



Holli Johnson
NW External Affairs

December 3, 2019

Sent via email

Whatcom County Council
311 Grand Avenue, STE 105
Bellingham WA 98225

Re: WSPA Comments on AB 2019-597
Ongoing Whatcom County Unrefined Fossil Fuels Moratorium

Honorable Council Members:

I am writing on behalf of the Western States Petroleum Association (WSPA) to express WSPA's opposition to AB2019-597, a proposed Ordinance extending the County's moratorium on new or expanded fossil fuel shipment facilities in the Cherry Point UGA. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport, and market petroleum and petroleum products in five western states, including Washington. WSPA members have operated refineries along Cherry Point in Whatcom County for years. This area provides key energy and emergency infrastructure as recognized by various city, state, and federal documents and is a regional hub for energy production and distribution. WSPA urges the Council to refrain from improperly extending the moratorium for the eighth consecutive six-month increment. Instead, the County should allow the existing moratorium (the seventh installment) to lapse.

WSPA has explained its interest in and opposition to the County's interim moratorium in previously submitted letters.¹ The current iteration of the moratorium repeats the legal flaws detailed in WSPA's prior letters. In short, the ordinance violates both state and federal law and is inconsistent with the County's comprehensive plan policies. Additionally, the County is without legal authority to extend the moratorium. RCW 36.70A.390 authorizes only temporary measures. While the statute allows "one or more" six-month renewals,² that provision does not authorize *de facto* permanent regulations through the systematic and continuous renewal of nominally "interim" controls. With its eighth installment, the moratorium is neither interim nor temporary. Adoption of AB2019-597 contravenes the language of the Growth Management Act and frustrates its purpose.

We are aware that the County's work on permanent amendments is delayed. WSPA has expressed significant concerns over the draft permanent regulations and has encouraged the County to work with stakeholders to solicit and consider input before taking action on those permanent regulations. Nevertheless, the delays in the County's consideration of permanent regulations do not excuse or absolve the County's improper eighth extension of its moratorium.

¹ We incorporate by reference WSPA's comments on prior iterations of the County's moratorium, including the attached letters dated August 2018, January 2019, and July, 2019.

² RCW 36.70A.390.

Whatcom County Council
December 3, 2019
Page 2

WSPA therefore respectfully urges Whatcom County to allow the current moratorium to expire without further renewal.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact me at (360) 352-4506 or by email at holli@wspa.org.

Sincerely,

A handwritten signature in cursive script that reads "Hollie Johnson".

cc: Jessica Spiegel - WSPA
Jodie Muller - WSPA



Jessica Spiegel
NW MANAGER

August 8, 2018

Whatcom County Council
311 Grand Avenue, STE 105
Bellingham WA 98225

Re: WSPA Comments on the Ongoing Whatcom County
Unrefined Fossil Fuels Moratorium, Ordinance 2018-77B

Via hand delivery and email:
bbuchana@co.whatcom.wa.us
tbyrd@co.whatcom.wa.us
TBallew@co.whatcom.wa.us
tdonovan@co.whatcom.wa.us
bbrenner@co.whatcom.wa.us
rbrowne@co.whatcom.wa.us
ssidhu@co.whatcom.wa.us

Honorable Council Members:

The Western States Petroleum Association (WSPA) appreciates the opportunity to provide comments on Ordinance 2018-77B. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport, and market petroleum and petroleum products in five western states, including Washington. WSPA members have operated refineries along Cherry Point in Whatcom County for years. This area provides key energy and emergency infrastructure as recognized by various city, state, and federal documents and is a regional hub for energy production and distribution.

