Arnold & Porter

Brian D. Israel
+1 202.942.6540 Direct
Brian.Israel@arnoldporter.com

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Whatcom County Council
311 Grand Avenue, Suite # 105
Bellingham, VA 98225-4038

Re: Ongoing Interim Moratorium For Cherry Point Urban Growth Area

Dear Honorable Council Members,

On behalf of the BP Cherry Point Refinery ("Cherry Point"), we appreciate the opportunity to provide comments on proposed Ordinance Number AB2019-597, providing for an eighth extension of the County's "Moratorium on the Acceptance and Processing of Applications and Permits in the Cherry Point Urban Growth Area the Primary Purpose of Which Would Be the Shipment of Unrefined Fossil Fuels Not to Be Processed at Cherry Point" ("Proposed Moratorium").[1]

For more than 39 months—since August 9, 2016—Whatcom County has enacted a series of consecutive moratoria that have been "interim" in name only. An unprecedented eighth extension of the "interim" moratorium would extend the moratorium's lifespan to at least 45 months, with the possibility of a further extension in 2020. These actions by the County defy both the letter and spirit of Washington's Growth Management Act ("GMA") and Planning Enabling Act.

In addition to these procedural deficiencies, Whatcom County's moratoria have violated, and will continue to violate, both federal and state substantive law. As discussed in more detail below, not only is the Proposed Moratorium inconsistent with the GMA, State Environmental Policy Act ("SEPA"), and the Whatcom County Comprehensive Plan, but it also violates the U.S. Constitution and is preempted by several federal statutes.

Cherry Point urges the County Council not to enact the Proposed Moratorium and to instead put an end to this development ban that never should have been enacted in the first place, let alone extended seven times. Whatcom County refineries—which support more than 1,800 direct jobs and thousands more indirect jobs—can best contribute to

[1] These comments incorporate by reference, and are intended to supplement, the comments Cherry Point submitted previously on earlier versions of the moratoria, which apply just as much to the Proposed Moratorium, as well as the comments previously submitted by the Western States Petroleum Association ("WSPA").

FILE UNDER: AB 2019 - 597
DATE RECEIVED: 12-3-2019
SUBMITTED BY: Pam Brady for BP
☒ COUNCIL MEETING
☐ _____ COMMITTEE
EXHIBIT: A

Whatcom County if they are able to respond and adapt to the highly-competitive, rapidly-changing, dynamic market for transportation fuels. The County Council's perpetual, indefinite, and illegal extension of its "interim" moratoria should not continue. If the County Council proceeds with the Proposed Moratorium, we reserve our right to challenge the ordinance in court.

I. THE PROPOSED EIGHTH CONSECUTIVE EXTENSION OF THE MORATORIUM WOULD VIOLATE WASHINGTON LAW ON INTERIM ZONING MEASURES

"Interim" zoning measures are intended to be *temporary* in nature. The County Council's misuse of this zoning mechanism to enact a *de facto* permanent development ban is inconsistent with both the Washington Planning Enabling Act and Growth Management Act ("GMA").

The Revised Code of Washington permits county planning agencies to implement "interim" zoning measures in only limited circumstances. As the Proposed Moratorium observes, the Planning Enabling Act (RCW §§ 36.70.790 and 36.70.795) "allow for the adoption of interim official controls."[2] Section 36.70.790 provides that a planning agency may, *in good faith* and in case of emergency, "adopt as an emergency measure a *temporary interim* zoning map the purpose of which shall be to classify or regulate uses and related matters as constitute the emergency."[3] Section 36.70.790 was the only possible source of authority to adopt interim ordinances until 1992.[4] In 1992, the Washington Legislature passed Senate Bill 5727, which created RCW section 36.70.795. Proponents of Senate Bill 5727 explained that the bill was intended to "***limit[] abuse*** of moratorium and interim zoning *by* ***limiting duration*** and reducing surprise factor when adopted."[5] Thus, section 36.70.795 requires that counties hold public hearings on interim moratoria and restricts such measures to six month renewable time periods.[6] The Washington Court of Appeals has recognized that the purpose of section 36.70.795 is to "protect private property rights

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[2] Proposed Moratorium at 3.

[3] RCW § 36.70.790 (emphasis added). Although RCW section 36.70.790 only mentions a "temporary interim zoning map," Washington courts treat section 36.70.790 as applying both to a zoning map and to an ordinance that would adopt the map. *Peyote Canyon, LLC v. Cty. of Benton*, No. 34600-5-III, 2017 WL 3189719, at *4 (Wash. Ct. App. July 27, 2017).

