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Whatcom County Planning Commission
5280 Northwest Drive
Bellingham, WA 98226

RE: Whatcom County Comprehensive Plan and County Code Amendments

Dear Planning Commissioners:

On behalf of the BP Cherry Point Refinery ("Cherry Point"), we appreciate the opportunity to provide comments on the proposed Whatcom County Comprehensive Plan and County Code amendments relating to fossil fuel and renewable fuel refineries, storage, transshipment facilities, piers, and other related facilities within the Cherry Point Urban Growth Area ("Proposed Amendments"). This letter provides comments on the August 7, 2019 version of the Proposed Amendments.

Cherry Point fully supports well-designed public health, safety and environmental regulations, including those related to greenhouse gas ("GHG") emissions. Indeed, Cherry Point supports and complies with numerous federal, state, and local regulatory and permitting requirements.

Cherry Point cannot, however, support proposals that are unlawful, unworkable, or inappropriate—and that, in some instances, are counterproductive given their stated intent, though, arbitrarily constraining Cherry Point's ability to drive improvements in safety and environmental protection and to advance its commitment to promoting a low carbon future. For the reasons explained below, the Proposed Amendments to the County Code are not sound public health, safety or environmental policy; would have serious economic repercussions for the County; and are not permissible under both federal and state law.

These comments are presented in the spirit of cooperation. Cherry Point's goal is to engage with the Planning Commission in a mutual effort to develop public health, safety and environmental policies that are responsive to the County's concerns but that are also practical, effective, and fully consistent with existing federal and state law. To that end, Cherry Point has repeatedly expressed concern about and provided input on the Proposed Amendments, but so far the County has declined to acknowledge Cherry Point's feedback in any meaningful way.. We reiterate Cherry Point's desire to meet with the Planning Commission and the County to discuss these concerns with the current Proposed Amendments, as well as to discuss constructive alternatives.

I. INTRODUCTION

The Cherry Point Refinery has been an important contributor to the Whatcom County community since 1971. Cherry Point employs 850 people and 1,000 contractors, directly supporting 1,850 jobs in Whatcom County. Cherry Point also invests significant time and money every year in multiple community projects, charitable initiatives, and environmental restoration. Furthermore, Cherry Point is one of the largest taxpayers in Whatcom County and is proud to be part of the Whatcom County community.

On August 7, 2019, the County Council approved Resolution 2019-037, forwarding the Cascadia Law Group's proposed Cherry Point Comprehensive Plan and Zoning Code amendments to the Planning Commission for review under the Washington State Environmental Policy Act ("SEPA"). This is roughly the 14th version of these Proposed Amendments that the County has considered over the last 15 months, resulting in tremendous uncertainty for the regulated community. In most instances, the County has not provided adequate notice and opportunity to study and comment on this shifting series of proposals.

As detailed below, the Proposed Amendments represent misguided public health, safety, environmental and economic policy, and will not survive judicial scrutiny. For example:

The Proposed Amendments Are Vague, Impractical and Unworkable – The Proposed Amendments are full of undefined terms, ambiguous criteria, and infeasible requirements. As just one example, the Proposed Amendments seek to require Cherry Point to obtain a new conditional use permit ("CUP") for any expansions (on top of all other required federal and state permits). The Proposed Amendments do not define "expansions" nor do they meaningfully articulate the criteria for obtaining a permit. As another example, the Proposed Amendments seek to require insurance that the County itself (or its consultants) admit is unavailable in the marketplace. Further examples of the impracticability of the Proposed Amendments are discussed below.

The Proposed Amendments Attack the Solution Not the Problem – The Proposed Amendments purport to address the community's interest in safeguarding important public health, safety, and environmental issues, and Cherry Point and its employees wholeheartedly share the Council's commitment to safeguarding public health, safety and the environment. However, the Proposed Amendments are misguided in that regard. Because of untenable uncertainty and unwarranted additional costs, the Proposed Amendments create a tremendous—possibly insurmountable—disincentive for capital projects that would result in increased efficiency, lower emissions, cleaner products, and

improved technologies. The Proposed Amendments will stifle innovation and place unnecessary obstacles in the way of efforts to transition to cleaner, lower-carbon renewable fuels. In these ways, among others, the Proposed Amendments represent unsound policy.

The Proposed Amendments Could Have Serious Adverse Economic Consequences for Whatcom County – The energy business in general, and refineries in particular, operate in a highly-competitive, rapidly-changing, dynamic, low-margin market. A refinery, to survive, must be able to modify various aspects of its product mix in response to shifts in supply and demand. The Proposed Amendments will have the effect of imposing unique constraints and unnecessary costs on the refineries in Whatcom County. By squelching a company's ability to innovate and adapt to the marketplace, the Proposed Amendments, over time, will likely make it impossible for responsible companies to operate successfully. In the worst-case scenario, large companies may elect not to remain in Whatcom County, resulting either in the closure of the facilities or the takeover by less risk-averse and possibly less responsible companies.

The Proposed Amendments Will Have an Adverse Environmental Impact – To the extent that the Proposed Amendments harm the ability of companies to operate or remain in Whatcom County, the result will not be a decrease in refining operations or GHG emissions. Instead, demand will be met by older operations with less environmentally protective processes, producing a net *increase* in GHG emissions and other contaminants. This adverse impact will be exacerbated further to the extent the same fuels will have to travel longer distances or by less efficient means (*e.g.*, ships instead of pipelines) in order to get to market, resulting in a further increase in aggregate GHG emissions, among other issues.

The Proposed Amendments Run Afoul of Federal and State Law – For the reasons described below, the Proposed Amendments are unconstitutional, preempted by both federal and state law, and inconsistent with the Washington State Growth Management Act ("GMA"). In addition, the County has failed to comply with its obligations under SEPA to undertake a reasoned analysis of the probable, significant adverse impacts of the Proposed Amendments. Indeed, the County's purported SEPA checklist, published on September 6, 2019, is superficial and conclusory, failing to even identify, much less analyze, the adverse environmental impacts associated with the Proposed Amendments. For these reasons among others, the Proposed Amendments will not survive judicial scrutiny.

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This letter highlights many of Cherry Point's principal concerns with the Proposed Amendments, but is not exhaustive. We reserve the right to supplement these comments

with additional submissions throughout the comment period, through and including the date of any formal hearing(s) or other proceedings. In addition to the issues raised by this letter, Cherry Point notes that the Western States Petroleum Association ("WSPA") has provided a detailed provision-by-provision analysis of the Proposed Amendments that raises many important issues deserving careful consideration.

This letter includes the following sections:

- Section II provides comments on specific provisions within the Proposed Amendments, including concrete examples where the Proposed Amendments are unworkable, vague, counterproductive, or otherwise ill-advised.

- Section III provides a preliminary economic analysis of the Proposed Amendments showing that the County's proposal will impose significant economic impacts on the County and its residents with little or no environmental benefit in return.

- Section IV provides an initial discussion of the inadequacy of the County's SEPA determination, including the threshold Determination of Non-Significance ("DNS") issued by the Whatcom County Planning and Development Services Department on September 6, 2019. Cherry Point will submit additional comments on the County's failure to comply with SEPA by the deadline of September 20, 2019, supplementing the views contained herein.

- Section V sets forth several reasons why the Proposed Amendments are inconsistent with both the GMA and Whatcom County's Comprehensive Plan.

- Section VI explains why the Proposed Amendments, in whole or in part, are unconstitutional for several reasons, including violations of the federal dormant commerce clause, due process clause, and takings clause, as well as their analogs under the Washington State Constitution.

- Section VII explains the many ways in which the County's Proposed Amendments are preempted by federal and state law, including the Interstate Commerce Commission Termination Act, the Hazardous Liquid Pipeline Safety Act, the Hazardous Materials Transportation Act, the Clean Air Act, and the State's prohibition on local land use exactions, among others.

II. COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED AMENDMENTS

In this section, we highlight several concrete, pragmatic concerns with the Proposed Amendments, including that (a) the CUP requirement is impractical; (b) the change of use requirement is overbroad; (c) the GHG baseline calculation requirement is vague, ill-considered and unworkable; and (d) the insurance obligation is infeasible. Cherry Point takes seriously its obligation to comply with environmental and land use regulations, but has no choice but to object to drastic changes in those regulations that are ill-conceived and rushed through without adequate consideration.

A. The CUP requirement for expansions of fossil fuel and renewable fuel refineries and transshipment facilities is impractical.

1. The Proposed Amendments reflect a major change in the County's land use scheme by converting long permitted uses into discretionary, conditional uses in the Cherry Point Urban Growth Area.

Refinery and transshipment facility expansions are currently, and have long been considered, "permitted uses" in the Cherry Point Urban Growth Area ("UGA")—an industrial zone that was planned for such industrial activities.[1] The Proposed Amendments would effectuate a sweeping change by (1) converting these permitted uses to conditional uses and (2) requiring a CUP for any improvement that would entail an "expansion"—a permit that can only be obtained through a highly discretionary approval process. This change alone introduces an untenable degree of uncertainty into the County's land use system. The new requirement to obtain a discretionary CUP undermines the investment-backed expectations of companies, that for decades have been operating responsibly and investing steadily in their operations in the Cherry Point UGA.

The application process for a CUP also includes highly burdensome and impractical requirements, including "upstream" GHG analysis and mitigation, insurance mandates, and others as described further in this letter. Such requirements are discriminatory and disproportionate, in that they do not apply to any other industrial land uses in the Cherry Point UGA.

Finally, the highly discretionary CUP requirements will lead to regulatory uncertainty for permitting agencies, SEPA lead agencies, permittees, and appeal venues,

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[1] The Cherry Point Industrial Zone represents an area in Whatcom County designated for heavy industrial use. There are nine active companies in the zone representing several industrial sectors including petroleum, primary metals, electricity generation, food production, and construction.

such as the Whatcom County Hearings Examiner. This uncertainty will in turn make investment decisions at refineries infeasible or uneconomic, disincentivize process improvements, and impede innovation.

2. The Proposed Amendments fail to define what constitutes an "expansion" that would trigger a CUP.

The Proposed Amendments do not define the term "expansion." Nor do they explain *what* must be expanded, or how an expansion is measured or identified, in order to trigger the CUP requirement. Moreover, under the Proposed Amendments, there is no minimum threshold that would exempt projects with relatively modest increases in production, capacity, or emissions, no matter how beneficial those projects may be.

Section 20.68.153 of the Proposed Amendments provides that a CUP in the Heavy Impact Industrial District is required for any "*[e]xpansion* of existing legal fossil or renewable fuel refinery *operations* and the *primary manufacturing of products thereof* or expansion of existing legal fossil or renewable fuel transshipment *facilities*." Proposed WCC § 20.68.153 (emphasis added). Elsewhere, the Proposed Amendments refer to "fuel facility *capacity* expansions" and define "fossil-fuel refinery capacity" as the "extent of refinery production capacity in relation to storage capacity." Proposed WCC § 20.68.801(1) (emphasis added); 20.97.160.5. This definition only adds confusion, however, because the relationship between production and storage capacity is never explained, and the ratio of one to the other does not determine throughput for a refinery.

Construed broadly, the "expansion" of a refinery or transshipment facility could cover a wide variety of improvements, including many facility efficiency upgrades that have safety, environmental or maintenance benefits. Uncertainty over whether a CUP is required for a project, compounded by the uncertainty whether such a permit would ever be granted, would impose significant additional delays and costs and, as illustrated by specific examples below, be counterproductive to the County's own objectives, as it would disincentivize facilities from making potential upgrades and efficiency improvements.

3. The Proposed Amendments discourage development of renewable fuel facilities.

The Proposed Amendments subject renewable fuel facilities to the same arbitrary treatment discussed above, imposing the same CUP requirement on any new renewable fuel facilities or on any expansions of such facilities.

The County has expressly stated that it does "NOT [want to] cause any of the following: . . . *[u]nnecessarily delay improvements that would have a positive impact on*

climate change, such as . . . reduced pollution or greenhouse gas emissions."[2] Yet that supposedly unintended consequence is precisely what would happen if the Proposed Amendments were enacted.

Cherry Point is uniquely situated, for example, to invest and innovate in the area of lower carbon renewable fuels. In particular, Cherry Point recently began producing renewable diesel, which is considered an "advanced" biofuel (*i.e.*, biomass-based diesel) under the U.S. Environmental Protection Agency's ("EPA's") Renewable Fuels Standard ("RFS") program.[3] As defined in the Clean Air Act, advanced biofuels reduce GHG emissions by at least 50% as compared with petroleum fuels.[4] In 2018, Cherry Point launched a renewable diesel unit that co-processes biomass-based feedstocks alongside conventional feedstocks to produce ultra-low-sulfur diesel.[5] During the calendar year 2018 alone, renewable diesel produced at Cherry Point resulted in a life-cycle reduction of 200,000 tons of carbon dioxide equivalent ("CO_2e"), as compared to petroleum diesel.[6] Cherry Point's development and production of renewable diesel reflects its broader commitment to provide needed energy while promoting a lower-carbon economy.