WSPA opposes the Whatcom County Council's ongoing extension of the Unrefined Fossil Fuels Moratorium. The continued imposition of this "temporary" moratorium exceeds Whatcom County's powers under state law and likely may violate the United States Constitution as it pertains to interstate and foreign commerce. The moratorium also is a breach of the compact created between Whatcom County and the Cherry Point businesses in existence when county planning policies for the Cherry Point area were enacted decades ago. Those countywide planning policies announced the County's interest in creating an area where industrial business would be fostered, and this commitment led many businesses to commit significant resources to Whatcom County. However, it appears the Council is turning away from these longstanding commitments, which threatens the viability of some of the most significant economic engines of Whatcom County.

Along with other community stakeholders, WSPA opposed the initial August 9, 2016 emergency moratorium, and each extension that has taken place (Sept. 2016, March 2017, Sept. 2017, Feb. 2018). Additionally, when a moratorium is repeatedly extended, it becomes a de facto revision to a lawful land use provision. This is now the fifth "interim" moratorium action by Whatcom County on this issue. As we have noted in our prior comment letters, continued extensions of the "temporary" moratorium are an improper proxy for revising the Whatcom County Comprehensive Plan or zoning regulations. To legally change a zoning regulation, the action must be consistent with the Whatcom County Comprehensive Plan, the Growth Management Act, and SEPA, among many applicable legal obligations. The moratorium has not undergone any such assessment, despite the fact that it has been in place for over two years.

Each extension of the moratorium that does not comply with these laws is a further failure to comply with both the letter and the spirit of Washington's robust planning laws.

WSPA does not believe that the County has the statutory authority to impose the moratorium in this manner. The Planning Enabling Act is the authority under which the County is considering extending this moratorium. Yet, the Planning Enabling Act is limited to planning and zoning; it does not grant the County authority to enact commodity regulations, export restrictions, or favor some commodities over others.

The moratorium also runs afoul of federal constitutional restrictions on local government's ability to regulate commerce and exports. The United States Constitution reserves to the federal government the power to regulate interstate commerce and exports, and the commerce clause in the federal constitution forbids local governments from enacting laws that overly burden interstate commerce. The moratorium exceeds these limitations in several ways. It favors some commodities over others by forbidding permits that would facilitate the increased shipment of "unrefined fossil fuels," while not forbidding other commodities, including other fossil fuels. On its face, the moratorium adopts the type of economic protectionism forbidden by the federal constitution. The moratorium purports to regulate the transport of dangerous fuels through Whatcom County by limiting the shipment of unrefined fossil fuels that are not processed at Cherry Point; yet the moratorium also does not (because Whatcom County cannot) regulate "transport of dangerous fuels" to Cherry Point, so long as they are processed at Cherry Point, and does not regulate what is transported through the County to other locations. Finally, the moratorium lacks any analysis of whether the commodities it regulates are less safe than commodities it does not regulate.

The nearly 300-page Cascadia Law Group report (prepared by the outside counsel hired by the Council) cautions against such discriminatory, pretextual action. Through the continued introduction of this "interim" moratorium, the Council appears to have disregarded this advice. At bottom, the moratorium is but a pretext; the County is not attempting to exercise its police powers to regulate some local concern but is instead attempting to enact national—and even global—energy policy through its development regulations.

Each restriction Whatcom County imposes could lead to a bottleneck in energy supply for the state and region through zoning provisions that violate state and federal law. The right to regulate trade among the states and with foreign nations is vested exclusively with the United States Congress pursuant to the Commerce Clause of the United States Constitution. Whatcom County has neither the right nor the duty to legislate what products may or may not be exported from Cherry Point to other states or nations. Further, as a matter of policy, the County may not pick winners and losers, favoring some commodities over others or local commerce over export commerce.

Existing County Planning Policies encourage growth of these existing businesses to support the economic viability of Whatcom County. The County has declared that "Cherry Point industrial area is an important and appropriate area for industry due to its access to deep water shipping, rail, all-weather roads, its location near the Canadian border and its contribution to the County's goal of providing family wage jobs." Other County policies recognize the importance of the expansion of the existing business: "Expansion of existing businesses [is] a key[] factor in providing 'family wage' jobs and a strong tax base. Economic development that pays family wage rates should be encouraged. Industrial land designations must be sufficient to permit the concentration of industry in appropriate locations beyond 20 years." Countywide Planning Policy E.3. The moratorium breaches these social contracts that Whatcom County has had with the businesses in Cherry Point for decades.