[4] *Id.*

[5] Senate Bill Report, SB 5727 (Mar. 5, 1991) (emphasis added), http://lawfilesext.leg.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/Senate/5727.SBR.pdf.

[6] RCW § 36.70.795; *see also Peyote Canyon*, 2017 WL 318791, at *6. In 1992, the Legislature also added section 36.70A.390 to the GMA. Section 36.70A.390 echoes the language of the section 36.70.795, providing that local planning agencies can only implement interim zoning measures under the GMA if a public hearing is held and the moratoria are limited to six-month renewable time periods.

by imposing *additional limitations* on permit-granting agencies authorized to adopt moratoria, *not to make moratoria easier*."[7]

An illustrative example of a county's abuse of "interim" zoning, one which prompted the Legislature to impose these additional restrictions, is *Byers v. Board of Clallam County Commissioners*.[8] There, the Commissioners of Clallam County attempted to enact an "interim" zoning measure that would have lasted four years.[9] In response to a challenge by residents and taxpayers, the Supreme Court of Washington struck down the ordinance, reasoning that "'[i]nterim zoning,' under RCW 36.70.790, is meant to be ***only a temporary protective measure***. It is not intended to be used as a means of adopting a virtually complete zoning ordinance for a *relatively extended period of time*."[10] The Supreme Court of Washington's ruling in *Byers* remains good law today.[11] Here, the County Council's proposed extension of the Cherry Point development moratorium to 45 months can no longer be described as a "temporary protective measure."

Statements by County Councilmembers indicate that the Council knew what it was doing by repeatedly renewing an "interim" moratorium. For example, in May 2016, while the County Council was considering incorporating a Cherry Point development ban into its Comprehensive Plan, Councilmember Todd Donovan asked whether a "temporary moratorium" approach would "require less in the record as far as a police powers justification."[12] Moreover, on August 3, 2016, six days *before* the County Council enacted the initial emergency moratorium, former Councilmember Carl Weimer indicated in an email to an employee of Stand.Earth that, while emergency moratoria are limited to 60 days, "[t]he *normal way around this* is to pass another interim ordinance for a six month period."[13] One week later, and just four days after the Emergency Moratorium was enacted, County Clerk of the Council Dana Brown-Davis emailed Councilmember Barry

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[7] *Peyote Canyon*, 2017 WL 3187791, at *6 (emphasis added).
[8] 84 Wash. 2d 796, 800-01 (1974).
[9] *Id.*
[10] *Id.* (emphasis added).
[11] *See Peyote Canyon*, 2017 WL 3189719, at *4 (summarizing the *Byers* decision as the case where the Washington Supreme Court "made a distinction between 'interim' zoning ordinances that are sufficiently short-term to be eligible for adoption under RCW 36.70.790 and those that, because they are longer term, non-emergency measures, are subject to other procedural requirements of the Planning Enabling Act.").
[12] Email from Todd Donovan to Karen Frakes and Barry Buchanan, "Re: Exec session, Monday" (May 13, 2016, 09:00 PM).
[13] Email from Carl Weimer to Matt Krogh, "Fwd: Draft moratorium language - part 2" (Aug. 3, 2016, 09:58 AM), (emphasis added).

Buchanan to indicate that she would begin working on drafting an interim measure to extend the moratorium into 2017.[14]

Three-plus years and seven "interim" extensions later, the County Council's moratorium on development at Cherry Point remains in effect. Indeed, Councilmember Barbara Brenner foreshadowed a perpetual extension of the moratoria at the September 13, 2016 Special Committee of the Whole Meeting when she expressed skepticism over Councilmember Rud Browne's claim that the County's first extension would be "just an interim moratorium": "It's just an interim, this is just 60 days, it just keeps growing. . . . There'll be another interim and another one and until there's a final one."[15] Because the Proposed Moratorium, like the long line of "interim" moratoria enacted before it, cannot legitimately be considered a "temporary protective measure," it would not pass muster if challenged.

The repeated renewal of "interim" moratoria, without conducting environmental analysis, is also unlawful under SEPA (Ch. 43.21C RCW). SEPA requires that government consider the general welfare, social, economic, and other requirements in weighing and balancing alternatives *before* making final decisions.[16] As noted above, the interim moratoria enacted for the Cherry Point Urban Growth Area have long exceeded the point where they can be considered "temporary protective measures." The County must therefore comply with all SEPA requirements before re-enacting this measure.