Production of renewable fuels should be encouraged rather than discouraged. It is counterproductive to require renewable fuel facilities to undergo a CUP permitting process, with an uncertain timeframe and unworkable requirements, including mitigation for GHG emissions from "upstream" activities. If enacted, the Proposed Amendments would disincentivize facilities, including Cherry Point, from making further significant efforts to develop renewable fuels.

4. The CUP process mandates unworkable limits on the raw materials that may be processed at a refinery.

The Proposed Amendments require applicants for CUPs to document "to the satisfaction of the County decision maker all of the anticipated sources, types, and volumes

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[2] Whatcom County, Wash., Resolution No. 2019-037 (Aug. 7, 2019).

[3] The RFS program was created specifically "to reduce greenhouse gas emissions and expand the nation's renewable fuels sector while reducing reliance on imported oil." *Renewable Fuel Standard Program,* U.S. Envtl. Prot. Agency, https://www.epa.gov/renewable-fuel-standard-program (last visited Sept. 5, 2019).

[4] *See* 42 U.S.C. § 7545(o)(1)(D).

[5] *Cherry Point Refinery,* BP, https://www.bp.com/en_us/united-states/home/where-we-operate/washington/cherry-point-refinery.html (last visited Sept. 8, 2019).

[6] *Cherry Point renewable diesel,* BP, https://www.bp.com/en/global/corporate/sustainability/climate-change/low-carbon-accreditation-programme/case-study-cherry-point-renewable-diesel.html (last visited Sept. 8, 2019).

of substances transferred in bulk at the facility." Proposed WCC § 20.68.153(3). If approved, the CUP "shall be limited exclusively to those types and volumes." *Id.* This requirement is inconsistent with how a refinery actually operates. Requiring refineries to predict specific types and volumes of raw materials assumes static conditions. But the fuel and oil markets are in constant flux. Refineries adapt to dynamic changes in availability and costs of sources of supply, as well as fluctuations in demand, for their constantly evolving product mix. Ultimately, consumers benefit from the agility of refineries to acquire low cost supply. In any event, it is not possible for a refinery to forecast the sources, types, and volumes of raw materials that it will be processing in six months' time, let alone for the entire duration of a permit.

B. The Proposed Amendments create a new, overbroad change of use requirement.

The Proposed Amendments impose an entirely new permit requirement for "changes of use" that does not appear elsewhere in the County Code. Under the Proposed Amendments' tautological definition, a "change of use" permit is required "when the occupancy of a building or a site use changes from one use to another in whole or in part." Proposed WCC § 20.74.110. This change of use permit requirement is overbroad: it is not limited to refineries and fuel transshipment facilities, and it would apply to *any* change in occupancy or site use change for *any* type of building—including residential homes, energy utility structures and facilities, and other uses in the Cherry Point Industrial Zone. We have identified no regulatory nexus authorizing the County to impose such a permit requirement, much less one that is so overly broad.

C. The requirements for emissions baseline calculations and mitigation are vague, redundant, and unworkable.

1. <u>The Proposed Amendments interfere with existing federal and state air quality permitting and regulation.</u>

The emission of air pollutants in Whatcom County is governed by a comprehensive and complex framework of federal, state, and local requirements contained in the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, the Washington Clean Air Act, RCW § 70.94, and regulations adopted under those acts. Permitting and regulation of air emissions is the province of the federal EPA, the Washington Department of Ecology ("Ecology"), and local air agencies, like the Northwest Clean Air Agency ("NWCAA"); it is not within the jurisdiction of Whatcom County. A local governmental body without specialized expertise in air quality engineering and permitting, and without statutory authority to regulate in this arena, should not seek to assume the role of air regulator—through revisions to its land use and zoning regulations.

The Washington legislature has granted NWCAA jurisdiction to administer air quality permitting in Whatcom, Island, and Skagit Counties. *See* RCW § 70.94.057; NWCAA Regulation § 100. Four of the five Washington refineries, including BP's Cherry Point Refinery, are within NWCAA's jurisdiction.

Under the air permitting scheme that NCWAA has long administered, proposals to *modify* units are generally evaluated by comparing baseline actual emissions and projected actual emissions, based on well-defined concepts to identify changes in emissions of particular pollutants as a result of a proposed project. *See, e.g.*, 40 C.F.R. § 52.21(b)(48) (defining "baseline actual emissions"), 40 C.F.R. § 52.21(b)(41) (defining "projected actual emissions"). For every project undertaken at a refinery that will result in an increase in emissions above specified *de minimis* thresholds, NWCAA must issue a Notice of Construction ("NOC") Approval Order before construction can begin. *See* NWCAA Regulation §§ 300.1, 300.4.

If increases in emissions exceed certain thresholds for a given pollutant, a major source pre-construction permit is required, *i.e.*, a Prevention of Significant Deterioration ("PSD") permit, which requires application of Best Available Control Technology ("BACT"). 42 U.S.C. § 7475(a); 40 C.F.R. § 52.21(a)(2).[7] Ecology has exclusive jurisdiction to issue PSD permits in Washington, even for sources such as Cherry Point that are otherwise regulated by a local air authority.[8] Some projects may require both a PSD permit from Ecology (for pollutants that exceed PSD thresholds) and a NWCAA NOC Approval Order (for pollutants that do not exceed PSD thresholds or are not regulated under the PSD program).

Both air permitting programs require highly technical analyses of the impacts on emissions that may result from a project. These analyses are carefully outlined under the Clean Air Act, associated regulations, and volumes of guidance documents and policy, and the permitting authorities have implemented them for decades. Refineries are complex, integrated facilities with highly variable operating parameters. Evaluating the effects attributable to a particular project at a refinery can be an extremely challenging undertaking and require the efforts of professional environmental consultants and permitting engineers

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[7] Ecology's PSD permitting regulations are found in WAC §§ 173-400-720 to -750. Ecology's regulations largely incorporate by reference EPA's PSD permitting program in 40 C.F.R § 52.21. *See* WAC § 173-400-720(4)(a)(vi) (incorporating by reference sections of 40 C.F.R. § 52.21).

[8] EPA has approved Washington's PSD program and incorporated it into the State Implementation Plan. *See* Approval and Promulgation of Implementation Plans; Washington: Prevention of Significant Deterioration and Visibility Protection, 80 Fed. Reg. 23,721 (Apr. 29, 2015) (to be codified at 40 C.F.R pt. 52). With small exceptions not relevant here, Ecology issues all PSD permits in Washington. *See* WAC § 173-400-700(2).

with expertise regarding both the complexities of the facilities they are regulating and a deep understanding of the applicable air regulations.

In addition, the air quality programs implemented by EPA and Ecology already encompass consideration of GHG emissions. For example, as part of the PSD permitting process for a major modification project that would cause a significant increase in GHG emissions, Ecology determines BACT for minimizing GHG emissions from a project and includes the associated emission limit and/or conditions in the permit. *See* 40 C.F.R. §§ 52.21(b)(49)(iv), (j); WAC § 173-400-720(4)(a)(vi) (incorporating EPA's regulations by reference).

Ecology also administers Chapter 173-485 WAC – *Petroleum Refinery Greenhouse Gas Emission Requirements*. This program requires reasonably available control technology ("RACT") for emissions of GHGs from Washington refineries, including Cherry Point. Refineries must demonstrate that they are more efficient than the 50th percentile of similar-sized refineries in the United States, based on a third-party energy efficiency certification program. EPA and Ecology also administer comprehensive mandatory GHG reporting programs—set forth at 40 C.F.R. Part 98 and Chapter 173-441 WAC, respectively—which apply to Cherry Point.

In short, GHG and other air emissions generated by sources in the Cherry Point Industrial Zone are already heavily regulated by EPA, Ecology, and NWCAA as reflected in Cherry Point's state-issued Clean Air Act Title V operating permit. Cherry Point is operating lawfully within the limits of that permit.[9] And Whatcom County currently meets national ambient air quality standards for all six "criteria" air pollutants under the Clean Air Act. There is simply no need for an additional layer of air emissions regulation administered by a local land use agency. The Proposed Amendments are inconsistent with, and in some cases, directly contrary to, the well-established air quality permitting programs and analyses administered by EPA, Ecology, and NWCAA, and will interfere with the ability of air regulators to carry out their existing mandates.

2. The GHG emissions analysis required under the Proposed Amendments is unworkable and arbitrary.

While Cherry Point is fully supportive of thoughtfully-designed environmental policies and regulations, including those related to GHG emissions, the Proposed

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[9] *See Detailed Facility Report [for Cherry Point Refinery]*, U.S. Envtl. Prot. Agency, https://echo.epa.gov/detailed-facility-report?fid=110000490157 (last visited Sept. 8, 2019) (showing Cherry Point Refinery in compliance with Clean Air Act requirements).

Amendments are so hastily drafted and filled with legal and practical flaws, that they would do more damage than good.

For example, the Proposed Amendments require a determination of "baseline [GHG] emissions" based on the "average of the prior three-year throughput." Proposed WCC § 20.68.801. This is an arbitrary baseline value for multiple reasons. At the outset, it is not clear what is intended by requiring facilities to calculate an emissions baseline based on three years of "throughput" data. *Throughput* (*e.g.*, the capacity for refining crude over a given period of time) is not equivalent to, and does not alone determine, *emissions*. Furthermore, refineries are not static facilities. They have turnarounds, outages, and production peaks and valleys due to business cycles that could skew the three-year baseline emissions well below the refinery's actual unused capacity for any given year. Indeed, almost by definition, the three-year average is going to be below the peak one-year emissions and could be significantly below shorter-term peak capacity. If obligations are based on comparison to one-year future emissions, there would thus be a projected increase even with no project at all.[10]

The Proposed Amendments would also apparently require refineries to predict and mitigate future estimated *actual* GHG emissions attributable to a proposed "expansion." Proposed WCC § 20.68.801(3). The Amendments are unclear as to whether or how this analysis is to be conducted, or how it relates to the analyses in which facilities must already engage for permitting authorities under the Clean Air Act, described above. Predicting the increases that will be attributable to a proposed project at a refinery, year-in and year-out is complex. For example, it is unclear what assumptions should be made in such a projection regarding changes in demand or utilization that might be unrelated to the project in question. Refineries are complex systems that rely on interconnected process units that operate in highly variable configurations. Cherry Point, as well as others in the industry, constantly runs models to determine how to run the refinery most efficiently, depending on changing prices of crude and other feedstocks, demand for certain products, and the constraints of the refinery on any given day. Numerous parameters affect the run rates of refinery process units: cooling water capacity, single vessel or unit maximum operating limits, maximum unit rates at the end of a run prior to major maintenance, and so forth. The extent and nature of the constraints vary on a daily basis.

To complicate matters further, in determining the three-year average "baseline emissions," as well as in estimating actual post-project GHG emissions, the Proposed Amendments instruct applicants to calculate the "upstream" emissions from the extraction and transportation of feedstocks outside of the County, *plus* the emissions from

[10] The federal Clean Air Act, by contrast, compares any two of the ten years prior to a proposed modification to projected future actual emissions. This allows the source to address variation in the business cycle.

transportation of feedstocks and refined product within the County. Proposed WCC § 20.97.124.1. Yet the Proposed Amendments do not define any of the key terms in this provision. For example, the Proposed Amendments do not define what is meant by "the upstream emissions generated by the production and transport of raw products to the facility such as crude oil feedstocks or other fuels used in production or energy generation at facilities." Nor do they provide any details as to how the calculations are intended to work. Even with clear guideline, which are lacking here, estimation of such upstream emissions can be administratively complex, methodologically challenging, and dependent on contestable or speculative assumptions.

The Proposed Amendments unhelpfully refer applicants to the GREET model for purposes of calculating "upstream" emissions. *See* Proposed WCC § 20.68.801(2)(e). But GREET is a modeling tool used, in combination with several other models, to assign a certain carbon intensity and renewable credit value to a specific fuel stream for purposes of a state-wide or national program, such as the federal RFS or California's Cap-and-Trade and Low Carbon Fuel Standard programs.[11] GREET was never intended to apply to individual refineries or specific refinery crude slates. The GREET model does not "provide the capability of assessing the effect of changes in a refinery (e.g., change in input crude slate, and refinery configuration) on the resulting refinery GHG emissions."[12]

Moreover, the required "upstream" GHG analysis for a future scenario is difficult, if not impossible, to calculate accurately due to uncertainty and variability in crude and feedstock sources, suppliers, and modes of transportation. It is not feasible to calculate lifecycle emissions associated with all "upstream" activities related to a proposed "expansion" in a business that is constantly in flux and changing its mix of crude and other feedstocks. The Proposed Amendments are silent as to how a facility is to make such projections about future crude supply, particularly in the more distant future.

Even if it were possible to calculate upstream emissions for feedstocks with any degree of accuracy, such a calculation would require disclosure of confidential business information ("CBI"). The data used to calculate actual throughput average is CBI, and the federal agency with jurisdiction over such data, the U.S. Energy Information Administration, maintains the data as CBI. Yet the Proposed Amendments do not

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[11] *See* Argonne Nat'l Lab., *Summary of Expansions and Updates in GREET® 2018* (2018), https://greet.es.anl.gov/files/greet-2018-summary.