Finally, WSPA would like to express its concerns about the lack of transparency throughout the series of moratoriums. WSPA strives to have a collaborative relationship with Whatcom County and hopes that it will have an opportunity to engage with Whatcom County in a productive and open manner. Thus far, instead of working together with industry to create energy and economic policy that will work for all of Whatcom County, Whatcom County has decided to continue the "interim" moratorium, without any of the process protections that Washington law typically affords to the enactment of such restrictions.

WSPA respectfully urges Whatcom County to restore to its local stakeholders the right to apply for and have processed any land use and development permit applications that are authorized by the Whatcom County Code. To do so, the current moratorium should be allowed to expire without further renewal.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact me or the Senior Coordinator for the Northwest Region of WSPA, Holli Johnson at (360) 352-4506 or by email at hjohnson@wspa.org.

Sincerely,



cc: Jodie Muller, WSPA



Jessica Spiegel
NW Director

January 29, 2019

Whatcom County Council
311 Grand Avenue, STE 105
Bellingham WA 98225

Re: WSPA Comments on the Ongoing Whatcom County
Unrefined Fossil Fuels Moratorium, Ordinance 2019-064

Via hand delivery and email:
bbuchana@co.whatcom.wa.us
tbyrd@co.whatcom.wa.us
cfrazey@co.whatcom.wa.us
tdonovan@co.whatcom.wa.us
bbrenner@co.whatcom.wa.us
rbrowne@co.whatcom.wa.us
ssidhu@co.whatcom.wa.us

Honorable Council Members:

The Western States Petroleum Association (WSPA) appreciates the opportunity to provide comments on Ordinance 2019-064. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport, and market petroleum and petroleum products in five western states, including Washington. WSPA members have operated refineries along Cherry Point in Whatcom County for years. This area provides key energy and emergency infrastructure as recognized by various city, state, and federal documents and is a regional hub for energy production and distribution.

WSPA opposes the Whatcom County Council's ongoing extension of the Unrefined Fossil Fuels Moratorium. The continued imposition of this "temporary" moratorium – now in its sixth iteration -- exceeds Whatcom County's powers under state law and likely may violate the United States Constitution as it pertains to interstate and foreign commerce. The Council's repeated extensions have rendered the moratorium unreasonable and therefore unconstitutional. The moratorium is fundamentally a breach of the compact created between Whatcom County and the Cherry Point businesses in existence when county planning policies for the Cherry Point area were enacted decades ago. Those countywide planning policies express the County's commitment to creating an area where industrial business would be fostered, and this commitment led many businesses to commit significant resources to Whatcom County. With the moratorium, the Council is turning away from these longstanding commitments, which threatens the viability of some of the most significant economic engines of Whatcom County.

The Council further breached its commitment to its industrial businesses when it made the sudden decision, without any prior notice, to consider Comprehensive Plan amendments that will restrict the ability of all "fossil fuel" businesses to obtain permits for their facilities. This is a significant departure from the Council's long-stated interest in restricting the creation of export terminals at Cherry Point, an effort that WSPA has consistently opposed as exceeding the County's power and violating the U.S. Constitution. (See WSPA's prior letters dated Sept. 2016, March 2017, Sept. 2017, Feb. 2018, and Aug. 2018.) Now the Council has determined to expand its two-year "interim" moratorium on the export of "unrefined fossil fuels" to a broader restriction on all fossil fuel facilities. This expansive restriction on existing operations flies in the

face of the Council's repeated statements that it does not intend to restrict existing businesses. The January 15 amendments will do just that: they will transform even the most modest capital improvement or maintenance project – for instance, creating a new parking lot -- into an onerous, costly, and uncertain permitting process.

