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June 22, 2009

David Stalheim, Director  
Whatcom County SEPA Official  
Planning and Development Services  
5280 Northwest Drive  
Bellingham, WA 98226

**Re: Draft Environmental Impact Statement – Urban Growth Area Review  
Submitted on behalf of Caitac USA Corp.**

Dear David:

According to the County's Scoping document, its broad objective is to examine potential impacts of the alternative plans for the 10-year UGA-review process. Because the scope of the objective is so broad, the reasonableness of alternatives must be determined on the basis of that same, broad, overall objective. The alternatives considerations must, therefore, compare the impacts of proposed future actions if projected growth is accommodated in the UGAs and if projected growth occurs in the form of sprawling rural growth (rather than within the UGAs).

Unfortunately, the DEIS fails to achieve what it sets out to do. Key issues are described below:

**1. The DEIS does not fulfill its statutory purpose.**

The purpose of the EIS is to ensure that government agencies' actions are based on sufficient environmental information to make a reasoned decision<sup>1</sup> that is in accord with SEPA's substantive policies.<sup>2</sup> Because the EIS must inform the agencies' actions, the timing of the EIS preparation is critical.<sup>3</sup> "Statements must be prepared early enough

<sup>1</sup> RCW 43.12C.030(2); *Citizens' Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

<sup>2</sup> See, e.g., *Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983), quoted by *Bellevue Farm Owners Ass'n v. Shorelines Hearings Board*, 100 Wash. App. 341, 997 P.2d 380 (2000).

<sup>3</sup> WAC 197-11-406.

to inform and guide decision makers rather than rationalize or justify decisions already made.”<sup>4</sup>

In the present situation, the County initiated the process by informing the cities and citizens of the County’s conclusion the cities’ UGAs are oversized and must therefore be reduced — before even completing the land-capacity analysis. Although the County notified the cities that the cities should ‘ground truth’ the County’s analysis, the County informed them that any city response would not have much impact on the County’s LCA or on its conclusion. As promised, none of the cities’ responses as to flaws in the County’s LCA (which flaws result in significant overstatement of the cities’ capacity to accommodate growth) impacted the County’s conclusion. On May 7, 2009, long *after* the County had already expressed its conclusion, the DEIS became publicly available. Then, before the cities had the opportunity to meaningfully review the DEIS (an approximately 750 page document), the cities were required to present the County with their respective UGA proposals.<sup>5</sup> Before even presenting their UGA proposals, the cities notified the County of significant flaws in the County’s Land-Capacity Analysis (LCA), over the planning period. Nonetheless, the County maintained its conclusion. The cities’ written and oral presentations of their proposals Throughout the process (and the DEIS itself), and even after receiving analysis from the cities that contradicts the County’s conclusion, the County has repeated its conclusion numerous times making clear that the County’s sole purpose is to justify the decision it has already made.

**2. The DEIS violates GMA public participation and SEPA sequencing requirements.**

*a. The County’s SEPA process violates public participation requirements.*

As stated, the County began the 10-year UGA update process with its conclusion that the cities’ UGAs are oversized. This conclusion is reiterated throughout the DEIS.<sup>6</sup> However, the very land-capacity analysis on which the DEIS is to be based is still not complete. As a result, the DEIS violates not only SEPA timing requirements, but also the GMA’s public participation requirement.

In February, 2009, the County released a preliminary LCA, and followed with updated versions on March 6, 2009, March 22, 2009, and again on April 22, 2009, while the DEIS was in process of development. According to the County, the LCA is still being changed. Without a complete LCA, and associated opportunity for public (and city) review, there can be no meaningful public participation regarding the LCA, much

<sup>4</sup> Richard Settle, *The Washington Environmental Policy Act: A Legal and Policy Analysis*, LexisNexis, 2008, at § 14.01, 14-6 (citing *Barrie v. Kitsap County*, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980).

<sup>5</sup> Written proposals were due on June 15, 2009, and were followed by presentations to the joint County Council and Planning Commission on June 16, 2009.

<sup>6</sup> *See, e.g.*, DEIS at 2-23.

less an opportunity for public review and comment on the DEIS, which is to be based on such a LCA.

Additionally, an adequate DEIS, along with a *complete* LCA, is necessary to inform the cities' UGA proposals. However, the cities did not have the opportunity to review the approximately 750-page, inadequate DEIS before the deadline for the cities to present their UGA proposals.<sup>7</sup>

*b. The DEIS violates SEPA sequencing requirements.*

Because the LCA is based on an obsolete LCA, which continues to remain incomplete and unresolved, the DEIS, which must be based on the LCA, can only be meaningless, confusing, and essentially pointless. Without a complete and final underlying LCA, the DEIS is inadequate, and, therefore, not ready for review and consideration by citizens or the cities.