[12] *See* Kavan Motazedi et al., *GHG Emissions Impact of Shifts in the Ratio of Gasoline to Diesel Production at U.S. Refineries: A PADD Level Analysis*, 52 Envtl. Sci. & Tech. 13609, 13609 (2018); *see also* Adam R. Brandt, *Embodied Energy and GHG Emissions from Material Use in Conventional and Unconventional Oil and Gas Operations*," 49 Envtl. Sci. & Tech. 13059, 13059 (2015) ("The indirect or 'embodied' impacts of material consumption during construction of oil and gas wells and infrastructure are not well studied."); *id.* at 13065 (describing sensitivities and discrepancies with GREET model).

acknowledge or make any provision for protecting CBI, potentially conflicting with federal protections.

Finally, the Proposed Amendments unfairly require Cherry Point to mitigate "upstream" GHG emissions that are associated with extraction and production activities, as well as certain transportation activities, by third party actors that Cherry Point does not control. Indeed, Cherry Point has no control over demand for oil, which is what drives these activities. Any projected "increase" in GHG emissions associate with upstream third-party activities will be due to reasons other than its projects. There is thus a fundamental disconnect between Cherry Point's own projects and activities, and the mitigation that would be required.

3. The mitigation requirements are impracticable because "local" mitigation projects are unavailable, and the proposed in-lieu fee is excessive and arbitrary.

The Proposed Amendments require "local mitigation" in the form of local carbon offset projects whenever a proposed project (taking into account all upstream activities) would increase GHG emissions above the arbitrary three-year baseline. Proposed WCC § 20.68.801(3). The Proposed Amendments do not define "local," but assuming that the term means "within the County," this requirement is impossible to meet. It is not possible to conduct the scale of local offset projects within the County contemplated under the Proposed Amendments, due to the lack of available mitigation projects.

NWCAA's administration of a $4.6 million GHG mitigation fund developed as part of Cherry Point's 2014 Clean Fuels Project illustrates the problem. NWCCA has been administering the fund for years but has been unable to fully allocate the funds due to the difficulty of identifying offset projects within its jurisdiction (which is larger than the County).[13]

The Proposed Amendments permit the County to approve a fee in lieu of local offset projects. The fee is set at $60 per metric ton of CO_2e, to be collected annually for the life of the facility.[14] Further, the fees collected will purportedly be used by the County for "local greenhouse gas mitigation projects that are additional, real and quantifiable."

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[13] *See Greenhouse Gas Reduction*, Nw. Clean Air Agency, https://nwcleanairwa.gov/projects/greenhouse/ (last visited Sept. 10, 2019); *see also* Nw. Clean Air Agency, *Board Meeting Minutes* (May 9, 2019), https://nwcleanairwa.gov/?wpdmdl=5990.

[14] By contrast, in a previous GHG mitigation agreement reached with NWCAA, the scope of the mitigation requirement was limited to the facility's own emissions and valued at $1.60/ton CO_2e. *See* Nw. Clean Air Agency, *Order of Approval to Construct 211c* (Revision C. Sept. 18, 2012), https://nwcleanairwa.gov/?wpdmdl=983.

Proposed WCC § 20.68.800(3)(b). As already explained, however, there are nowhere near the number of local mitigation projects available to meet the potential demand. It is therefore unclear what purpose the in-lieu fee would actually serve, or whether it would function as a disguised "tax" to raise revenue. As described below, the GHG mitigation requirement—holding Cherry Point liable for the activities of upstream actors—constitutes an unlawful exaction that local authorities cannot demand as a condition for a land use permit. But apart from its legality, it is misguided as a practical matter, and counterproductive as a matter of environmental policy.

4. By requiring a baseline emissions analysis and mitigation for even non-capacity purposes, the Proposed Amendments discourage safety and environmental upgrades.

The Proposed Amendments designate refinery and transshipment facility expansions for "non-capacity purposes" as "outright permitted uses." Proposed WCC § 20.68.802(1). Non-capacity purposes include construction of accessory buildings, office space, parking lots, storage buildings, and similar structures. In addition, "[r]egular equipment maintenance, replacement, safety upgrades, and environmental improvements are outright permitted uses, *but shall mitigate greenhouse gas emissions if required by WCC 20.68.801*." Proposed WCC § 20.68.802(2) (emphasis added). That is, even these "outright permitted uses" will require mitigation of GHG "upstream" emissions in the same manner as required for "expansions" of fossil fuel and renewable fuel refinery and transshipment facilities.

As an initial matter, the Proposed Amendments never define the critical terms "regular equipment maintenance" or "environmental improvements"—thus leaving companies uncertain as to what kinds of projects will be deemed "outright permitted uses." For example, at the end of the useful life for a piece of equipment or unit, a facility could choose to undertake a single replacement project to achieve overlapping or interrelated goals: to reduce emissions, increase efficiency, and improve safety. Such a project, even though it would serve important environmental and safety objectives, could result in an increase in GHG emissions, or could potentially even be deemed an "expansion." But the Proposed Amendments provide no guidance as to whether a company will be required to seek a CUP for such a project.

In any event, the onerous mitigation requirements will discourage companies from undertaking important safety upgrades and environmental improvement projects. Even for an "outright permitted use," *any* increase in GHG emissions, including "upstream" emissions, above the arbitrary three-year baseline requires mitigation under the Proposed Amendments. These additional costs may make it financially infeasible or imprudent to undertake voluntary safety upgrades and environmental improvements.

An illustrative example is Cherry Point's 2019 North Vacuum Heater Project. The purpose of this project was to retrofit a heater nearing the end of its useful life for maintenance and safety reasons. As part of this project, Cherry Point replaced and upgraded the metallurgy within the heater components to reduce the potential for corrosion, thereby reducing safety risks posed by corrosion in refinery equipment, which can occur as a result of the properties of refinery feedstocks. In addition, as part of the overall project, Cherry Point also installed new, more efficient burners. According to pre-project estimates, the new burners will result in annual emissions reductions for both nitrogen oxides and carbon monoxide.

While the primary objectives of this project were safety and maintenance improvements, the project also achieved tangible environmental benefits. However, it is possible that this project would have been deemed an "expansion" under the Proposed Amendments because the new burners are more efficient and technically increase the capacity of the heater. If that were the case, then under the Proposed Amendments, Cherry Point would have had to obtain a CUP, determine the GHG emissions "baseline" based on the trailing three-year average, evaluate projected GHG emissions increases attributable to the project taking into account all associated "upstream" activities, and comply with the new GHG mitigation requirements—likely by paying a fee based on $60 per metric ton of CO_2e, collected annually for the life of the facility. In view of the costs and effort involved, it is unclear whether Cherry Point would have been able to undertake the North Vacuum Heater Project had the Proposed Amendments been in force. If Cherry Point had not undertaken the North Vacuum Heater Project, the consequence would have been a higher emitting, less efficient unit without the safety upgrades described above.

D. The Proposed Amendments mandate unattainable insurance requirements.

The Proposed Amendments require permit applicants to obtain insurance for "hazards created in the County," but do not explain why current insurance requirements for existing facilities are inadequate. More important, the new requirements are impossible to meet for Cherry Point and likely for other refineries or transshipment facilities in the County. Among other things, applicants must obtain a policy that would cover loss for pollution conditions "emanating from and beyond the boundaries of" a facility. Proposed WCC § 22.05.125(2)(a). The Proposed Amendments also require a $100 million policy limit.

Some of the requirements of the Proposed Amendments would be met by BP's significant self-insurance program, but several of the requirements are simply unattainable for the reasons explained below.

- The requirement to provide complete copies of applicable insurance policies and endorsements is unworkable. Proposed WCC § 22.05.125(1). Insurance policies are proprietary and extremely sensitive company assets. The insurance policies cannot be distributed to the public nor maintained in the public domain. Cherry Point is willing to provide evidence of coverage, as is standard for permit applications, but is unable to provide its insurance policy.
- The liability provisions are also unworkable. An insured cannot be held responsible for pollution "emanating from and *beyond* the boundaries of a Permitted Facility" because the entity has no legal or physical control over such areas. Proposed WCC § 22.05.125(2)(a) (emphasis added).
- The requirement that the insured is responsible for all transportation to and from a facility is likewise impossible to meet. Cherry Point can hold its fuel transportation contractors responsible for their actions and require its contractors to hold insurance. But Cherry Point cannot be held liable for the actions of third-parties who are transporting product across geographical areas that are outside of Cherry Point's facilities. Insurers of refineries and transshipment facilities simply will not provide insurance for operations that are outside of its insured's control.
- The required policy limit is arbitrary and unreasonably high. Proposed WCC § 22.05.125(3). Indeed, the policy limit of $100 million may not be available on the commercial insurance market, as noted in the August 7, 2019 version of the Proposed Amendments. The Discussion/Note states: "Minimum insurance amounts could be increased, but at least above $50 million to $100 million may not be available in the insurance market. We suggest taking out the $100 million liability limit . . . ." *Id.*
- The requirement that the "Insurer shall be liable for the payment of amounts within any deductible or self-insured retention amount applicable to the policy, with a right of reimbursement by the Insured for any such payment made by the Insurer" is problematic. Proposed WCC § 22.05.125(4). In insurance policies with policy limits of $50 million or more, the insurer does not pay the self-insured retentions on behalf of the insured. Policies are generally paid out on a reimbursement basis, or after they are adjudicated in a legal action, which can take years, and the proceeds are paid as a net of any retentions.
- The insurance company financial strength requirement may also be impossible to meet. Proposed WCC § 22.05.125(8). Insurers in this category of financial strength may not be able or willing to write the insurance coverages required under the Proposed Amendments.

- The definitions provision is inconsistent with the law of Washington State. "Loss" is defined to include "punitive, exemplary, or multiple damages," where allowed by law, and "civil fines, penalties, or assessments." Proposed WCC § 22.05.125(9)(b). The State of Washington does not permit insurance coverage for punitive damages, and the standard practice for insurance coverage is to exclude awards for civil fines and penalties.

III. THE ECONOMIC IMPACT OF THE PROPOSED AMENDMENTS

Even a preliminary, cursory economic analysis reveals that the Proposed Amendments will impose significant economic burdens, with little or no benefit in return. Only a few highlights are presented here. As with this letter in general, we reserve the right to supplement these initial observations with additional detailed analysis in future submissions. For present purposes, from an economic impact perspective, it is clear that the Proposed Amendments likely will:

- Stifle innovation in low carbon fuel technology;
- Shift production to less efficient refineries outside of Whatcom County, thus increasing overall GHG emissions elsewhere in Washington, nationally and globally; and
- Raise prices for transportation fuels and lower fuel production in Whatcom County.

A. Background.

The Cherry Point Refinery opened in 1971 with the purpose of refining crude oil transported from the North Slope of Alaska. Cherry Point's location minimizes travel distance by ship through the Inside Passage between the terminus of the Trans-Alaskan Pipeline near Anchorage and the lower 48 states. Apart from the Cherry Point location, there are three other major refineries in Washington State: the Conoco-Phillips facility in Ferndale within Whatcom County and two refineries (Shell and Marathon) at the Anacortes location in Skagit County. U.S. Oil and Refining (purchased by Par Pacific in November 2018) owns a smaller refinery, with a capacity of 35,000 barrels per day that is located in Tacoma, Pierce County, Washington. *See* Table 1.

Cherry Point now accepts crude oil from around the world. Based on the last *Oil & Gas Journal* survey, the facility could process up to 238,450 barrels of crude oil per day.[15] About 90% of the facility's output is used for transportation fuel including gasoline,

[15] *See Worldwide, US Refinery Survey-Capacities as of Jan. 1, 2019*, Oil and Gas J. (Feb. 2019).

diesel and jet fuel. Cherry Point is the largest supplier of jet fuel to the Seattle, Portland, and Vancouver International Airports. The remaining 10% of Cherry Point's output is anode-grade calcined coke sold to aluminum smelters.[16]

Table 1: Summary of Washington Refineries

	Company Name	Location	Year Built	Capacity	Major Crude Sources	Products
	[1]	[2]	[3]	[4]	[5]	[6]
[A]	BP West Coast Products LLC	Cherry Point (Ferndale, WA)	1971	288,450	ANS, Canadian, US Shale, Foreign Waterborne	Gasoline, diesel oil, jet fuel, liquified pertoleum gas, calcined coke
[B]	Phillips 66 Company	Ferndale, WA	1954	105,000	ANS, Canadian, US Shale, Foreign Waterborne	Gasoline, diesel oil, jet fuel, liquid petroleum, residual fuel oil
[C]	Shell Oil Products US	Anacortes, WA	1957	141,440	ANS, Canadian, Foreign Waterborne	Gasoline, diesel oil, jet fuel, propane, coke, sulfur
[D]	Tesoro Refining & Marketing Cc	Anacortes, WA	1955	119,000	ANS, Canadian, US Shale, Foreign Waterborne	Gasoline, diesel oil, turbine & jet fuel, liquid petroleum gas, residual fuel oil
[E]	US Oil & Refining Co	Tacoma, WA	1957	39,900	ANS, Canadian, US Shale	Gasoline, diesel oil, jet fuel, marine fuel, gas oils, emulsified & road

Sources:

[1], [2], [4]: *Worldwide, US Refinery Survey-Capacities as of Jan. 1, 2019*, Oil and Gas J. (Feb. 2019).