WSPA has engaged in a two-year dialog with the Council in good faith and during this time, and has been assured by the Council that the purpose of the moratorium was to allow the Council time to draft limitations on export of unrefined fossil fuels, not to impact existing businesses. The Council viewed these restrictions as necessary because the federal government removed the federal restriction on the export of crude oil. The new proposed Comprehensive Plan amendments far exceed this stated intention, and the effect of these amendments on local businesses will be substantial and catastrophic. Businesses have choices on where to spend human and capital resources. This proposal sends the clear message that they should not invest in Whatcom County.

WSPA would also like to express its concerns about the lack of transparency and the haste with which the January 15 Comprehensive Plan amendments were brought forward for consideration. WSPA strives to have a collaborative relationship with Whatcom County and has endeavored to engage with Whatcom County in a productive and open manner. The sudden introduction of the January 15 amendments, without any prior notice, make it clear, however, that Whatcom County is not interested in working together with industry to create energy and economic policy, but instead prefers to work behind closed doors with special interest groups to draft restrictions to curtail industry. The Council's decision to approve to forward the proposed January 15 amendments to the Planning Commission prior to conducting a line-by-line review of the amendments is inconsistent with the longstanding practice of the Council. It is also inconsistent with the letter and spirit of the County's public participation requirements, which require the County to provide a meaningful opportunity for review of, and comment on, any proposed Comprehensive Plan amendments. The Council's actions send the plain message that the effort of industrial groups to provide input and feedback on the very real and harmful impacts of the restrictions on development has been largely ignored.

At bottom, the sixth "interim" moratorium, along with the introduction of the January 15 amendments to restrict all fossil fuel development confirm what WSPA has suspected– the moratorium is but a pretext; the County is not attempting to exercise its police powers to regulate some local concern but is instead attempting to enact national—and even global—energy policy through its development regulations.

In point of fact, while the Council states that it wants to renew the moratorium and adopt new permitting requirements to address the impacts that fossil fuel extraction, transportation and use have on human health and the environment, its other statements contradict this. The Plan Amendments also note that it is the Policy of the County to promote and ultimately achieve energy use by the public and private sectors that is 100% reliant on renewable energy. This is

the true goal of the County. In its efforts to meet this goal, the County has proposed regulatory language that potentially affects any business in the Cherry Point district that sells or uses petroleum products. This includes service stations which sell gasoline to County residents for combustion of the fuel in their vehicles and small businesses that use heating oil to heat their buildings. Ultimately it also affects local power generation plants that use natural gas to provide electricity to the area. Furthermore, the Comprehensive Plan amendments will cloud the refineries ability to invest and participate in the energy transition, including the incorporation of renewables in the production of liquid fuels.

WSPA respectfully urges Whatcom County to restore to its local stakeholders the right to apply for and have processed any land use and development permit applications that are authorized by the Whatcom County Code. To do so, the current moratorium should be allowed to expire without further renewal.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact me or the Senior Coordinator for the Northwest Region of WSPA, Holli Johnson at (360) 352-4506 or by email at hjohnson@wspa.org.

Sincerely,



cc: Jodie Muller, WSPA



Holli Johnson
NW External Affairs

July 9, 2019

[Sent via email](#)

Whatcom County Council
311 Grand Avenue, STE 105
Bellingham WA 98225

Re: WSPA Comments on AB2019-339

Honorable Council Members:

I am writing on behalf of the Western States Petroleum Association (WSPA) to express WSPA's opposition to AB2019-339, a proposed Ordinance extending the County's "interim" moratorium on fossil fuel facilities in the Cherry Point UGA. The County's proposal to extend these burdensome restrictions for the seventh consecutive six-month increment is an unlawful use of a statute that authorizes only temporary regulations. WSPA urges the Council to refrain from adopting the moratorium and, instead, to allow the existing moratorium (the sixth installment) to lapse.