II. THE PROPOSED MORATORIUM IS UNCONSTITUTIONAL

As the BP Cherry Point Refinery and WSPA have noted in their comments on prior versions of the Moratorium—and as further explained here—the County's actions violate the dormant Commerce Clause of the U.S. Constitution. In short, the U.S. Constitution grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states."[17] The Commerce Clause has a "dormant" or "negative" aspect, which bars state and local governments from unjustifiably "discriminat[ing] against or burden[ing] the interstate flow of articles of commerce."[18]

A local ordinance can violate the dormant Commerce Clause in multiple ways: (1) by discriminating between in-state and out-of-state interests; (2) by excessively burdening

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[14] Email from Dana Brown-Davis to Barry Buchanan, "Interim Moratorium" (Aug. 10, 2016 09:33:25 PM).
[15] Whatcom County, Special Committee of the Whole Meeting (Sept. 13, 2016) (clip from 54:50 - 55:34), https://wa-whatcomcounty.civicplus.com/2036/2013-2018-Agendas-Action-Taken-Minutes-a.
[16] RCW § 43.21C.030(c).
[17] U.S. Const., art. I, § 8, cl. 3.
[18] *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

interstate commerce; or (3) by regulating extraterritorial conduct. An ordinance can also violate the dormant Foreign Commerce Clause by interfering with the federal government's ability to speak with one voice on matters of foreign trade. The Moratorium is unconstitutional in all four ways.[19]

A. Discrimination Against Interstate Commerce

The dormant Commerce Clause restricts state and local governments' ability to discriminate against interstate commerce by "favor[ing] in-state economic interests over out-of-state interests."[20] If a law is discriminatory, "it is virtually *per se* invalid."[21] The law can be upheld only if the state or local government demonstrates that it "serves a legitimate local purpose" that "could not be served as well by available nondiscriminatory means."[22]

The Proposed Moratorium facially discriminates against interstate commerce. The Moratorium bars companies in Cherry Point from constructing or expanding facilities that receive, transfer, or store crude oil, *unless* the oil will be processed or consumed within Whatcom County. That is, companies are free to construct or expand facilities as long as they use local refineries to process their fuel. The Moratorium thus disfavors companies that wish to transport crude oil through the county for processing elsewhere. And it has the practical effect of steering business toward local refineries, to the detriment of out-of-state competitors.[23]

This scheme plainly violates the dormant Commerce Clause. The Supreme Court has long held that states and municipalities cannot take advantage of local resources by

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[19] Indeed, there is evidence that Council members themselves were aware that the Moratorium might be unconstitutional. For example, in an August 3, 2016 email exchange with Alex Ramel of Stand.Earth, former Councilmember Carl Weimer stated: "I removed most of the 'transport through, transshipment or transfer of' language [from the initial version of the Moratorium] because I thought that got us in more trouble with the Commerce Clause than trying to focus on the permitting of 'facilities' for export. **Transportation** of goods is clearly something that local governments are heavily constrained on controlling by the Commerce Clause." Email from Carl Weimer to Alex Ramel, Stand.Earth, "Re: Draft moratorium language - part 2" (Aug. 3, 2016, 11:14:47 AM PDT) (emphasis added).

[20] *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

[21] *Or. Waste Sys.*, 511 U.S. at 99.

[22] *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

[23] *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (explaining that tariffs and other discriminatory laws "violate[] the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States").

requiring companies to process those resources locally before exporting them.[24] In *C & A Carbone, Inc. v. Town of Clarkstown*, the Court explained that such requirements "hoard a local resource . . . for the benefit of local businesses that treat it."[25] The Proposed Moratorium functions similarly. It prohibits exporters from accessing the County's export market—an important channel of interstate and foreign commerce—unless they use local refineries to process their fuel. That type of leveraging is impermissible under the dormant Commerce Clause.

There is evidence, moreover, that the Proposed Moratorium's discrimination against out-of-state interests was motivated by economic protectionism. The Proposed Moratorium states that existing refineries in the county have "provid[ed] substantial local employment" for decades, and that those "high wage jobs . . . could be lost if the existing refineries were converted to crude oil export facilities."[26]

Because the Proposed Moratorium discriminates against interstate commerce in both purpose and effect,[27] it could be upheld only if the County could demonstrate that it was the only means available to advance a legitimate local interest. Even assuming the Proposed Moratorium serves a legitimate interest in public safety, the County cannot show that it lacked any nondiscriminatory means to achieve that same end.