[3], [6]: Energy Transitions Lab., W. Wash. Univ., *A Refining History of Washington State* (Aug. 2015).

[5][A]: John Stark, *BP Taking Next Steps on Rail Project for Crude Oil*, Bellingham Herald (Nov. 30, 2012; updated May 18, 2015), https://www.bellinghamherald.com/news/local/article22213488.html.

[5][B]: *Ferndale Refinery*, Phillips 66, https://www.phillips66.com/refining/ferndale-refinery (last visited Sept. 10, 2019).

[5][C]: *About Us [Shell Puget Sound Refinery]*, Shell, https://www.shell.us/about-us/projects-and-locations/puget-sound-refinery/about-shell-puget-sound-refinery.html (last visited Sept. 10, 2019).

[5][D]: *Tesoro to Move Bakken Crude Oil Via Rail*, Oil & Gas J. (July 2011).

[5][E]: *Par Pacific Holdings, Inc., U.S. Oil & Refining Co. - M&A Call*, Edited Transcript, Thomson Reuters, Nov. 27, 2018.

South of Washington, the bulk of the refining capacity on the west coast of the United States is located near the major ports in the San Francisco Bay Area and Los

[16] *See Cherry Point Refinery*, BP, https://www.bp.com/en_us/united-states/home/where-we-operate/washington/cherry-point-refinery.html (last visited Sept. 8, 2019).

Angeles. The State of Oregon has no major refineries. Table 2 lists the California refineries that make up the bulk of remaining capacity on the West Coast.

Table 2: Summary of California Refineries

	Company Name	Location	Year Built	Capacity	Crude Sources	Other Products
	[1]	[2]	[3]	[4]	[5]	[6]
[A]	Delek US Holdings Inc.	Long Beach and Bakersfield	1932	85,500	Idle	Hydrogen, Sulfur, Asphalt
[B]	Chevron Corp.	El Segundo	1912	269,000	Alaskan Pipeline; Kern County, CA; Ecuador; the Middle East	Hydrogen, Coke, Sulfur
[C]	Chevron Corp.	Richmond	1902	257,000	Alaskan North Slope; The Middle East	Hydrogen, Sulfur, Asphalt
[D]	Kern Oil & Refining Co. Inc.	Bakersfield	1934	25,650	San Joaquin Valley, CA; Kern County, CA	Sulfur
[E]	PBF Energy Co. LLC	Torrance	1907	149,910	Central Valley, CA; Offshore drills	Hydrogen, Coke, Sulfur
[F]	Phillips 66 Co.	Carson-Wilmington	1917	138,700	California (pipeline); foreign and domestic (tanker)	Hydrogen, Coke, Sulfur
[G]	Phillips 66 Co.	Rodea-Arroyo Grande	1896	120,000	California (pipeline); foreign and domestic (tanker)	Hydrogen, Coke, Sulfur
[H]	Royal Dutch Shell	Martinez	1915	150,100	Central Valley, CA	Hydrogen, Coke, Sulfur
[I]	San Joaquin Refining Co. Inc.	Bakersfield	1969	23,750	San Joaquin Valley, CA	Hydrogen, Sulfur, Asphalt
[J]	Marathon Petroleum Co. LP	Los Angeles	1923	363,000	San Joaquin Valley, CA; Los Angeles Basin, CA; Alaskan North Slope; South America; West Africa	Hydrogen, Coke, Sulfur
[K]	Marathon Petroleum Co. LP	Martinez	1913	161,000	California and other domestic and foreign sources.	Hydrogen, Coke, Sulfur
[L]	Valero Energy Corp.	Benicia	1968	141,550	Alaskan Pipeline; San Joaquin Valley	Hydrogen, Coke, Sulfur, Asphalt
[M]	Valero Energy Corp.	Wilmington	1969	82,650	Blend of California and foreign crude, as well as unfinished feedstocks from local and foreign sources.	Hydrogen, Coke, Sulfur

Sources:

[1], [2], [4], [6]: *Worldwide, US Refinery Survey-Capacities as of Jan. 1, 2019*, Oil and Gas J. (Feb. 2019).

[3], [5][A]: *California Oil Refinery History*, Cal. Energy Comm'n (Mar. 4, 2019), https://ww2.energy.ca.gov/almanac/petroleum_data/refinery_history.html.

[5][B]: *Chevron's El Segundo Refinery, California Land Use Database*, Ctr. for Land Use Interpretation, https://clui.org/ludb/site/chevrons-el-segundo-refinery (last visited Sept. 4, 2019).

[5][C]: Rachel Waldholz, *A Look Inside Chevron's Richmond Refinery*, Richmond Confidential (Sept. 13, 2011), https://richmondconfidential.org/2011/09/13/a-look-inside-chevrons-richmond-refinery/.

[5][D]: Press Release, NTR Acquisition, NTR Acquisition Co. Retains Foster Wheeler USA Corporation to Initiate Engineering Work on Future Refinery Assets (Nov. 15, 2007), https://www.sec.gov/Archives/edgar/data/1366578/000114420407062203/v094476_ex99-1.htm.

[5][E]: *Refineries*, PBF Energy, https://www.pbfenergy.com/refineries (last visited Sept. 10, 2019).

[5][F]: *Los Angeles Refinery*, Phillips 66, https://www.phillips66.com/refining/los-angeles-refinery (last visited Sept. 10, 2019).

[5][G]: *San Francisco Refinery*, Phillips 66, https://www.phillips66.com/refining/san-francisco-refinery (last visited Sept. 10, 2019).

[5][H], [L]: *San Francisco Bay Area Oil Infrastructure*, IWW Environmental Unionism Caucus, https://ecology.iww.org/PDF/misc/BayAreaRefineryInfrastructure.pdf.

[5][I]: *About Us*, San Joaquin Refining Co., https://www.sjr.com/about-us/#event-san-joaquin-refining-co-inc-was-founded (last visited Sept. 10, 2019).

[5][J]: *Los Angeles Refinery*, Marathon Petroleum Corp., https://www.marathonpetroleum.com/Operations/Refining/Los-Angeles-Refinery/ (last visited Sept. 10, 2019).

[5][K]: *Martinez Refinery*, Marathon Petroleum Corp., https://www.marathonpetroleum.com/Operations/Refining/Martinez-Refinery/ (last visited Sept. 10, 2019).

[5][M]: *Wilmington Refinery*, Valero, https://www.valero.com/en-us/AboutValero/refining-segment/wilmington (last visited Sept. 10, 2019).

The major market for Cherry Point's output is the West Coast transportation fuel market, which includes gasoline, diesel, and jet fuel products consumed in Washington, Oregon, and California.[17] Supply for the market generally comes from the 22 oil refineries on the West Coast, with the major refineries located near Seattle, San Francisco, and Los Angeles as described above. Cherry Point is the newest refinery on the West Coast.

Gasoline products for consumption in Washington and Oregon are largely supplied by the Washington refineries. This is partly due to differences in the gasoline formula in California that is required by the California Air Resources Board under the California Reformulated Gasoline Program. Washington and Oregon use a more common "conventional" gasoline formula shared with most other states.[18] Cherry Point has made significant investments at the plant in order to produce gasoline meeting the California requirements, in addition to the conventional gasoline used in Washington and Oregon. Diesel and jet fuel share a common formula across Washington, Oregon, and California. Hence, some diesel and jet fuel products produced at Cherry Point are sold in California (and vice versa).

A second, smaller market for Cherry Point is the anode-grade calcined coke market. Anode-grade calcined coke is a specialty product produced by few refiners (e.g., only two

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[17] The Cherry Point facilities are part of an interconnected system of refineries that make up a larger market. In particular, Washington State is part of the fifth federal Petroleum Administration for Defense District ("PADD"), which also includes the states of Alaska, Hawaii, the western states of California and Oregon, and Nevada and Arizona. Eastern Washington receives supply from a pipeline to Salt Lake City (from PADD4), while Nevada and Arizona receive pipeline supplies from both California refineries and pipelines from PADD3 and PADD4 sources. Constraints on facilities that are key components of this broader network would have ripple effects on prices and supplies of transportation fuels and other petroleum products across the western United States.

[18] *See Gasoline Standards: State Fuels*, U.S. Envtl. Prot. Agency, https://www.epa.gov/gasoline-standards/state-fuels (last visited Sept. 9, 2019).

on the West Coast) and is necessary in the production of aluminum, a highly recyclable product used to produce lighter-weight, more fuel-efficient vehicles.

B. Impact on the Western Transportation Fuel Markets.

If the Proposed Amendments are enacted as currently written, then any change that constitutes an "expansion" would require mitigation of GHG emissions above the baseline. Under the Proposed Amendments, the sources of GHG emissions that must be accounted for include upstream extraction, transportation to the refinery, emissions from the refinery itself, and finally transportation from the refinery to the Whatcom County line. The GHG mitigation costs are large enough to put the refinery's products (gasoline, diesel, and jet fuel) at a competitive disadvantage, thereby making any such "expansions" uneconomic and moving production elsewhere.

As a simplified example, suppose a refinery wanted to increase its gasoline-production capacity. As described above, the Proposed Amendments leave the methodology required for calculating "upstream" GHG emissions vague and undefined, which is problematic in itself. But even a cursory economic analysis indicates that the costs could be substantial. Setting aside important details, such as what is the composition of the feedstock crude oil mix and what other distillate products (*e.g.*, kerosene, diesel, asphalt, coke) are made from the crude oil, we can make an elementary calculation to determine the likely order of magnitude of the costs imposed by the Proposed Amendments.

The refinery would have to obtain a CUP, which would entail GHG emissions mitigation described above—either a local GHG mitigation project, or payment of $60/ton of GHG emissions, paid annually for the life of the refinery. A study sponsored by the U.S. Department of Energy and the National Energy Technology Laboratory calculated estimates of CO_2e emissions per unit of energy at various stages of production.[19] In theory, using the estimate of well through refinery emissions of 18.5 kg CO2e per MMBtu in this study, an estimate of 120,333 Btu per gallon of gasoline[20] and a cost of carbon of $60 per

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[19] *See* Nat'l Energy Tech. Lab., *An Evaluation of the Extraction, Transport and Refining of Imported Crude Oils and the Impact on Life Cycle Greenhouse Gas Emissions* tbl.1-1 (2009) (the sum of the lifecycle stages 1-3 for conventional gasoline (18.5 kg CO_2e)).

[20] *Units and calculators explained*, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/units-and-calculators/ (last visited Sept. 12, 2019).

metric ton of CO_2e under the ordinance, we arrive at a cost of an additional 13 cents per gallon in GHG mitigation costs.[21]

Alternatively, an estimate of 124,790 Btu per gallon of gasoline (including adjustments to extract the impacts of 10% ethanol blended gasoline),[22] a CO_2e emission estimate of 35.1 kg CO_2e per MM adjustments BTU of gasoline,[23] and the same cost of carbon of $60 per metric ton of CO_2e, would result in an additional 26 cents per gallon in GHG mitigation costs.[24]

In other words, just adding the GHG emissions mitigation (including "upstream" emissions) to the cost of gasoline production (aside from other costs imposed by the Proposed Amendments) could cost between 13 and 26 cents or more per gallon of gasoline depending on the methodology used.

Additional marginal costs between 13 and 26 cents per gallon is a significant additional cost in an industry with tight margins. Nor does this account for the fact that, under the Proposed Amendments, payment must be made annually for the life of the refinery, which increases the cost dramatically.

As a result of the increased costs imposed by the Proposed Amendments, refineries in Whatcom County will be at a competitive disadvantage compared to refineries that are not subject to the GHG mitigation requirements. Consequently, refineries outside the County—most likely the two Skagit County refineries—would increase their production to realize the new market opportunity. Because of the transport costs and the cost of switching from the California fuel blend, California refineries may be less likely to step in than the refineries in Washington south of Whatcom County. As described in the next section below, the substitution of less efficient refining operations would result in a net increase in GHG emissions. The jet fuel market may be particularly sensitive to limits on

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[21] The calculation is: (120,333 Btu of a gallon of gas)*(18.5 kg CO_2e per MMBtu of gas)/1000000*($60/MT of CO_2)/1000=$0.13 per gallon.

[22] U.S. Energy Info. Admin., *supra* note 20.