Furthermore, because the County incorrectly required the cities to provide their respective UGA "proposals" before the crucial issue of the LCA had been settled, there can be no meaningful discussion as to specific impacts. The County has failed to explain why it adopted such a reversed approach. The sole conclusion that can possibly be drawn is that the County seeks to utilize the SEPA process only as a 'cover' to justify the County's predetermined conclusion that all the cities' UGAs are oversized, in a sort of Lewis Carroll-esque process where the sentence precedes the trial.<sup>8</sup>

**3. The DEIS improperly examines a flexible date range, rather than an actual date range.**

The DEIS examines the possible impacts of growth planning for the date range 2029-2031, for "[t]he Proposed Action [which] is the 10-year Urban Growth Area Review of the Whatcom County Comprehensive Plan as required by the Growth Management Act."<sup>9</sup> The GMA, however, does not appear to allow for a flexible date range for purposes of the 10-year UGA review and update process.

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<sup>7</sup> See, e.g., Memorandum, *May 5<sup>th</sup> Public Hearing on Urban Growth Recommendations*, Greg Aucutt, Senior Planner, City of Bellingham, to City of Bellingham Planning Commission, at 7 (April 24, 2008).

<sup>8</sup> See Lewis Carroll, *Alice in Wonderland*, Chapter 12, Trial of the Knave and Queen of Hearts, ("Let the jury consider their verdict," the King said, for about the twentieth time that day. "No, no!" said the Queen. "Sentence first - verdict afterwards." "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!" "Hold your tongue!" said the Queen, turning purple. "I won't!" said Alice. "Off with her head!" the Queen shouted at the top of her voice.

<sup>9</sup> DEIS at 1-1 ("Upon adoption, the 10-year UGA review would achieve the following objectives . . . Review the Plan to extend the planning horizon from the year 2022 to the range 2029-2031.")

**4. The DEIS alternatives are inadequate and meaningless.**

The DEIS must include a reasonable number and range of alternatives.<sup>10</sup> It must also “[p]resent a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative.”<sup>11</sup> “[T]he purpose of the requirement for analysis of the no-action alternative is to provide a benchmark against which the other proposals may be measured.”<sup>12</sup>

*a. The DEIS does not include a no action alternative.*

The County’s DEIS does not actually include a no action alternative, although it purports to include *two* such alternatives.

- i. The No Action Current Comprehensive Plan Alternative purports to assume growth similar to the adopted comprehensive plan, but then greatly reduces the annual growth rate by extending the population projection period. As a result, it is not a “No Action” alternative.
- ii. The No Action Trends Alternative purports to assume future growth that “matches the historic pattern of urban and rural growth”, but then greatly reduces overall growth by placing an artificial cap (that does not appear to reflect any “historic pattern”) on that growth.<sup>13</sup> The County’s *action* of altering the population segment of this alternative for purposes of the DEIS, is by definition, then, an *action* alternative.

Because the DEIS does not include a no action alternative,<sup>14</sup> which would allow meaningful comparison with any proposed alternative, the DEIS is inadequate.

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<sup>10</sup> WAC 197-11-440(5)(b)(i).

<sup>11</sup> WAC 197-11-440(5)(c)(vi).

<sup>12</sup> *Hood Canal, et al. v. Jefferson County*, WWGMHB Case No. 03-2-0006, Compliance Order at 4 (Oct. 14, 2004) (citing WAC 197-11-440(5)(b)(ii)).

<sup>13</sup> *See, e.g.*, DEIS at 2-18, (“...the No Action Trends Alternative would allocate shares of growth based on historic trends to 258,448 . . . .” (Emphasis added.)).

<sup>14</sup> Consider, for example, the statement on page 4.1-8 of the DEIS, which states that under the No Action Trends Alternative, locations for greater development within the rural areas cannot be precisely determined. If this were truly a no action alternative that examines and analyzes matters as they exist, it would be reasonable to expect that the County could easily delineate and quantify at least the general locations of growth within the rural areas.

*b. Alternatives X and Y do not allow for meaningful comparison of possible environmental impacts.*

Action Alternatives X and Y are purportedly devised to measure the differences between impacts of growth is Bellingham-centric, or if population growth is spread out between the smaller cities. However, Alternatives X and Y include an additional significant assumption difference: according to the DEIS, Alternative X assumes that planned densities would be achieved, while Alternative Y assumes that historic densities would be achieved. By adding to each Alternative a density assumption different from the assumption contained in the other, particularly where the density assumption appears to have no bearing on locational differences, it is impossible to compare what might be the environmental impact of continuing a Bellingham-centric growth pattern, or spreading population growth out among the smaller cities.