B. Excessive Burden on Interstate Commerce

The Proposed Moratorium also violates the dormant Commerce Clause by placing burdens on interstate commerce that clearly exceed its putative local benefits. In *Pike* v.

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[24] *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down Alaska regulation that required all Alaska timber to be processed within the state prior to export); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (striking down requirement that all Arizona-grown cantaloupes be packaged in state prior to export); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (striking down Louisiana statute that prohibited the export of shrimp unless the heads and hulls had first been removed within the state); *Minnesota v. Barber*, 136 U.S. 313 (1890) (striking down statute requiring any meat sold within the state, regardless of origin, to be examined by a state inspector).

[25] 511 U.S. 383, 392 (1994).

[26] Proposed Moratorium at 1; *see also* Email from Jack Louws, Whatcom County Council Executive, to Council, "Cherry Point January 15th proposal" (Jan. 23, 2019, 05:57 PM) ("The Cherry Point Interim Moratorium . . . recognizes the substantial local employment at Cherry Point, and underscores the job loss if refineries are converted from refiners to exporters. . . . I have heard many of you articulate the position . . . 'that in no way it was your intent to restrict the business viability of the existing operations at Cherry Point, only to prevent future exporting' (my generalization of what I've heard).").

[27] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." (internal citations omitted)); *cf. C & A Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism.").

Bruce Church, Inc., the Supreme Court held that even a state or local ordinance that "regulates even-handedly to effectuate a legitimate local public interest" will be struck down if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[28]

The burden imposed by the Proposed Moratorium is considerable. The ordinance notes that "existing and proposed pipeline facilities have increased, or proposed to increase, their capacity to move crude oil, diluted bitumen, and natural gas to Cherry Point."[29] These proposed expansions will not be permitted under the Moratorium unless the companies agree to process their fuel in the county. Out-of-state producers of fuel that do not wish to use local refineries will have no choice but to reroute their fuel, causing delays, inefficiencies, and increased costs.[30] And any interest in reducing crude oil exports and global fossil fuel emissions cannot be treated as "putative *local* benefits" for purposes of the Commerce Clause.[31]

The Proposed Moratorium purports to serve local interests in public health and safety by, for example, reducing the risk of train derailments and explosions. Those interests cannot justify the ordinance for multiple reasons. First, the Proposed Moratorium includes an exemption that allows (indeed, encourages) the transportation of crude oil into the county for processing. This exemption undermines the asserted safety interests, as it allows trains and pipelines to operate notwithstanding the risks.[32] Moreover, any companies that choose not to use local refineries will likely have to transport their crude oil to export markets via longer and less convenient routes. That may well increase the overall number of accidents; as the Supreme Court has noted in the trucking context, "[o]ther things being equal, accidents are proportional to distance traveled."[33]

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[28] 397 U.S. at 142.

[29] Proposed Moratorium at 2.

[30] *See Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 674 (1981) (finding that restrictions on truck size created a substantial burden where trucking companies would either have to "route [trucks] around Iowa" or change their operations, and "[e]ach of [those] options engenders inefficiency and added expense").

[31] *Pike*, 397 U.S. at 142 (emphasis added); *cf. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986, 1008 (N.D. Cal. 2018) ("It is facially ridiculous to suggest that this one operation resulting in the consumption of coal in other countries will, in the grand scheme of things, pose a substantial global warming-related danger to people in Oakland.").

[32] *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (concluding that the State's asserted interest in highway safety was "undercut by the maze of exemptions ... that the State itself allows").

[33] *Kassel*, 450 U.S. at 675; *see id.* at 678 ("[A] State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it.").

C. Direct Regulation of Extraterritorial Conduct

A local ordinance violates the dormant Commerce Clause when it has the practical effect of controlling conduct beyond municipal boundaries.[34] The practical effect of the ordinance "must be evaluated not only by considering the consequences of the [ordinance] itself, but also by considering how the challenged [ordinance] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[35] Under the Proposed Moratorium, companies that previously could have transported crude oil through the county for export must now either reroute their shipments or agree to refine their fuel at local refineries. The Proposed Moratorium therefore unconstitutionally regulates out-of-county conduct.