[23] *See Green Vehicle Guide: Greenhouse Gas Emissions from a Typical Passenger Vehicle*, U.S. Envtl. Prot. Agency, https://www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle (last visited Sept. 12, 2019); *Lookup Table for Gasoline and Diesel and Fuels that Substitute for Gasoline and Diesel*, Cal. Air Res. Bd., https://ww3.arb.ca.gov/fuels/lcfs/ca-greet/lut.pdf. The approach is "well-to-wheels" minus "tank-to-wheels" equals "well-to-tank" (*i.e.*, emissions associated with the production and transport upstream of actual vehicle combustion). The calculation is: [(100.82 kg CO2e per MJ)/(948 MJ per Btu)*1000] - [(8.887 kg CO_2e per gallon of pre-ethanol gasoline)/(124,790 Btu per gallon of pre-ethanol gasoline)*1000000] = 35.1 kg CO2e per MMBtu.

[24] The calculation is: (124,790 Btu per gallon of pre-ethanol gasoline)*(35.1 kg CO2e per MMBtu of pre-ethanol gasoline)/1000000*($60/MT of CO2)/1000=$0.26 per gallon.

output from Whatcom County; some supply may need to be shipped from California and abroad, with even greater negative consequences for GHG emissions.

C. Negative Impacts on State-wide and Global GHG Emissions.

Table 3 below lists the refinery capacity of Washington and California state refineries, as published by the U.S. Energy Information Agency ("EIA") (January 2018), along with their total metric tons of CO_2e emissions in 2017, based on date from EPA. This information shows that GHG emissions associated with production at refineries in Whatcom County is lower than at refineries in Washington outside of Whatcom County, and much lower than at refineries outside of Washington. Adding costs to refining in Whatcom County only serves to cause production to shift other refineries, resulting in higher, not lower, GHG emissions.

Table 3: GHG Emissions per Barrel of Refinery Capacity

Refinery	State	County	City	Local Air Authority	2017 total emissions (MTCO2e) [1]	Capacity (barrel per calendar day) [2]	MTCO2e Emissions per daily capacity [3]
BP Cherry Point Refinery - Blaine	WA	Whatcom	Blaine	Northwest Clean Air Agency	2,132,646	227,000	9.4
Phillips 66 Ferndale Refinery - Ferndale	WA	Whatcom	Ferndale	Northwest Clean Air Agency	748,775	105,000	7.1
Shell Puget Sound Refinery - Anacortes	WA	Skagit	Anacortes	Northwest Clean Air Agency	1,902,427	145,000	13.1
Tesoro Refining & Marketing Company LLC - Anacorte	WA	Skagit	Anacortes	Northwest Clean Air Agency	1,350,080	120,000	11.3
U.S. Oil & Refining Co. - Tacoma	WA	Pierce	Tacoma	Puget Sound Clean Air Agency	133,427	40,700	3.3
Chevron Richmond	CA	Contra Costa	Richmond	Bay Area Air Quality Management District	4,594,307	245,271	18.7
Chevron El Segundo	CA	Los Angeles	El Segundo	South Coast Air Quality Management Distri	3,637,486	269,000	13.5
P66 Los Angeles Refinery - Carson-Wilmington	CA	Los Angeles	Cason, Wilmington	South Coast Air Quality Management Distri	2,817,925	139,000	20.3
P66 Los Angeles - Carson	*CA*	*Los Angeles*	*Carson*	*South Coast Air Quality Management Distri*	*918,076*	-	-
P66 Los Angeles - Wilmington	*CA*	*Los Angeles*	*Wilmington*	*South Coast Air Quality Management Distri*	*1,899,849*	-	-
San Francisco Refinery at Rodeo	CA	Contra Costa	Rodeo	Bay Area Air Quality Management District	1,450,188	120,200	12.1
Shell Martinez	CA	Contra Costa	Martinez	Bay Area Air Quality Management District	3,373,399	156,400	21.6
Teroso Carson & Wilmington	CA	Los Angeles	Carson, Wilmington	South Coast Air Quality Management Distri	6,366,417	341,300	18.7
Tesoro - Carson	*CA*	*Los Angeles*	*Carson*	*South Coast Air Quality Management Distri*	-	*243,800*	-
Tesoro - Wilmington	*CA*	*Los Angeles*	*Wilmington*	*South Coast Air Quality Management Distri*	-	*97,500*	-
Tesoro Golden Eagle Martinez	CA	Contra Costa	Martinez	Bay Area Air Quality Management District	2,176,808	166,000	13.1
Torrance Refining - Torrance	CA	Los Angeles	Torrance	South Coast Air Quality Management Distri	2,875,646	160,000	18.0
Ultramar Wilmington	CA	Los Angeles	Wilmington	South Coast Air Quality Management Distri	1,036,726	85,000	12.2
Valero Benicia	CA	Solano County	Benicia	Bay Area Air Quality Management District	2,412,040	145,000	16.6

Sources and Notes:
[1]: EPA Greenhouse Gas Reporting Program 2017 Data Summary Spreadsheets: 2017 data as of August 19, 2018; "Total reported direct emissions".
https://www.epa.gov/ghgreporting/ghg-reporting-program-data-sets
[2]: EIA Table 3: Capacity of Operable Petroleum Refineries by State as of January 1, 2018; "Atmospheric Crude Oil Distillation: Barrels per Calendar Day (Operating + Idle)".
https://www.eia.gov/petroleum/refinerycapacity/archive/2018/table3.pdf
[3]: [1] / [2]

Calculating the weighted GHG emissions per barrel of daily capacity shows that the oil refining process at the Whatcom County refineries produces approximately 8.7 metric tons of CO_2e per barrel of daily capacity. The equivalent figure for the three Washington State refineries outside Whatcom County is 28% higher at 11.1 metric tons

per barrel of daily capacity.[25] In addition, to the extent that supply displaced from Whatcom County is filled by supply outside of Washington in California, the GHG emissions associated with product from the California refineries would likely be even higher than that from the Washington refineries. The average GHG emissions in metric tons of CO_2e per barrel of daily capacity is 15.5 for California refineries, 78% higher than the Whatcom County refineries. Furthermore, supply from California would likely come by ships burning bunker fuel in addition to emissions at the refinery. Thus, any shift in production to refineries outside the County will only serve to *increase* global GHG emissions (and emissions within the state of Washington), even if the amount of emissions originating in Whatcom County declines—a counterproductive phenomenon that economists and scientists refer to as "carbon leakage."[26]

In short, refineries have no control over national or international demand for crude oil or other energy resources. In short, freezing or reducing refinery production in Whatcom County will not dampen national or international demand for petroleum products, but merely change the location at which oil is refined, among other economic effects, with counterproductive environmental results.

D. Negative Impacts on Investment in Cleaner Low-Carbon Fuels.

As noted above, Cherry Point has committed substantial resources to increasing efficiency at its own facilities and to developing low carbon and renewable fuels and technology.[27] As the newest refinery on the West Coast, Cherry Point has served as a platform for investments in low-carbon alternative fuels, such as a blended renewable diesel product produced through co-processing traditional diesel and animal-based bio-fuels.[28] For example, Cherry Point has made significant investments in co-processing renewable diesel from waste animal fats from beef and swine food processors. The

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[25] This analysis does not account for differences in the portfolio of products produced by the various refineries nor differences in their utilization rates.

[26] For example, carbon leakage "may occur if, for reasons of costs related to climate policies, businesses were to transfer production to other countries with laxer emission constraints." *Carbon leakage*, European Commission, https://ec.europa.eu/clima/policies/ets/allowances/leakage_en (last visited Sept. 5, 2019).

[27] BP's 2018 Sustainability Report presents the company's low carbon emissions plan. The Plan includes among other things a 3.5 Mte reduction in GHG emissions by 2025, zero net growth in operational emissions out to 2025, and a $500 million investment in low carbon ventures and renewables. *See* BP, *Sustainability Report 2018* (2019), https://www.bp.com/content/dam/bp-country/fr_ch/PDF/bp-sustainability-report-2018.pdf.

[28] Dave Gallagher, *BP Cherry Point Takes a Step Towards Cleaner Diesel with New Major Fuel Unit,* Bellingham Herald (Oct 29, 2018; updated Oct. 30, 2018), https://www.bellinghamherald.com/news/business/article220440550.html.

Ferndale Refinery has also announced plans for renewable diesel production in Whatcom County.[29]

Because of its location in Washington and its proximity to California, Cherry Point is uniquely positioned to serve the growing markets for low carbon fuels. The largest state market for transportation fuel in the Western Market (PADD 5) is California. In 2006, California passed Assembly Bill 32 (The Global Warming Solutions Act, or "AB 32"), which authorized the establishment of the Low Carbon Fuel Standard ("LCFS"), which seeks to reduce the carbon intensity of the transportation fuel pool by 10% by 2020.[30] The standard has been in place since 2011. Oregon also has an LCFS.

At the federal level, the RFS, implemented by EPA under the Clean Air Act, requires the introduction of increased volumes of lower carbon biofuels, produced from renewable biomass, into the U.S. transportation fuel supply. Congress aimed to incentivize domestic production of renewable fuels to reduce GHG emissions and improve energy independence and security. Obligated parties, such as importers and refiners, can meet their annual RFS obligations either by producing renewable fuels or purchasing renewable fuels credits called renewable identification numbers. BP's U.S. operations have been steadily increasing the percentage of their RFS obligations that it satisfies through production of renewable fuels. Nearly all of that renewable fuel production comes from Cherry Point.

The Proposed Amendments threaten to undermine the unique ability at the Cherry Point Refinery to continue to invest and innovate in the area of renewable and low-carbon fuels, because expansions of such production would result in GHG offset obligations and costs. This would only serve to frustrate the intent of Congress, and states like California and Oregon, in enacting programs to facilitate the transition to lower carbon fuels. The Proposed Amendments would also undermine the County's own self-expressed desire to support these policies.

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[29] *See* Press Release, Phillips 66, Phillips 66 and Renewable Energy Group Announce Plans for Large-Scale Renewable Diesel Facility on West Coast (Nov. 1, 2018), https://investor.phillips66.com/financial-information/news-releases/news-release-details/2018/Phillips-66-and-Renewable-Energy-Group-Announce-Plans-for-Large-Scale-Renewable-Diesel-Facility-on-West-Coast/default.aspx.

[30] Assemb. B. 32, 2005–2006 Reg. Sess. (Cal. 2006), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf.

E. Negative Impacts on the Whatcom County and Regional Economies.

Before imposing new land use policies that will impede the ability of its local industries to compete, the County should carefully consider the profound implications these measures could have for the overall economy on a local and regional level.

Cherry Point itself employs about 850 people, making it the seventh largest employer in Whatcom County (by employees). Cherry Point also engages 1,000 contract workers, increasing up to 2,500 contract workers during periods of major maintenance.[31] More generally, two recent studies identify Cherry Point as a major economic driver in the County.[32] A study by the Center for Economic and Business Research at Western Washington University published in March 2019 determined that, in addition to supporting over 1,800 direct living-wage jobs, Cherry Point also accounts for another 4,637 indirect and induced jobs in the County, and another 3,715 in the rest of the state.[33] This is due to the high level of employee compensation at Cherry Point—an average of $146,231 compared to the County average of $45,000[34]—which creates demand for goods and services that is met by local and in-state firms.

The Center report also observed that the top three employers in the Cherry Point Zone (Cherry Point, Phillips 66, and Alcoa) pay almost $15 million to the state and local governments in property taxes, accounting for over 5% of the property taxes generated in the County in 2017.[35] The Center study also noted that firms in the Cherry Point Industrial Zone are major contributors to local charities. Cherry Point, for example, contributed over $300,000 to the United Way (employees plus a corporate match) in 2018, and has contributed to other causes including the Whatcom Library Foundation, the Boys & Girls Club of Whatcom County, and the Red Cross. Between 2013 and 2017, Cherry Point contributed over $3.9 million to community organizations state-wide.[36]

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[31] *See* Ctr. for Econ. & Bus. Research, W. Wash. Univ., *Employment at Cherry Point* (2019) (hereinafter, "Center Report"), https://cbe.wwu.edu/files/2019%20Cherry%20Point%20Employment%20Impact%20Study.pdf.

[32] Wash. Research Council, *The Economic Contribution of Washington State's Petroleum Refining Industry in 2017* (2019); Center Report, *supra* note 31.

[33] Center Report, *supra* note 31, at 12 tbl.4, 13 fig.4. These estimates were based on IMPLAN, a widely used economic impact model and reflect employment multipliers of 3.52 at the county level and 5.55 at the state level.

[34] *Id.* at 7 tbl.2.

[35] *Id.* at 15 fig.5.

[36] *Id.* at 16.