Because the two, different density assumptions bar comparison of the locational alternatives, the density assumptions should either be deleted or studied as additional alternatives.

**5. The time frames relied on by the DEIS are invalid and make a comparison of potential impacts impossible.**

The time frames utilized within the DEIS cause it to be inadequate and bar useful comparison of environmental impacts.

*a. The DEIS utilizes an invalid base time frame.*

The County does not explain why the data it uses in the LCA is the County's growth during the 2000-2008 timeframe. The relevant period should be from the date of the County's initial adoption of the UGAs in 1997, until 2009,<sup>15</sup> assuming the present ten-year UGA review is completed before the end of the year.

In an underlying County document entitled "Review of Growth," the County states that it 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." It is not clear what the County means by this statement, or whether the County is inferring that OFM did not provide data for 1997, 1998 and 1999. Regardless of what population data is available from OFM, the GMA requirement that the County determine the extent to which growth has occurred inside and outside the UGAs does not depend on OFM data.<sup>16</sup>

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<sup>15</sup> Because the County did not complete its ten-year review on time the extended period of review is longer than ten years.

<sup>16</sup> See, e.g., Letter from Richard Settle to Whatcom County Council, Planning Commission, and Planning and Development Services, February 18, 2009.

- b. *The DEIS's utilization of differing time frames for different purposes make any comparison of possible environmental impacts under the various scenarios impossible.*

For example, although the instant process is the 10-year UGA review and update of the 1997 process, the DEIS limits its review of County growth rates to the 2000-2008 period, noting that the growth rates during that period were lower than the rate shown by using the appropriate 1997-2009 timeframe.<sup>17</sup>

Also, according to the DEIS, a principle aspect of Alternative Y is the fact that it is based on densities that are “similar to the patterns achieved in the last 5 years”<sup>18</sup>, making clear that, for purposes of establishing achieved densities, the DEIS relies only on the 2003-2008 time frame.

In other situations, it appears that the DEIS relies on data from a single year to represent a trend. For example, when discussing the school district data regarding student to household ratio in order to project capacity through 2031, the DEIS states that the data is derived from 2008 enrollment data<sup>19</sup> (despite the fact that data from other years appears to be readily available).

Likewise, the DEIS appears to rely only on 2008 average-household-size data, again, interpolating data from a single year to measure a trend.<sup>20</sup>

Additionally, although the No Action Trends Alternative “assumes future growth that matches the *historic pattern* of urban and rural growth”,<sup>21</sup> and, a “highlight” of Alternative Y is that “Bellingham allocation stays at or below *historic trends*,”<sup>22</sup> the DEIS does not identify the time frame for these “historic trends.”

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<sup>17</sup> See DEIS at 1-5, § 1.4.1 (stating that historic density rates are based on density achieved in the past five years); 4.7-1. (“The County’s average annual population growth rate from 1960 to 2008 was approximately 2.11% while the State of Washington’s average annual growth rate was 1.76%. Between 1990 and 2008, the growth rates were 2.26% and 1.70% for the County and state, respectively. Reviewing the period 2000 to 2008, the growth rates were lower at 1.71% and 1.40% for the County and state, respectively.” See also 4.7-2 (examining rates of net migration, first based on the rate from 1990 to 2008, then reducing the period to 2000-2008.); 4.7-9 (showing population growth by cities from 2000 to 2008.); 4.7-11 (showing Extent of Urban and Rural Growth in Housing Units); 4.3-16 (using 2000 data to determine impervious surface percentages) land cover analysis) lots as determined by reviewing available land cover analysis.

<sup>18</sup> See, e.g., FS-1, 1-5, 2-13

<sup>19</sup> See DEIS at 4.10-43, 4.10-45.

<sup>20</sup> See, e.g., DEIS at 4.7-10.

<sup>21</sup> DEIS at FS-1, 1-4, 2-12, etc.

<sup>22</sup> DEIS at 2-13.

**6. The DEIS includes fatal, and misleading, errors of logic.**

The County's DEIS includes errors of logic that bar meaningful comment.

