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Mark Personius
 Director

Memorandum

November 5, 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.

Date	Type of Meeting	Comments
9/12/19	Town Hall Meeting	Opportunity for the public to speak on the proposal.
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.
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.
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).
11/14/19	Work Session	

At the November 14, 2019 work session, the Planning and Development Services Department would like to request Planning Commission consideration of several issues:

- Federal, State, Regional, and County Regulations
- Definition of “Expansions” vs. “Improvements”
- List of Permitted Uses / New Storage Tanks
- Change of Use Provisions
- Insurance Provisions
- SEPA – New Worksheet

1. **Federal, State, Regional, and County Regulations**

The Northwest Clean Air Agency (NWCAA) letter of September 25, 2019 summarizes State Department of Ecology and NWCAA 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.

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).

There are provisions in the proposed SEPA rules that address the relationship between federal, state, regional, and local regulation of GHG emissions and other matters. Staff is suggesting changes to these provisions to clarify how the roles and procedures of the different agencies relate to SEPA review, as shown on Exhibit B (pp. 3-6).

2. **Definition of “Expansions” vs. “Improvements”**

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.

The term "expansion" could be defined or clarified. However, staff is proposing an alternative to replace the word "expansion" with "improvements" and state that any improvements not specifically allowed as a permitted use or accessory use in the Heavy Impact Industrial zone would require a conditional use permit (Exhibit C, pp. 14 and 16).

3. List of Permitted Uses / New Storage Tanks

Staff is proposing to move the permitted uses in former proposed WCC 20.68.802 to the permitted use section of the Heavy Impact Industrial zoning district (proposed WCC 20.68.068), consistent with the format of other code sections. We are also proposing to expand the list of permitted uses, after receiving input from industry (Exhibit C, p. 13).

Staff is asking the Planning Commission to provide specific direction on whether new storage tanks in the Cherry Point area should be a permitted use or a conditional use in the proposed amendments. One option would be to allow all tanks under a certain volume as a permitted use (Exhibit C, p. 13). Larger tanks would 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)).

In any event, a threshold could be set that requires a conditional use permit if a tank is over a certain size.

4. Change of Use Provisions

The Council proposal includes new "Change of Use" provisions in the Cherry Point Industrial District (proposed WCC 20.74.110). Some of the public comment letters have expressed concern about changing existing transshipment facilities associated with the refineries to crude oil export facilities. 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 could be interpreted for this scenario:

- Would it be considered a "new fossil fuel transshipment facility" that is prohibited under proposed WCC 20.68.205?
- Would it be an "expansion" of an existing transshipment facility that requires a conditional use permit under proposed WCC 20.68.153?
- Would it simply be a "change of use" that requires only a Type I permit, administratively approved by staff under proposed WCC 20.74.110 and WCC 22.05.020(1)?

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 create an added degree of uncertainty over how the regulations would be applied to the Cherry Point area.

Staff would note that additional review by legal counsel (e.g. Cascadia Law Group) may be appropriate to address potential legal issues regarding the extent to which the County may regulate exports. However, staff has 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 “change of use permit” would only be required if no other County permit is needed that documents the change of use.

5. Insurance Provisions

The Council proposal requires a \$100 million insurance policy for capacity or storage tank increases at fossil fuel and renewable fuel facilities (proposed WCC 22.05.125(3)). However, in a note underneath this provision, Cascadia Law Group stated “. . . We suggest taking out the \$100 million liability limit and substituting language that determines the liability limit as each permit is reviewed. . .” Therefore, on September 9, 2019, the Whatcom County Prosecuting Attorney’s Office recommended modifying the insurance provisions as follows:

Policy limits shall be ~~no less than \$100 million for each Loss / total for all Losses determined by the County during the review of each individual permit application and shall be based on an assessment of the facility’s specific risk of loss or damages~~. The required limits may be revised periodically by the County based on factors including inflation adjustments and Permit- or Facility-specific risks.

At the October 24, 2019 Planning Commission work session, it was noted that industry will try to have a representative at the November 14 work session to discuss the insurance issue in more detail.

A question for the Planning Commission is whether the Commission wants to recommend:

- The original Council language,
- The Prosecuting Attorney’s alternative language, or
- Commissioner Deshmane’s proposal (no County-mandated insurance requirement, but indemnification language included).

6. SEPA – New Worksheet

The Council proposal includes a new worksheet for fossil and renewable fuel facilities to supplement the SEPA checklist (Exhibit B, p. 1). The proposal indicates that the worksheet will be prepared by the SEPA Responsible Official in consultation with the County Climate Impact Advisory Committee.

One of the concerns raised in the Northwest Clean Air Agency memo (September 25, 2019) is that there would “. . . need to be a significant amount of policy work and guidance material provided to project proponents to clarify the details of what is required. . . ” (p. 2). The Northwest Clean Air Agency also indicated that pollutants covered should be defined. It will take some time to develop the worksheet.

Staff is suggesting that an expert evaluation be inserted as an option that could be used as an alternative to the worksheet. One result would be that, if the worksheet is not ready for use when the ordinance is adopted, the expert evaluation could be used satisfy the code’s intent to provide additional information for the SEPA review process.

7. Other Changes

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.