In another recent study, the Washington Research Council likewise determined that Cherry Point and the other refineries located in the State make major contributions to the State and County economies.[37] The Council report presented aggregate contributions for the petroleum industry overall, but it is possible to approximate Cherry Point's individual contribution. The Council report concluded that direct employment in the petroleum refining industry has an employment multiplier of 11.68. Applying this multiplier, Cherry Point's direct employment of 850 results in total employment in Washington of about 10,000, which is consistent with the Center's estimate.[38] The Council also reports more fully on refinery tax payments. The aggregate state tax payments reported indicate that Cherry Point pays on the order of $70 to $85 million annually covering Washington's business and occupation tax, hazardous substances tax, property tax, sales and use tax, and oil spill tax. The hazardous waste and oil spill taxes account for almost half of these tax payments. Recent Washington legislative changes effective July 2019 have served to double the hazardous waste tax.[39]

In view of Cherry Point's substantial economic contributions, any legislative or regulatory change that adversely affects current and long-term investment and production decisions could have serious economic repercussions. For example, based on the modeling results described above, even a 10% reduction in output would eliminate approximately 85 direct jobs, 355 total jobs in Whatcom County and 770 total jobs statewide. Whatcom County tax revenues would fall by about $1.5 million, and state level tax revenues would fall by $7 to $8.5 million.[40]

IV. THE PROPOSED AMENDMENTS FAIL TO COMPLY WITH SEPA

As noted above, the County Planning and Development Services Department erred in issuing a threshold DNS on September 6, 2019, and Cherry Point intends to submit formal comments objecting to that determination by the deadline of September 20, 2019. Nonetheless, Cherry Point shares these initial observations on the County's SEPA obligations in regard to the Proposed Amendments.

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[37] The Western States Petroleum Association sponsored this study.

[38] The Center and the Council rely on different economic impact models to determine total employment impacts but arrive at similar results. The Council study relies on REMI, while the Center Report relies on IMPLAN. The REMI-based multipliers do not include contract employment as direct employment, while the IMPLAN multipliers do.

[39] *See* T.J. Martinell, *Senate Approves Hazardous Waste Tax Hike*, Lens (Apr. 26, 2019), https://thelens.news/2019/04/26/senate-approves-hazardous-waste-tax-hike/.

[40] These calculations rely on the multipliers used in the Center Report and the assumption that direct employment has a linear relationship.

SEPA (Ch. 43.21C RCW) requires that government consider the general welfare, social, economic, and other requirements in weighing and balancing alternatives and in making final decisions. RCW § 43.21C.030(b); WAC § 197-11-448(1). Here, the County's proposed regulation of the entire hydrocarbon refining process creates overlapping economic and environmental issues that should be comprehensively addressed during the County's SEPA review process.[41]

SEPA requires the County to take a reasoned look at the probable, significant adverse impacts of the Proposed Amendments. RCW § 43.21C.030(c). In this case, given the complexity of the activities that the County intends to regulate and their clear potential for environmental impacts, to comply with SEPA, the County should have issued a Determination of Significance and prepared an Environmental Impact Statement ("EIS") that addresses the impacts of the Proposed Amendments on both the built and natural environments.

An EIS is the appropriate means to integrate SEPA's policies into the County's proposed action.[42] An EIS is particularly important because it documents the extent to which the County has complied with the procedural and substantive requirements of SEPA; it reflects the administrative record; and it is the basis upon which the County can make the balancing judgment mandated by SEPA between the benefits to be gained by the Proposed Amendments and the impacts on the environment.[43] Under SEPA, the requisite amount of environmental information is directly proportional to the potential adverse environmental consequences that could occur from implementation of the County's Proposed Amendments.[44]

The potential environmental impacts of the Proposed Amendments include, but are not limited to, the following:

- Effects on fuel supplies, availability, and cost;

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[41] *ASARCO Inc. v. Air Quality Coal.*, 92 Wash. 2d 685, 713–14, 601 P.2d 501, 519 (1979) (SEPA does not preclude consideration of economic factors, "[r]ather, the essential factors balanced frequently are the substantiality and likelihood of environmental cost and economic cost."); *Barrie v. Kitsap Cty.*, 93 Wash. 2d 843, 859–61, 613 P.2d 1148, 1157–58 (1980) (addressing socio-economic impacts on the built environment from a proposed rezone); *see also* RCW § 43.21H.020 (local governments must adopt methods and procedures to "insure that economic impacts and values will be given appropriate consideration in the rule-making process along with environmental, social, health, and safety considerations").

[42] *See* Richard L. Settle, *The Washington State Environmental Policy Act, A Legal and Policy Analysis* § 14.01, at 14-6 (2017) (hereinafter "SEPA Deskbook").

[43] *Juanita Bay Cmty. Ass'n v. City of Kirkland*, 9 Wash. App. 59, 68, 510 P.2d 1140 (1973).

[44] SEPA Deskbook, *supra* note 42, § 14.01, at 14-4.

- Negative effects on the global environment resulting from the freezing or reduction of refining activities within the Cherry Point UGA and substitution of alternate fuel sources to meet continued demand;
- Effects on the regional marine transportation systems resulting from the substitution of alternative fuel sources that do not have access to the Olympic pipelines;
- An overall increase in net GHG emissions resulting from the production and transport of fuel from alternative sources;
- Effects related to reductions in tax revenue, personal income, and employment resulting from reduced refinery activity within the Cherry Point UGA; and
- Effects on Whatcom County's essential public facilities.

A. The County should hold itself to the same standard of SEPA compliance that it requires from applicants in the Proposed Amendments.

Proposed Whatcom County Code sections 16.08.090, 16.08.160 and 20.60.801 require detailed information from applicants, including identification of "the 'significance' of direct, indirect, and cumulative impacts" of any proposed expansion of a fossil fuel facility. Under SEPA's Rule of Reason, an EIS "must present decisionmakers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision."[45] The County should hold itself to the same standard that it is seeking to impose on applicants and should conduct a thorough analysis of the impacts of the Proposed Amendments. Among other things, that analysis should:

- Discuss in detail the alleged "increased risks to public health, safety and the environment" including alleged risks to "transportation, the economy and the environment" that the County contends support adoption of the Proposed Amendments.
- Explain how the County calculated its "fair share" of the public health, safety, and environmental risks associated with fossil and renewable fuel facilities.
- Document "the significant transportation, health, and safety risks to the community" that the County believes would result from the transshipment of petroleum products or the expansion of petroleum refining or storage capacity.

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[45] *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wash. 2d 619, 633, 860 P.2d 390, 398–99, *opinion amended by* 866 P.2d 1256 (1993).

- Analyze the components of the County's proposed "Reasonable Worst Case Scenario," including the alleged significant impacts and the probability of occurrence, particularly since it is the purported basis for the insurance mitigation requirement.
- Establish a baseline for the "rare, uncommon, unique or exceptional plant and wildlife habitat, designated wildlife corridors, or habitat diversity for plants or animal species of substantial educational, ecological, or economic value" that it contends might be impacted by refinery or transshipment operations.
- Identify and discuss the "treaty rights, clean water rights and endangered species act protections" that the County contends are implicated by refinery or transshipment operations.
- Discuss the impacts of the Proposed Amendments on transportation, physical infrastructure, and County economics that will result from limiting or prohibiting fossil fuel refining and transshipment activities. In particular, since demand for fossil fuels, including jet fuel demand at regional airports and gasoline for the Seattle and Portland metropolitan areas, are expected to remain at current levels or increase, the County's SEPA analysis should discuss the environmental impacts that will result if this demand cannot be met from Whatcom County refineries, including an analysis of expected GHG emissions that will be generated from refining and transporting these products from alternate sources, which likely would be located outside of Whatcom County and even out-of-state.
- Examine the likely impacts to public recreation, educational facilities, and public health facilities associated with higher fuel prices that could result from decreases in production of fossil fuels at refineries located in the Cherry Point UGA and the need to import these fuels from remote sources.
- Discuss the impact of the Proposed Amendments on disincentivizing refinery owner/operators from making safety or emission reduction improvements that may also include an incremental increase in petroleum refining capacity.
- Discuss the impact of limiting the use of Cherry Point marine facilities, which are designated as an essential public facility under the County's comprehensive plan.
- Discuss the impacts on other designated essential public facilities (Burlington Northern Railroad tracks), Interstate 5, and State Routes 539, 546, and 20 that may be affected by reduction of refining capacity in the Cherry Point UGA and substitution of petroleum products procured from other sources.

- Discuss the effects of disincentivizing the production of renewable fuel stocks at refineries in the Cherry Point UGA.
- Consider the impacts that will result from reducing refining capacity in the Cherry Point UGA, which supplies a significant portion of the fuel needs to the Seattle and Portland metropolitan areas. Since this demand will have to be met from alternative sources, the County's SEPA analysis should include the transportation and environmental risks of transporting petroleum products from alternate refineries that do not have access to the product shipment pipeline that originates at Cherry Point and serves Seattle and Portland.
- Analyze the direct, indirect, and cumulative impacts of the Proposed Amendments. *See* WAC §§ 197-11-060(4)(d–e); *see also* Growth Management Act, RCW § 36.70A.130(2)(a) (subarea plan may be adopted only "if the cumulative impacts of the proposed plan are addressed by appropriate environmental review under [SEPA].").

B. Under SEPA, mitigation measures must be reasonable and capable of being accomplished.

SEPA reflects the requirements of nexus and proportionality that run throughout Washington land use law. *See, e.g.*, Wash. Const. art. I, § 16; RCW § 82.02.020 (local government must demonstrate that mitigation is "reasonably necessary as a result of the proposed development"). Under SEPA, "mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal." WAC § 197-11-660(1)(b). SEPA mitigation measures also must be "reasonable and capable of being accomplished" and may be imposed on an applicant "only to the extent attributable to the identified adverse impacts of its proposal." WAC § 197-11-660(1)(c, d). Finally, before requiring mitigation measures, the County must consider "whether local, state, or federal requirements and enforcement would mitigate an identified significant impact." WAC § 197-11-660(1)(e).

The County's SEPA analysis should include a detailed discussion of the alleged GHG impacts that it is seeking to regulate—including GHG emissions generated by all "upstream," out-of-state activities associated with feedstock production, initial processing, and transportation over which Cherry Point has no control—and the nexus and proportionality between those alleged impacts and the proposed mitigation established in amended WCC § 20.68.801.

C. The County should postpone adoption of the Proposed Amendments until it completes an EIS.

In order to comply with SEPA, the County must collect relevant environmental information at an early stage of the decision-making process so that the EIS can make "an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." WAC § 197-11-406.

The Proposed Amendments include significant requirements for environmental analysis that should be completed up front during the County's non-project required environmental review so that later, project-specific environmental review can be streamlined.[46]

V. THE PROPOSED AMENDMENTS ARE INCONSISTENT WITH WASHINGTON'S GMA AND THE WHATCOM COUNTY COMPREHENSIVE PLAN

Washington's GMA (Ch. 36.70A RCW) requires coordinated and cooperative comprehensive land use planning. RCW § 36.70A.010. RCW § 36.70A.020 establishes several planning goals to guide the development plans and development regulations. Goals relevant to the County's Proposed Amendments include Goal 1 (Urban Growth); Goal 3 (Transportation); Goal 5 (Economic Development); Goal 6 (Property Rights); Goal 8 (Natural Resource Industries); and Goal 12 (Public Facilities and Services).

As the County notes in its Comprehensive Plan, Whatcom County is a "gateway" that is uniquely located between Canada and major utility users to the south that require natural gas, petroleum products, and electricity.[47] Consistent with Comprehensive Plan policies 2A-7, 2A-9, and 2A-13[48], over the past 70 years, significant investment has been made in private and public transportation and utility infrastructure within the Cherry Point UGA to serve this demand. Moreover, as explained above, refinery operations in the Cherry Point UGA provide over 1,800 direct living-wage jobs, thousands more indirect and induced jobs, and other significant economic benefits to the County, including substantial tax revenues and charitable contributions. *See supra* at 26.

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[46] *See* Whatcom Cty. Planning & Dev. Servs., *Whatcom County Comprehensive Plan*, Policy 7D-2 at 7-12 (2018), https://www.whatcomcounty.us/1171/Current-Comprehensive-Plan (hereinafter, "Comp. Plan") (calling upon the County to "[c]onsider conducting in-depth environmental analysis for comprehensive plans and subarea plans to limit the need for future analysis by the private sector to a few issues that are unique to a specific project and cannot be reasonably analyzed at the subarea level").

[47] *Id.* at 5-3.

[48] *Id.* at 2-5.

The Proposed Amendments put all this in jeopardy. The Proposed Amendments conflict with Comprehensive Plan Goal 2D and Policies 2D-1 through 2D-4[49] by creating a regulatory regime that fosters uncertainty, impedes growth, and disincentivizes investment in infrastructure upgrades that would have safety and environmental benefits. The Proposed Amendments also conflict with Goal 2H by denying refineries in the Cherry Point UGA the opportunity to operate in a manner that is consistent with best business practices. And the Proposed Amendments also conflict with Goal 2H by depriving refineries of their property rights and the opportunity to recoup the substantial investments that they have made in their Cherry Point facilities to date.

A. The Cherry Point UGA refineries are GMA essential public facilities.

RCW § 36.70A.200(5) provides that "[n]o local comprehensive plan or development regulation may preclude the siting of essential public facilities." This regulation also prohibits comprehensive plans and development regulations that preclude the expansion of existing essential public facilities.[50] The Cherry Point refineries are essential public facilities, and the Proposed Amendments thus run afoul of the GMA by purporting to preclude the expansion of the refineries at Cherry Point.