*a. Vehicle impacts*

According to the DEIS, "All alternatives would increase countywide population and employment compared to existing levels. As a result, countywide vehicle travel is also forecast to increase."<sup>23</sup>

While it is accurate that population growth will result in an increase of VMT and GHG emissions, logic would normally dictate that *how much* VMT and GHG emissions increase would depend on how far that new population would have to travel to fulfill its employment, entertainment, health care, commercial needs. As a result, it would seem that VMT and GHG emissions would be *lower* under a scenario where residential density is located closer to those facilities, and higher if residential density is located farther away from them. Perhaps the DEIS' apparent implication that VMT and GHG emissions remain the same under any scenario reflects a concept that those facilities will be created close to where people live, even if they choose to live in the smaller cities. Such a result, however, is unlikely – just one example is medical facilities. St. Joseph's Hospital and related medical facilities are all located in Bellingham, and there is presently no suggesting that this will change.

*b. Shorelines*

According to the DEIS, under the No Action Current Comprehensive Plan Alternative, "shoreline impacts are anticipated to be similar to those associated with the current development pattern; development is assumed to continue at the previously forecast rate, with a focus on urban areas."<sup>24</sup>

This is does not appear to make sense: the No Action Current Comprehensive Plan Alternative assumes that the overall population growth number through 2029/2031 will remain the same as through 2022, thereby *decreasing the annual rate* in order to spread the overall number out over the additional 7-9 year period. As a result, a statement that shoreline impacts would remain consistent where growth is dramatically slowed is nonsensical. Instead, under this Alternative, the DEIS should likely examine the potential environmental impacts if the County's annual growth rate were to drop suddenly and dramatically.

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<sup>23</sup> DEIS at 1-8.

<sup>24</sup> DEIS at 1-16.

*c. An alternative “alternative”*

The DEIS, suggests that the County may elect to adopt an alternative other than those examined by the DEIS.<sup>25</sup>

This indicates that an alternative that combines elements of the studied alternatives may be possible. However, the DEIS provides no information as to what such an alternative might look like, and, as a result, provides no environmental impact analysis of such an alternative.

*d. There is no concurrent, meaningful capital facilities plan*

The GMA requires the existence of a capital facilities plan to support proposed EIS alternatives. “The lack of a fully completed capital facilities plan is more than a conceptual shortcoming – it is a fatal legal defect in a comprehensive plan. . . .” Such a deficiency, standing alone, “is sufficient cause for the Board to find that the land use element and every other component of a plan violates the requirements of the Act.”<sup>26</sup>

In the present situation, the DEIS includes a review of the 1997 Whatcom County Comprehensive Plan. Whatcom County is in the final six years of the 1997 Comprehensive Plan’s 1995 – 2015 planning period and, according to RCW 36.70A.070(3), the plan was required to contain a capital facilities section that could ensure “. . . the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent.”

However, there does not appear to be any meaningful capital facilities plan in effect to indicate that *any* County UGA is able to ensure growth can take place throughout the UGAs by 2015, much less by 2029/2031.<sup>27</sup> In fact, the DEIS appears to indicate that capital facilities plans may not be completed in time to adopt the ten year review.<sup>28</sup>

Furthermore, according to the DEIS section regarding GMA Planning Goals, “While Action Alternative Y has some potential vehicle mile travelled efficiencies and fewer impervious acres which better meet GMA transportation and environmental goals, it has the second highest rural growth allocation.”<sup>29</sup>

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<sup>25</sup> DEIS at 1-17 (“Impacts common to all alternatives: Once a growth forecast and allocation is selected from the alternatives or a combination of the alternatives, comprehensive plan amendments would be required.”).

<sup>26</sup> *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, FDO at 77 (Oct. 6, 1995).

<sup>27</sup> Without such a plan, the DEIS cannot examine the potential environmental impacts of an inability to serve growth throughout the County’s UGS.

<sup>28</sup> DEIS at 4.6-31

<sup>29</sup> DEIS at 1-17.

This statement presumes that availability of the facilities described above will increase at the same rate as residential growth in the small cities. However, there cannot be any rational basis for such a presumption where it appears there is no capital facilities plan in place to support such a concept.

Additionally, the County's failure to adopt complete capital facilities plans in association with any new comprehensive plan would necessitate continued non-compliance for Whatcom County, with continued, attendant loss of critical funding for projects associated with environmental enhancements. Despite these significant risks, the DEIS fails to examine the potential impacts a continued loss of funding over a period of years would have on Whatcom County.

**7. The DEIS relies on conclusions rather than analysis.**

Throughout, the DEIS relies on conclusory statements, which, by definition, include no factual or analytical support.