WSPA members are directly impacted by the County's action because they operate facilities that are the target of the moratorium. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport, and market petroleum and petroleum products in five western states, including Washington. WSPA members have operated refineries in Cherry Point for decades. Those facilities create and preserve living wage jobs for County residents, are integral to meeting the energy needs of the region, and are vital to the local, state, and regional economies.

WSPA has previously submitted comment letters explaining the significant impact of the County's continued moratorium on its members.¹ The ordinance will extend the prohibition on accepting and processing applications of County permits for new or expanded fossil fuel facilities. It restricts the refineries' operational flexibility and prohibits the refineries from making improvements necessary to stay competitive in the marketplace and to continue to improve the efficiency of the facilities.

The current iteration of the moratorium repeats the legal flaws of the preceding six installments that are detailed in WSPA's prior letters. Specifically, the regulations single out a specific industry for disparate treatment without justification. The moratorium violates both state and federal law as well as the Constitutions of the United States and Washington. Moreover, the County's action is inconsistent with the County's overarching comprehensive plan policies for the Cherry Point Subarea that recognize the importance of major industrial uses. By acting on the Ordinance, the County will implement these inconsistent regulations while bypassing the full public process that is required of the County before it amends its Comprehensive Plan, development regulations and subarea plan.

¹ We attach and incorporate by reference WSPA's previous comment letters dated September 2016, March 2017, September 2017, February 2018, July 2018, August 2018, January 2019, and June 2019.

Importantly, the County is without legal authority to extend the moratorium. RCW 36.70A.390 authorizes only temporary measures.² The statute limits interim controls to six months in duration (up to one year with adoption of a work plan). While the statute allows “one or more” six-month renewals,³ that provision does not create a backdoor for *de facto* permanent regulations through the systematic and continuous renewal of nominally “interim” controls.⁴ With its seventh installment, the County has long since passed any conceivable claim that the moratorium is interim or temporary. The County’s attempt to shoehorn a permanent regulation into an “interim” moratorium contravenes the language of the Growth Management Act, frustrates its purpose, and unlawfully extends the hardship created by the moratorium. The County is also exposed to potential claims for damages from its arbitrary, capricious, and unjustified refusal to process applications.⁵

The mere fact that the County is simultaneously advancing a proposal for permanent amendments by a separate draft Ordinance does not absolve its continued unlawful reliance on the rolling moratorium in the interim. The process for the County’s consideration and action on permanent amendments is delayed. Importantly, the County’s current pending proposal for permanent amendments is also flawed and WSPA opposes it. It is WSPA’s hope that the Council will abandon or significantly revise its approach. In any event, regardless of the status of the County’s effort to adopt permanent amendments through the full GMA process, its implementation of the seventh iteration of “interim” controls in the meantime would be unlawful. WSPA therefore respectfully urges Whatcom County to restore to its local stakeholders the right to apply for and have processed any land use and development permit applications that are authorized by the existing Whatcom County Code. To do so, the current moratorium should be allowed to expire without further renewal.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact me at (360) 352-4506 or by email at hल्ली@wspa.org.

Sincerely,



cc: Jessica Spiegel - WSPA
Jodie Muller - WSPA

² *Aadland v. Snohomish Cty*, CPSGMHB Case No. 08-3-0003, Order on Motions, (Sept. 3, 2008) (RCW 36.70A.390 “allows for temporary, interim or stopgap measures to manage development activity while appropriate analysis and planning can occur.”).

³ RCW 36.70A.390.

⁴ *Id.* See also *Master Builders Association of King and Snohomish Counties v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order, (Aug. 4, 2005).

⁵ See RCW64.40.020 and 42 U.S.C. § 1983; see also *Maytown Sand and Gravel v. Thurston Cty*, 191 Wn.2d 392, 433–34, 423 P.3d 223 (2018) (damages are available when a County abuses its power and is “motivated by improper and political concerns”).