The defining characteristic of essential public facilities is that the facilities are essential to the common good, but their local siting has traditionally been thwarted by exclusionary land use policies, regulations, or practices.[51] A facility need not be publicly owned or operated to qualify as an essential public facility.[52] In *Children's Alliance*, the Board noted that the statutory definition of essential public facilities was not all-inclusive and that essential public facilities could be large or small, many or few, and may be capital projects (*e.g.*, airports or prisons) or uses of existing structures (*e.g.*, health facilities or group homes).

The refineries located in the Cherry Point UGA are essential public facilities because they provide 20% of the gasoline used in Washington State and are the largest suppliers of jet fuel to Seattle, Portland, and Vancouver International Airports.[53] In

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[49] *Id.* at 2-9.

[50] *City of Des Moines v. Puget Sound Reg'l Council*, 108 Wash. App. 836, 844–45, 988 P.2d 27 (1999); *City of Airway Heights v. E. Wash. Growth Mgmt. Hearings Bd.*, 193 Wash. App. 282, 312, 376 P.3d 1112, 1126 (2016).

[51] *Children's Alliance v. City of Bellevue*, No. 95-3-0011, slip op. at 7 (G.M.H.B. July 25, 1995).

[52] *Sleeping Tiger, LLC v. City of Tukwila*, 173 Wash. App. 1026 (2013) (private hotel proposed for use as a diversion center was an essential public facility).

[53] *Washington*, BP, https://www.bp.com/en_us/united-states/home/where-we-operate/washington.html (last visited Sept. 11, 2019); *see Sleeping Tiger*, 173 Wash. App. at 1026; *Children's Alliance*, slip op. at 7.

addition, the refineries are at the epicenter of a complex transportation system that includes ships, pipelines, rail, and trucks.

The Comprehensive Plan itself recognizes the importance of the Cherry Point industries to the public good. "Because of the special characteristics of Cherry Point, including deep water port access, rail access, and proximity to Canada, this area has regional significance for the siting of large industrial or related facilities."[54] As a result, "[t]he County and industrial users have long recognized that the Cherry Point area exhibits a unique set of characteristics that makes the land there not only locally but regionally important for the siting of major industrial developments," including port and rail access, proximity to Canada, Alaska, and foreign ports, the presence of necessary infrastructure, and use compatibility/land use designation.[55]

Finally, the Comprehensive Plan also recognizes that "the industries currently located at Cherry Point are a substantial part of the economic base of Whatcom County and the region" such that "the economic welfare of the county is strongly tied to the health of these industries and their ability to flourish and expand as opportunities present themselves."[56]

B. The Proposed Amendments conflict with the Whatcom County Comprehensive Plan's economic development goals and policies.

Comprehensive Plan Goal 7 calls for promoting a healthy economy by providing ample opportunity for living-wage jobs.[57] Policy 7A-1 states the County's intent to ensure an ample supply of developable industrial land to assist new and expanding firms that wish to locate or remain in Whatcom County. Similarly, Policy 7A-2 calls for "the retention and expansion of existing businesses."[58] The Comprehensive Plan has several provisions to ensuring adequate infrastructure to support existing business including water supply (Policy 7C-1); transportation infrastructure (Policy 7C-2); electric power (Policy 7C-3); government services (Policy 7C-7); and integrated transportation planning (Policy 7C-8).[59]

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[54] Comp. Plan at 2-54.

[55] *Id.* at 2-55.

[56] *Id.* at 2-58; *see also id.* at 2-89 (noting that the purpose of the County's Major Industrial UGA was "[t]o reserve appropriate areas to attract heavy industrial manufacturing uses and provide employment opportunities while minimizing land use conflicts and offsite impacts").

[57] *Id.* at 7-7.

[58] *Id.*

[59] *Id.* at 7-11.

The Comprehensive Plan also recognizes that overly restrictive land use regulations can chill economic development. For this reason, Goal 7D calls for "balanced, clear, and predictable overall policies, practices and regulations which do not unnecessarily or inadvertently prevent, confuse, delay, or create costly hurdles" that restrict economic development.[60] To support Goal 7D, the County enacted Policy 7D-1 (work with other agencies to streamline environmental review); Policy 7D-2 (conducting environmental analysis as part of comprehensive plan and subarea plan amendment); Policy 7D-3 (integrating and simplifying land use regulations); and Policy 7D-6 (streamlining and coordinating the permit process).[61] Similarly, Goal 10C requires the County to provide protection for private property rights and economic opportunities when implementing environmental policies.[62] The Proposed Amendments conflict with the County's economic goals and policies by failing to adequately balance environmental and economic considerations.

Finally, disincentivizing future growth at Cherry Point by imposing onerous and uncertain land use processes will result in fuel demand being met from other suppliers located outside of the Cherry Point UGA. In addition, reducing capacity at Cherry Point may cause fuel price increases that will impact County residents and public operations. For these reasons, the Proposed Amendments also conflict with Comprehensive Plan Goal 2CC and Policies 2CC-1, 2, 3, 4, 9, 10, and 11, which call for maintaining Cherry Point as an unincorporated UGA based upon its "unique location, characteristics and its significant contribution to the overall industrial land supply and Whatcom County's tax base."[63] The Proposed Amendments conflict with Goal 5F and Policy 5F-1, which call for the removal of impediments to the siting of necessary utility facilities by eliminating unintended or unreasonable constraints on utilities, and Goal 5L and Policy 5L-1, which call for the County to support direct and indirect economic benefits to Whatcom County originating from energy or utilities.[64]

VI. THE PROPOSED AMENDMENTS RAISE SERIOUS CONSTITUTIONAL CONCERNS

Not only will the Proposed Amendments fail to achieve the desired environmental benefits and cause significant economic disruption, they raise serious concerns under a variety of constitutional doctrines. This letter does not offer an exhaustive list of the unconstitutional infirmities associated with the Proposed Amendments, but merely

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[60] *Id.* at 7-12.

[61] *Id.* at 7-12–7-13.

[62] *Id.* at 10-7.

[63] *Id.* at 2-58–2-60.

[64] *Id.* at 5-7, 5-9.

identifies some of the significant federal and state law challenges that the Proposed Amendments would face. Rather than enact regulations that will expose the County to significant litigation risk and expense, Cherry Point urges the County to reconsider its approach and work cooperatively on solutions that will be more effective, consistent with federal and state law.

A. Dormant Commerce Clause.

The dormant Commerce Clause of the U.S. Constitution forbids states from interfering with interstate commerce, and the Proposed Amendments impermissibly regulate out-of-state emissions and burden interstate commerce in multiple ways. Some aspects of the Proposed Amendments are patently unconstitutional under the dormant Commerce Clause. The Proposed Amendments impose the equivalent of an impermissible tax on out-of-state production and transport of oil by requiring Whatcom County refineries to pay fees or create local carbon offset projects to offset any upstream emissions generated by out-of-state commerce. This aspect of the proposed amendments "directly regulates" interstate commerce, meaning it will "generally [be] struck down . . . without further inquiry."[65] The County cannot enact a regulation intended to regulate and sanction emissions generated out-of-state, but that is the inescapable intent and effect of the upstream emission provision.

By constraining production capacity at Cherry Point, the Proposed Amendments will, among other things, likely lead to shortages of gasoline and an increase in gasoline prices in California, at least in the short run. That is because California refiners operate at or near capacity, limiting the ability of the interstate market to make up for a decline in output at Cherry Point. Likewise, constraining capacity at Cherry Point would inhibit the market's ability to respond to unplanned gasoline shortages, resulting again in higher prices for consumers. These effects would be multiplied many times over if other jurisdictions across the United States were to impose costs on refineries to mitigate upstream and out-of-state emissions—the burden on interstate commerce would be even greater. Suppliers of crude oil would also be negatively impacted. Vital industries like the airline, rail, and trucking industries would be materially affected. Fuel prices would rise which could have a dampening effect on consumers and the economy. Downstream purchasers would be forced to import fuel from overseas, potentially increasing GHG emissions. The "interfere[nce] with the natural functioning of the interstate market" would be immediate and undeniable.[66] Nor will the County be able to demonstrate that the putative local benefits of a freeze on oil refining outweighs such burdens on the national economy. For

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

[66] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

the reasons discussed above, the regulations are likely to *increase* global GHG emissions rather than decrease them.

Finally, the many efforts by the County during the legislative process to police its rhetoric relating to national effect will not save the Proposed Amendments. Courts are "not . . . bound by the stated purpose when determining the practical effect of a law."[67]

B. Substantive Due Process.

Because the Proposed Amendments are not a rational means of achieving the County's objectives, they are vulnerable under the Due Process Clauses of the federal and state constitutions.

As stated above and in prior submissions to the County, Cherry Point has outlined many of the ways in which the Proposed Amendments will be counterproductive and arbitrary. Restricting the ability of facilities like Cherry Point to "expand" is not rational environmental policy. Any shift of production to refineries outside Whatcom County (the likely effect if the Proposed Amendments are enacted) will mean that crude oil will be processed by less efficient facilities, resulting in more emissions per barrel of refinery capacity. Accordingly, it is likely that the Proposed Amendments will instead *increase* global GHG emissions, as well as other pollutants. And the County has targeted fossil and renewable fuel refineries and transshipment facilities while ignoring other sources of emissions within Whatcom County, including power plants, food production facilities, and aluminum smelting facilities.

That the Proposed Amendments are irrational and would not reduce emissions is reason enough for the County to reject them as a policy matter and under state law. But that fact also means that the Proposed Amendments offend various provisions of the federal and state constitutions aimed at barring the government from imposing unfair and irrational burdens on individuals and facilities like Cherry Point. Land use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. . . . [T]he government's chosen means must rationally further some legitimate state purpose."[68] And while the County has also expressed a desire to regulate the transportation of hazardous materials

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[67] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1098 (9th Cir. 2013).

[68] *Moore v. City of E. Cleveland*, 431 U.S. 494, 498 n.6 (1977) (citations omitted); *see also N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008); *cf. Presbytery of Seattle v. King Cty.*, 114 Wash. 2d 320, 330–31 (1990) (under Washington constitution, land use regulation must address a "public problem or 'evil,' . . . must tend to solve this problem, and . . . must not be 'unduly oppressive' upon the person regulated").

into the County, such regulation is the province of the federal government and is not a legitimate state interest for purposes of due process analysis.[69]

C. Vagueness.

"[I]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[70] As just one example, the key trigger for the Proposed Amendments' operation is the term "expansion." Yet that critical term is nowhere defined in the text of the Amendments, leaving regulated parties to guess what kinds of modifications to their facilities will require a CUP. As explained above in Section II, many other aspects of the Proposed Amendments are vague and uncertain. Vague ordinances that do not provide regulated parties with notice of prohibited conduct violate the federal and state guarantees of due process.

D. Takings Clause.

Finally, the Proposed Amendments will be vulnerable to a Takings Clause challenge. A taking need not be a direct appropriation of property; the U.S. Supreme Court has long recognized that certain forms of regulatory action may also constitute a taking. Even a state statute that furthers important public policies "may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[71] The Washington Supreme Court has set forth a similar analytical framework under the Washington Constitution.[72]

Cherry Point (and its predecessors) decided to develop and operate the facility in 1971 with the understanding that it would have the latitude to modify, update, and expand its operations to adapt to a dynamic energy market. Indeed, over the past several decades, Cherry Point has moved from primarily refining crude oil brought by tanker ships from the North Slope of Alaska, to refining crude oil from around the world. In the past ten years alone, BP has invested more than $1.7 billion in capital improvements at Cherry Point to support its operations. If enacted, the Proposed Amendments will make it impossible for Cherry Point to compete in a highly competitive, dynamic market, as it has done for nearly half a century.

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[69] *Cf. Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 970 (9th Cir. 2017).

[70] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Anderson v. City of Issaquah*, 70 Wash. App. 64, 75, 851 P.2d 744 (1993) (similar).

[71] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

[72] *See Guimont v. Clarke*, 121 Wash. 2d 586, 594–96 (1993).

The U.S. Supreme Court has recognized that certain forms of land-use regulation may constitute a taking. "[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."[73] While the Court originally developed this rule in the context of physical exactions of parcels of land, the Court in *Koontz* confirmed that the rule also applies to monetary exactions—*i.e.*, where the government conditions the approval of the permit on a monetary payment in lieu of some other exaction that fails the nexus and rough proportionality tests.[74]

As explained above, *supra* at 13–15, the Proposed Amendments condition the approval of a CUP to expand a refinery facility on either the mitigation of GHG emissions, or the payment of an in-lieu fee. This monetary payment neither has a nexus to, nor is it roughly proportionate to, the environmental impacts of the proposed expansion. The County does not seek mitigation for any local air emissions or pollution that will affect the immediate property or the County. Rather, the Proposed Amendments would exact money from Cherry Point to compensate for the contribution of numerous upstream, out-of-state third parties associated with production, initial processing, and transportation of feedstocks—that Cherry Point does not control—to global GHG emissions.