For example, according to the tables on pages 2-18 and 2-22, which respectively relate to potential employment and development capacity in the various UGAs, the rural areas could potentially be allocated more growth than any of the UGAs (with the exception of the Bellingham UGA). However, the DEIS fails to indicate any analysis as to, for example;

- a. what densities have been achieved in the various areas and what would be the impacts of continuing such a pattern;
- b. what is the "demand" side of the equation, which includes the demand for what proportion of single-family, multi-family, and special-needs housing;
- c. how much land supply is actually available in the rural areas for any use, including residential and employment-producing categories (considering limitations on use imposed by the fact that much of the rural land is designated Agricultural and Forestry);
- d. what is the proximity of the land supply to the demand;
- e. whether the land supply in each area is actually adequate to meet the demand;
- f. what are the potential environmental consequences of lack of proximity to jobs and/or an inadequate land supply in the rural areas;
- g. what quantity of land supply is actually available in LAMIRDs where the DEIS assumes that a sub-set of the rural allocation will be designated as LAMIRDs (in connection with the County's rural element update process);<sup>30</sup>

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<sup>30</sup> DEIS at 4.6-20.

- h. what is the capacity of the LAMIRDs to inform analysis of transportation patterns, residential patterns and other growth accommodations issues;<sup>31</sup> and
- i. how much of the county's growth will be assigned to which LAMIRD and what are the environmental impacts associated with that assigned growth.<sup>32</sup>

Additionally, at page 4.6-13, Table 4.6-2, the DEIS states under the column entitled "GMA Goal," "Encourage a variety of housing types including affordable housing." Then, under the column identified as "Discussion," the DEIS concludes that "All alternatives provide capacity for housing. New growth forecast assumes more opportunities." However, we are unable to locate within the DEIS any analysis as to affordability or a range of housing types available in each of the UGAs.

Likewise, as discussed previously, the DEIS mirrors the County's initial conclusion that most UGAs are larger than necessary to accommodate projected population growth.<sup>33</sup> As explained, although it appears that the DEIS is based on this fundamental assertion, there is no final LCA that supports such a conclusion, and the final LCA will not be available until after the Final DEIS is complete. Furthermore, (1) based on the cities' responses to the preliminary LCA, which note the significant errors and omissions contained in the County's preliminary LCAs,<sup>34</sup> and (2) the fact that there is no final adopted population growth projection, it is likely the contrary will be true.

The DEIS's complete failure to provide any analysis of such considerations result in the complete inadequacy of the DEIS.

#### **8. The DEIS fails to consider important impacts.**

The County acknowledges that the rural growth rate during the 2000-2008 period was several hundred percent higher than expected, and that development rights for over 26,000 residential units remain in rural and resource lands.<sup>35</sup> Furthermore, under the County's LCA, residential development in developable land within the City of Bellingham and its UGAs is largely limited to multi-family structures. Given this assumption, if fully implemented by development regulations, significant single-family home development will continue to be available in rural areas.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g.*, DEIS at 4.16-14, 4.6-21, 4.6-22.

<sup>34</sup> *See, e.g.*, City of Bellingham UGA Proposal (June 1, 2009). We hereby adopt by reference, on behalf of Caitac USA, Corp., the cities' UGA Proposals submitted in connection with the current County 10-year UGA review and update process.

<sup>35</sup> *See, Whatcom County, Review of Growth.*

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Such high rates of rural growth, if they continue, will have numerous significant adverse impacts, which the DEIS must (but does not) analyze in connection with each of the alternatives.

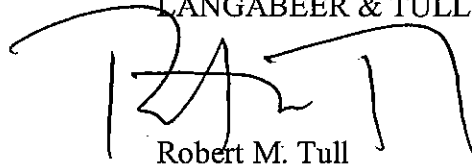
Unless the County can substantially reduce rural growth and sprawl, significant adverse environmental impacts will be unavoidable and must be disclosed in the DEIS. The DEIS must analyze the impacts on rural growth and sprawl of the continuation of very limited UGAs and very limited housing choices proximate to employment.

## 9. Conclusion

Based on the foregoing,<sup>36</sup> the DEIS as presented is fundamentally flawed and clearly inadequate, and therefore must be re-done. Careful examination of city and public testimony over the past one and one-half years should also be considered as comments on the DEIS

Thank you for the opportunity to submit these comments on the DEIS for Whatcom County's 10-year review and update of its UGAs. We look forward to working with the County in preparing a legally adequate EIS.

Sincerely,  
LANGABEER & TULL, P.S.



Robert M. Tull



Dominique Zervas

DYZ: ao  
cc: client

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<sup>36</sup> We also adopt by reference the DEIS comments issued on June 22, 2009, by Public Policy Perspectives.