a legally adequate EIS for the Ten-Year UGA Review.

Sincerely yours,

FOSTER PEPPER PLLC



Richard L. Settle

LANGABEER & TULL, P.S.



Robert M. Tull
Dominique Zervas

RLS: ej
enclosure

cc: Mayor Dan Pike, City of Bellingham
Mayor Gary Jensen, City of Ferndale
Mayor Jack Louws, City of Lynden
Mayor Bob Bromley, City of Sumas

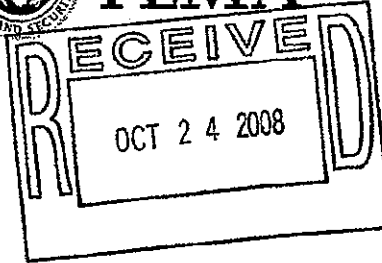
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Mayor Bonnie Onyon, City of Blaine
Mayor Jaleen Pratt, City of Everson
Mayor James S. Ackerman, City of Nooksack
David Stalheim, Planning Director, City of Bellingham
Dennis Rhodes, Planning Director, City of Ferndale
Amy Harksell, Planning Director, City of Lynden
Michael Jones, Senior Planner & Development, City of Blaine
Rollin Harper, City Planner for the cities of Everson, Nooksack and Sumas

U.S. Department of Homeland Security
Region X
130 228th Street, SW
Bothell, WA 98021-9796



FEMA



October 21, 2008

The Honorable Bud Norris, Mayor
City of Mount Vernon
P.O. Box 809
Mount Vernon, Washington 98273

Dear Mayor Norris:

In 2003 the National Wildlife Federation sued the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) for failure to consult under the Endangered Species Act (ESA) with respect to its administration of the National Flood Insurance Program (NFIP). On November 17, 2004, the United States District Court, Western District of Washington at Seattle agreed, and required FEMA to consult with the National Marine Fisheries Service (NMFS) on the impacts the NFIP was having on salmon. FEMA complied by submitting a Biological Evaluation on Feb 14, 2006 to NMFS, concluding that the NFIP affected salmon, but not adversely.

In September 2008 NMFS provided a Biological Opinion in which they concluded that development consistent with the NFIP jeopardizes threatened or endangered Chinook salmon, chum salmon, steelhead, and killer whales and adversely modifies critical habitat based on potential take of listed species. Federal agencies are prohibited by the Endangered Species Act (ESA) from causing Jeopardy or Adverse Modification.

Although the Biological Opinion determination is made for FEMA, the Endangered Species Act (ESA) is applicable to everyone, whether a federal agency, state agency, local jurisdiction or individual. We all have a legal responsibility to ensure our actions do not cause a take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) to threatened or endangered species. Under Section 9 of the ESA, actions or decisions enacted by you and your officials are subject to this prohibition regardless of federal involvement. Additionally, any person can be subject to criminal or civil penalties for causing a take. NMFS considers the issuance of floodplain development permits without addressing the impacts on listed species or their critical habitat as a take under the Endangered Species Act.

With a Jeopardy and Adverse Modification determination, NMFS is obligated to provide a Reasonable and Prudent Alternative, which are measures FEMA can do to avoid Jeopardy and Adverse Modification to critical habitat. These measures outline steps FEMA and communities participating in the NFIP can do to minimize harm to Puget Sound Chinook salmon, Puget Sound steelhead, Hood Canal summer-run chum and Southern Resident killer whales. For details on these measures, please see NMFS' Biological Opinion at <http://www.nwr.noaa.gov/>.

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NMFS requires FEMA to modify implementation of the NFIP according to recovery priorities. The Biological Opinion requires FEMA to focus our efforts of assistance according to a tiered approach (see attached Appendix 3). We will focus our technical assistance efforts according to this tiered approach.

The Incidental Take section of the Biological Opinion authorizes a certain amount of harm to the species or their habitat during the time necessary for FEMA and participating NFIP communities to implement the Reasonable and Prudent Alternative (RPA). Thereafter, take is exempted in all county and municipal NFIP jurisdictions as soon as they implement the floodplain management criteria set forth in RPA Element 3 of the Biological Opinion, provided the activity resulting in take is carried out in conformance with RPA Element 3, including applicable mitigation requirements. In the interim, one immediate option suggested by NMFS is for your community to voluntarily implement a temporary moratorium on floodplain development that adversely impacts species or their habitat.

FEMA will be working on identifying other options or methods that your community can implement and will be sharing that with you as we develop them. Those options may include guidance, training, technical assistance, education tools, etc. One option we are working with NMFS on is the development of a model ordinance that would meet FEMA's minimum criteria while also avoiding or minimizing impacts to listed species. Once we've finalized this model ordinance, we will share it with you. Should your community adopt it, then you will have Endangered Species Act coverage under the Incidental Take Statement of the Biological Opinion.

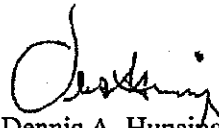
During the interim, until full implementation of the Reasonable and Prudent Alternative, FEMA and its participating communities will be required to report our progress, including the extent of take that has occurred, mitigation that is utilized and any unmitigated actions. FEMA intends to develop a reporting tool to track activities that will help minimize the time and effort imposed upon your staff in meeting this requirement. Should communities issue floodplain development permits without mitigating for take on species or their critical habitat, FEMA will be bound, in coordination with NMFS acting under their own authority, to initiate appropriate enforcement action.

FEMA recognizes that many of you have already been implementing measures which protect/mitigate floodplain development actions affecting listed species and their habitat. However, for others, these requirements may pose a burden on your community. We will work diligently with you, the state resource agencies and the NMFS to alleviate this burden as much as

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possible and to facilitate favorable opportunities for complying with the Endangered Species Act (ESA). We will keep you advised as we further develop our strategy for implementation. If you have any questions, please call Mark Carey, Mitigation Division Director at 425-487-4682.

Sincerely,



Dennis A. Hunsinger, PhD
Acting Regional Administrator

cc: Rick Prosser, Building Official, City of Mount Vernon
Dan Sokol, NFIP Coordinator, WA State Dept. of Ecology

JG:bb