Even the portion of the required mitigation that is attributable to emissions of GHGs by Cherry Point is, in reality, mitigation of purported global consequences, rather than any consequence related to land in Whatcom County. The fee is set at $60 per metric ton of CO_2e, which is based on the "Social Cost of Carbon," a metric that attempts to measure the cost of carbon emissions *globally*. Thus, the County is effectively asking the CUP applicant to pay compensation for impacts caused by GHG emissions all over the globe, rather than that experienced by neighboring property owners or within the jurisdiction of the County itself. This disconnect, when embodied in a precondition for a land use permit, fails the nexus and rough proportionality tests under the Takings Clause.

VII. THE PROPOSED AMENDMENTS ARE PREEMPTED BY FEDERAL AND STATE LAW

Numerous federal and state agencies play a role in regulating the environment, the energy industry, and the transportation of materials like crude oil that are involved in the production of fuel. And numerous federal and state laws, recognizing the importance of uniformity in this area and the importance of the energy and transportation industries to national commerce, prevent local governments from enacting their own laws that interfere

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[73] *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

[74] 570 U.S. at 612.

with the work of federal and state agencies and federal and state laws. The Proposed Amendments are preempted under these provisions.

A. Federal Preemption.

The Proposed Amendments would conflict with the Clean Air Act and federal statutes governing rail transportation and pipeline operations, and would be preempted under the federal Supremacy Clause for that reason. U.S. Const. art. VI, cl. 2.

1. The Interstate Commerce Commission Termination Act.

Railroads have long been subject to "pervasive and comprehensive" federal regulation.[75] In 1995, Congress passed the Interstate Commerce Commission Termination Act ("ICCTA"), which assigns the federal Surface Transportation Board exclusive jurisdiction over transportation by rail carriers and the construction, acquisition, operation, or abandonment of new rail facilities, even ones located entirely in one state. 49 U.S.C. § 10501(b). The ICCTA expressly preempts state regulation of railroads. *Id.*

On numerous occasions reflected in the history of the Council's prior work on this matter, proponents of the Proposed Amendments have made clear their intention is to regulate the transport of oil by rail. Indeed, in enacting the temporary moratorium that the Proposed Amendments would make permanent, the County observed that "federal policies . . . intended to reduce the risks associated with oil by rail have proven insufficient to protect communities along the rail corridor."[76]

The Proposed Amendments directly regulate railroads and rail transportation, in violation of ICCTA. The Proposed Amendments require a permit for any "expansion" of "transshipment facilities," which include facilities that off-load fuel materials from freight cars, *see* WCC § 20.97.160.3, and prohibit the development of new rail "transshipment facilities." The federal courts of appeals, including the Ninth Circuit, which oversees Washington state, have had no trouble overturning state permitting rules for railroads, much less outright development bans.[77]

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[75] *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

[76] Whatcom County, Wash., Ordinance No. 2016-031 (Aug. 9, 2016) (hereinafter, "August 9, 2016 Moratorium").

[77] *City of Auburn v. United States*, 154 F.3d 1025, 1029–31 (9th Cir. 1998).

2. The Hazardous Liquids Pipeline Safety Act.

With exceptions not relevant here, the Hazardous Liquids Pipeline Safety Act ("HLPSA") expressly preempts state regulation of interstate pipelines. 49 U.S.C. § 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."). Indeed, the courts have held that the HLPSA's reach is so broad that it covers "the entire domain of pipeline safety."[78]

But the Proposed Amendments seek to regulate pipelines in multiple ways. They impose an insurance requirement for the transportation of oil, a requirement that on its face is a regulation of pipeline transportation. And the Proposed Amendments define the phrase "transshipment facilities" so expansively as to cover pipelines, including pump and compressor stations and associated facilities. Proposed WCC § 20.97.160.3.[79] These are the kinds of regulations that federal courts routinely hold preempted under the safety standard provision.[80]

The County Council's initial August 9, 2016 Moratorium that led to the Proposed Amendments explicitly cited a fear of increased pipeline operations as a reason for halting the acceptance of fossil fuel permits in Whatcom County: "**WHEREAS, *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." August 9, 2016 Moratorium (emphasis added). The Moratorium also made clear that the County considers pipelines to be exactly the kind of "transshipment, transport, and transfer of unrefined fossil fuels" that it was targeting. *Id.* The County Council's July 23, 2019 Resolution forwarding Cascadia Law Group's recommendations to the Planning Commission cites these "safety" concerns as a key driver behind the Proposed Amendments (associating increases in "capacity to

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[78] *Tex. Midstream Gas Servs. v. City of Grand Prairie*, No. 3:08-cv-1724-d, 2008 WL 5000038, *8 (N.D. Tex. Nov. 25, 2008).

[79] In several Whatcom County locations on the interstate Olympic Pipeline, for example, booster pumps are required to ensure that the pressure is sufficient to transfer oil from one location to another. Such pumping stations arguably engage "in the process of off-loading" fossil or renewable fuel materials or products "from one transportation facility and loading it onto another transportation facility for the purposes of transporting such products into or out of Whatcom County." *See* Proposed WCC § 20.97.160.3.

[80] *See, e.g., Tex. Oil & Gas Ass'n v. City of Austin*, No. A-03-CA-570-SS (W.D. Tex. Nov. 7, 2003) (Order Granting Preliminary Injunction) (enjoining an Austin ordinance that imposed insurance requirements on pipeline regulators and explaining that such a requirement was a safety requirement); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 (9th Cir. 2006) (rejecting Seattle's attempt to impose safety conditions upon operation of pipeline).

receive crude oil, with subsequent increases in risks to public health, ***safety***, and the environment").[81]

The County's decision—at the Cascadia Law Group's urging—to delete the word "pipeline" from the proposed amendments will not save the Proposed Amendments from preemption. Federal preemption cannot be defeated by the equivalent of artful pleading. The bottom line is that the Proposed Amendments have the purpose and the effect of regulating pipelines and that is exactly what federal law prohibits.

3. The Hazardous Materials Transportation Act.

The Hazardous Materials Transportation Act ("HMTA"), as amended by the Hazardous Materials Transportation Uniform Safety Amendments Act of 1990, grants the Secretary of Transportation authority to promulgate and enforce regulations governing the transportation of hazardous materials in commerce. 49 U.S.C. § 5103. Congress enacted the HMTA to "replace a patchwork of state and federal laws and regulations" concerning the transportation of hazardous materials "with a scheme of uniform, national regulations."[82] In line with this goal, Congress advised that hazardous materials regulations ("HMR") promulgated under the HMTA are not minimum requirements that local jurisdictions may exceed. "[R]ather, the HMR are national standards that must be uniformly applied across jurisdictional lines."[83] The HMTA thus expressly preempts any state law, regulation, or requirement concerning five specific subject matters, including the classification and handling of hazardous materials, that do not conform to the HMRs in "every significant respect." 49 U.S.C. § 5125(a); 49 C.F.R. § 107.202(a). Crude oil and petroleum gases are among the hazardous materials regulated under the HMR. 49 C.F.R. § 172.101, Hazardous Materials Table.

For nearly three years, the County Council made crystal clear its intent to regulate the transportation of hazardous materials covered by the HMTA.[84] It is thus unsurprising

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[81] Whatcom County, Wash., Resolution No. 2019-037 (July 23, 2019) (emphasis added).

[82] *S. Pac. Transp. Co. v. Public Serv. Comm'n of Nev.*, 909 F.2d 352, 353 (9th Cir. 1990).

[83] Applicability of the Hazardous Materials Regulation to Loading, Unloading, and Storage, 68 Fed. Reg. 61,906, 61,923 (Oct. 31, 2003) (to be codified at 49 C.F.R. pts. 171, 173, 174, 175, 176, 177 & 178).

[84] *See* Whatcom County, Wash., Interim Ordinance Imposing an Interim Moratorium on the Acceptance and Processing of Applications and Permits for New or Expanded Facilities 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 (Sept. 13, 2016) ("WHEREAS, multiple trains carrying crude oil from the Bakken formation moving through the United States and Canada have derailed and exploded causing damage to the property and environment, one derailment caused significant fatalities, which is the reason regulations must be improved").

that the proposed amendments—both with their permitting requirement for any "expansion" of "transshipment facilities" transporting these materials and their outright prohibition of the development of new "transshipment facilities" of this type—regulate the transportation of such materials. The Proposed Amendments would thus disrupt the national uniformity of the HMTA and be preempted. Indeed, the Ninth Circuit has not hesitated to strike down similar examples of local or state governments overreach.[85]

4. The Clean Air Act.

Finally, the Proposed Amendments' regulation of out-of-state or foreign emissions also implicates conflict preemption issues under the Clean Air Act. The Clean Air Act reflects Congress's intent that GHG emissions would be regulated by EPA and the home state of the emitter.[86] Interpreting materially indistinguishable language in the Clean Water Act, the Supreme Court held that a "State only has an advisory role in regulating pollution that originates beyond its borders" and held that state laws attempting to regulate out-of-state pollution were preempted.[87] Through the upstream emissions provisions, the Proposed Amendments directly target pollution "that originates beyond [the] borders" of Whatcom County and indeed the State of Washington. This raises serious questions of conflict preemption. Allowing individual states and counties to impose liability based on emissions outside their own jurisdictions would interfere with the purposes and objectives of the Clean Air Act.

B. State Preemption.

The Proposed Amendments would also be vulnerable to state preemption challenges. For example, the Revised Code of Washington ("RCW") prohibits county governments from imposing "*any tax, fee, or charge, either direct or indirect*" on the construction or redevelopment of commercial or industrial buildings, or on the development of land. RCW § 82.02.020 (emphasis added). For multiple reasons, the Proposed Amendments' GHG mitigation requirements "directly and irreconcilably conflict[]" with this prohibition and would thus be preempted by Washington law.[88]

First, taxes, fees, or charges for GHG emissions do not fall within RCW section 82.02.020's enumerated exceptions for permissible local development fees. While, for instance, the RCW allows a county government to preclude dedications of land or

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[85] *See Chlorine Inst., Inc. v. Cal. Highway Patrol*, 29 F.3d 495 (9th Cir. 1994).

[86] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015); *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010).

[87] *Ouellette*, 479 U.S. at 490, 494.

[88] *See Cannabis Action Coal. v. City of Kent*, 183 Wash. 2d 219, 227 (2015).

easements within proposed developments that are reasonably necessary as a *direct result* of the proposed development, or to permit an applicant to make a *voluntary* payment in lieu, the RCW permits no such exception for GHG emissions. *See* RCW § 82.02.020. As a result, the Proposed Amendments' GHG mitigation requirement—which would require that a refinery seeking to develop its own land identify local GHG mitigation projects or apply for and obtain the County's permission to pay a fee in-lieu—is preempted on its face. *See* Proposed WCC § 20.68.801(2)–(3).

Second, even if Washington law permitted the County to compel local development fees for GHG mitigation, RCW § 82.02.020 would require that such fees be reasonably related to emissions from the proposed development.[89,90] For the same reasons discussed above in the context of the federal Takings Clause, the Proposed Amendments' accounting for upstream emissions in its mitigation analysis would not pass muster under RCW § 82.02.020.[91]

For example, a refinery could submit an application for a development project that would substantially improve its efficiency and lower its rate of emissions, but trigger the mitigation requirements for exceeding the three-year average baseline based solely on upstream activities. The Proposed Amendments would thus likely require Cherry Point to pay a significant fee for upstream activities it did not cause or control, effectively penalizing the refinery for taking steps that would otherwise be consistent with the goal of sound environmental policy. Such a fee would not only bear no semblance of being "roughly proportional" to or "reasonably necessary" to solve the "problem" created by the development, but would also be unfair to the refinery and detrimental to the County.

For all of these reasons, the County should not rush to enact a flawed proposal, but rather should take the time to engage in meaningful consultation, listen to the views of state and local environmental regulators, and draw on the expertise of its constituents, in order to give these important and complex issues the serious attention they deserve.

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[89] As discussed above, both SEPA and the federal takings clause contain similar nexus and proportionality requirements that the Proposed Amendments would infringe.

[90] *See* RCW § 82.02.020 (requiring that dedication or land easements be "reasonably necessary as a direct result of the proposed development"); *Burton v. Clark Cty.*, 91 Wash. App. 505, 523, 958 P.2d 343, 354 (1998) (striking down county's conditional approval of plat on landowner's dedication of right-of-way where the county failed to show that the dedication was "roughly proportional" to the problem created or exacerbated by the landowner's development).

[91] *See, e.g., City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wash. App. 17, 45 (2011) ("[I]n our state, the *Nollan/Dolan* analysis applies to mitigation payments under RCW 82.02.020.").

As stated above, Cherry Point very much appreciates the opportunity to provide these comments. We would welcome the opportunity to meet with the County and discuss our concerns in greater detail. Cherry Point and the County have worked together to benefit Whatcom County and its residents for nearly 40 years. It is our sincere hope that Cherry Point and the County can work together to address the community's interest in safeguarding public health, safety, and environmental protection—concerns that Cherry Point wholeheartedly shares. Please feel free to contact me at 202-942-6546 or Pam Brady to discuss further.

Sincerely,

Brian D. Israel

cc: Robert Allendorfer, Refinery Manager, BP Cherry Point Refinery
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