D. Interference with Foreign Commerce

Finally, the Proposed Moratorium violates the dormant Foreign Commerce Clause which also constrains state and local governments' authority to regulate commerce. "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny,"[36] given "the special need for federal uniformity" in matters of international trade.[37] The Supreme Court relied in part on this doctrine to invalidate an Alaska statute requiring local processing of Alaska timber prior to export.[38] The Court explained that it would be "peculiarly inappropriate" to allow states to impose export restrictions on unprocessed timber, since Congress had given the matter "substantial attention" in previous years.[39]

Here, too, the federal government has paid "substantial attention" to the subject of crude oil exports. The Obama Administration lifted the 40-year ban on crude oil exports in December 2015.[40] Crude oil exports have increased dramatically in the years since then, and encouraging energy exports remains central to U.S. foreign policy.[41] The Proposed Moratorium, however, prevents companies from constructing and expanding facilities designed to export crude oil and other unrefined fossil fuels. Indeed, there is evidence that the Council enacted the first iteration of the Moratorium for the express purpose of reducing exports; one Councilmember referred to the process of drafting the regulations as

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[34] *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).
[35] *Id.*
[36] *South-Central Timber*, 467 U.S. at 100.
[37] *Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011).
[38] *South-Central Timber*, 467 U.S. at 100–01.
[39] *Id.*
[40] Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2986, div. O, tit. I, § 101.
[41] *See* National Security Strategy of the United States of America (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

a "delicate dance since all the lawyers I have consulted with agree the County does not have the authority to just 'ban fossil fuel exports.'"[43]

As the Supreme Court has recognized, "[i]t is crucial to the efficient execution of the Nation's foreign policy that the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments."[44] The Constitution accordingly gives the federal government the prerogative to set national energy policy and to determine whether and under what circumstances crude oil exports serve our national interest. States and local governments may not substitute their own judgments on these delicate matters of foreign trade.

III. The Proposed Moratorium Would Be Preempted by Federal Law

Federal law recognizes that the energy and transportation industries are critical to national commerce, and that these industries cannot serve our nation effectively without uniform, federal regulation. Accordingly, Congress has enacted numerous statutes that prevent local governments across the country from collectively creating "patchworks" of local regulations that render national compliance on industry's part difficult, if not impossible. Here, the Proposed Moratorium infringes on three areas of law that Congress has expressly reserved for exclusive or near-exclusive federal regulation: (1) railroads; (2) the transportation of hazardous materials; and (3) interstate pipelines. Because the Proposed Moratorium conflicts with these statutes, it is preempted under the federal Supremacy Clause.[45]

A. Illegal Regulation of Railroads

Congress has vigilantly expressed its intent to shield railroads from state and local regulation since enacting the Interstate Commerce Act ("ICC") in 1887.[46] In 1995, Congress replaced the ICC with the Interstate Commerce Commission Termination Act ("ICCTA"), in part with the goal of expanding even further federal jurisdiction over railroads.[47] The ICCTA assigns the federal Surface Transportation Board ("STB") exclusive jurisdiction over transportation by rail carriers, as well as the *construction, acquisition, operation*, or abandonment of *new rail facilities*, even those located within one

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[43] Email from Carl Weimer to Pam Borso, "Re: Exporting certain fossil fuels from Cherry Point" (June 24, 2016, 10:08 AM).
[44] *See South-Central Timber*, 467 U.S. at 100 (internal quotation marks omitted).
[45] U.S. Const. art. VI, cl. 2.
[46] *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).
[47] *See Or. Coast Scenic R.R. v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

state.[47] The ICCTA provides that STB's regulation of rail transportation is "exclusive" and expressly preempts state regulation of railroads.[48]

Federal courts, including the Ninth Circuit, have not hesitated to overturn state and local permitting rules for railroads, much less outright development bans like in the Proposed Moratorium.[49] Here, the Proposed Moratorium would continue the County's unlawful prohibition on the construction and acquisition of rail facilities and lines in Whatcom County. Indeed, the Proposed Moratorium expressly provides that "rail loading and offloading facilities, road spurs, or any other such physical infrastructure" fall within the expansive definition of *facilities* that are barred from development.[50] Accordingly, the Proposed Moratorium likely runs afoul of the ICCTA.

B. Illegal Regulation of Hazardous Material Transportation

Congress enacted the Hazardous Material Transportation Act ("HMTA") to ensure the free, efficient, and safe transportation of hazardous materials in commerce. The HMTA grants the Secretary of Transportation exclusive authority to promulgate and enforce rigorous, uniform regulations, and safety standards for the transportation of these materials in Congress. Recognizing that divergent state and local regulations would impede the transportation of these materials, Congress included a strong federal preemption clause in the HMTA and its enacting regulations, the Hazardous Materials Regulations ("HMR"). This preemption clause leaves almost no room for states to regulate hazardous material transportation. Indeed, any regulation that does not conform to the HMR in "every significant respect" is preempted.

The HMR's Hazardous Materials Table establishes what hazardous materials may be transported, as well as any applicable quantity limitations and packaging requirements.[51] Petroleum crude oil, gasoline, diesel, and jet fuel are among the hazardous materials included on the Hazardous Materials Table.[52] In addition to establishing quantity limitations and handling procedures for hazardous materials, the HMR recognizes that unnecessary delays in the transportation of hazardous materials compromise safety. The HMR thus requires that "all shipments of hazardous materials . . . be transported without

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[47] 49 U.S.C. § 10501(b).
[48] *Id.*
[49] *See, e.g., City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).
[50] Proposed Moratorium at 4.
[51] 49 C.F.R. § 172.101.
[52] *Id.*

unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination."[53]

Here, the HMTA and HMR would preempt the Proposed Moratorium in two respects. First, by prohibiting the development of new facilities that transport hazardous materials, the Proposed Moratorium would effectively establish its own quantity limitations on hazardous materials transported across state lines. Second, the Proposed Moratorium would impose unnecessary delays on the transportation of hazardous materials into Whatcom County. Interstate fuel shipments that would otherwise be bound for Cherry Point in the absence of the Proposed Moratorium will need to be rerouted to different, more distant delivery points.

C. Illegal Regulation of Interstate Pipelines

Congress also reserved the regulation of interstate pipelines for exclusive federal regulation with the enactment of the Hazardous Liquid Pipeline Safety Act of 1979 ("HLPSA"). HLPSA expressly preempts, with two exceptions that do not apply here, any state or local government regulation of interstate pipelines.[54] Courts have broadly interpreted HLPSA's preemption statute, finding that it is so broad that it covers "the entire domain" of pipeline safety and have not hesitated to strike down local regulations that affect interstate pipeline operations.[55] Courts have not hesitated to preempt local regulations that affect pipeline operations.[56]

Here, the Proposed Moratorium would continue to impermissibly regulate interstate pipeline operations in Whatcom County. Pipeline facilities, as "physical infrastructure intended to receive, transfer, or store unrefined fossil fuels," likely fall under the umbrella of the Proposed Moratorium's expansive definition of "*facility*."[57] Consistent with prior decisions involving the HLPSA, a court would recognize that the development and operation of interstate pipelines falls under the jurisdiction of the federal government, not individual counties.

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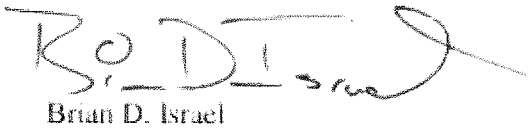
[53] 49 C.F.R. 177.800(d).
[54] 49 U.S.C. § 60104(c).
[55] *Texas Midstream Gas Services v. City of Grand Prairie*, No. 3:08-cv-1723-d, 2008 U.S. Dist. LEXIS 95091 (N.D. Tex. Nov. 25, 2008).
[56] *See, e.g., Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 (9th Cir. 2006).
[57] Proposed Moratorium at 4.

Cherry Point very much appreciates the opportunity to provide these comments. For the reasons stated above, Cherry Point urges the County Council not to enact the Proposed Moratorium, and to instead lift the restrictions to which Whatcom County businesses have already been subjected for more than 39 months. We would welcome the opportunity to discuss our concerns in greater detail with the County. Please feel free to contact me at 202-942-6546 or Pam Brady if you would like to discuss further.

Sincerely,



Brian D. Israel

cc: Robert Allendorfer, Refinery Manager, BP Cherry Point Refinery
Pam Brady, Assoc. Director, NW Gov't and Public Affairs, BP Cherry Point Refinery
Christina Landgraf, Counsel, BP
Vanessa Powers, Stoel Rives
Ethan Shenkman, Arnold & Porter