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TO ALL COUNCILMEMBERS:

Additional Information

For

January 29, 2019

SCOTW #1

1. Council to clarify intent of motion approved January 15, 2019, related to preliminary draft Comprehensive Plan and Zoning Code amendments - Cherry Point (AB2019-101) **285**

DISTRIBUTED: January 28, 2019
TIME: 3:30 p.m.

From:	Mark Personius
Sent:	Monday, January 28, 2019 2:28 PM
To:	Council
Cc:	Dana Brown-Davis; Matt Aamot; Amy Keenan; Nick Smith; Tyler Schroeder; Jack Louws
Subject:	SCOTW January 29, 2019
Attachments:	Pre-Draft Comp Plan-Zoning Amendments (Oct 9 2018).pdf; 1. Draft Exhibit A B C and D - Comp Plan (Jan 15 2019).pdf

Council,

PDS wanted the opportunity for you to see both the October 9th and January 15th versions of the proposed Cherry Point amendments (see attached) before we take both exhibits to the Planning Commission and begin the public review process as you requested in your January 15, 2019 motion. Our purpose on meeting with the SCOTW on Tuesday the 29th is to make sure:

1. Council is OK with sending these exhibits forward to the Planning Commission as presented; and
2. PDS understands how to represent these two documents to the Planning Commission (i.e., are they equal alternative proposals or is one a preferred alternative and the other just for informational purposes?)

Council started this conversation many months ago with some specific concerns:

- Potential adverse impacts of transporting unrefined fossil fuels into the county;
- Potential adverse impacts from exporting raw crude from Cherry Point;
- Potential loss of refining jobs at Cherry Point if the refineries turned into crude oil export terminals instead; and
- Increasing public awareness of and ability to comment on fossil fuel activities.

The ***October 2018*** exhibit focused on addressing those issues and the record indicates that Council clearly intended not to interfere with existing oil refining operations but to focus on unrefined oil activities. Several legal and technical issues arose during those Council deliberations regarding the regulation of unrefined fossil fuel export activities that were particularly vexing (e.g., how to differentiate between refining and non-refining export activities in the regulatory sense, insurance to address spills of unrefined fossil fuels during transport, etc.). Some of those issues remain unresolved in the October 2018 exhibit, but it did propose making some uses, now outright permitted by the zoning code, into conditional uses (requiring more public notice and a public hearing and decision before the Hearing Examiner).

The ***January 2019*** exhibit focuses on a very different approach and would have a much more significant effect on existing and future refining operations and activities. It does not try to distinguish between "refining" and "non-refining" activities at Cherry Point. Instead it proposes to define ***all*** new "fossil fuel facilities" as conditional uses (requiring a CUP, public hearing and decision before the Hearing Examiner) and would require that ***all*** new fossil fuel facilities CUPs in Cherry Point be required to prepare an Environmental Impact Statement (EIS) under the county's SEPA rules, including mandatory mitigation for any greenhouse gas emissions and any impacts to the Salish Sea. Those facilities subject to the CUP/EIS requirements under this proposal would include virtually ***any*** change to existing refining operations. It would also require CUPs (and therefore EIS's) for ***all*** "accessory uses" at Cherry Point not directly related to oil refining but that support the operations (e.g., things like radio communication facilities, parking lots, storage buildings, guard buildings, etc.). It would allow the PDS Director to "exempt" some of those new fossil fuel facilities and accessory uses from the

CUP/EIS requirements but specifically prevents the Director from issuing any exemptions within the Cherry Point UGA (where ***all*** the fossil fuel processing and refining operations are located).

Given these two very different proposals about regulating fossil fuel processing at Cherry Point, any guidance or clarification Council can provide would be helpful to the Planning Commission, the public, staff and the affected industries at Cherry Point as we move forward with the public review process.

Thank you.

Mark Personius
Director

Whatcom County Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226
P. 360.778.5950

Exhibit A
Whatcom County Comprehensive Plan
Amendments

Amend the Whatcom County Comprehensive Plan (Chapter 2 – Land Use) as follows:

Major Industrial Urban Growth Area / Port Industrial

Cherry Point

The Cherry Point Urban Growth Area (UGA) contains approximately 7,000 acres of industrial land. The land has long been planned and designated by Whatcom County for industrial development and is currently the site of three major industrial facilities including two oil refineries and an aluminum smelter. Together, these three existing industries own about 4,400 acres of the total Cherry Point industrial lands. A fourth large tract of undeveloped land constituting approximately 1,500 acres is designated for industrial development.

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. General Petroleum constructed the Ferndale Refinery in 1954, Alumax/Pechiney/Howmet constructed the Aluminum Smelter in 1966, and the Atlantic Richfield Company constructed the Cherry Point Refinery in 1971. The existing industries in the Cherry Point UGA, which provide significant employment, have produced and shipped refined fossil fuels and other products for decades.

Cherry Point is also important historically and culturally to the Coast Salish people, and part of the usual and accustomed fishing area for five treaty tribes, reserved under the Treaty of Point Elliot of 1855. The Lummi Nation and Western Washington University have identified an ancestral village dating back over 3,000 years ago in this area. The Cherry Point UGA contains sites of primary archeological and cultural significance.

Since the designation of this area for industrial development years ago, newer scientific study of the shoreline ecology has identified Cherry Point's unique function as part of the Fraser River/Georgia Strait and greater Salish Sea ecosystem and the associated Cherry Point Aquatic Reserve has been designated by the state Department of Natural Resources to recognize the ecological importance of the aquatic lands in this area.

Since adoption of earlier versions of this Comprehensive Plan, governments have increased their recognition of the observed and projected effects that fossil fuel extraction, transportation and use have on human health and the environment.

Policy 2CC-11: It is the policy of Whatcom County to limit the number of industrial piers at Cherry Point to the existing three piers, taking into account the need to:

- ~~Honor any existing vested rights or other legally enforceable agreements for an additional dock/pier;~~
- Update the Whatcom County Shoreline Master Program to conform with this policy;
- Encourage the continued agency use of best available science;
- Support and remain consistent with the state Department of Natural Resources' withdrawal of Cherry Point tidelands and bedlands from the general leasing program and the species recovery goals of the Cherry Point Aquatic Reserve designation and Management Plan;
- Recognize federal actions upholding treaty rights;
- Protect traditional commercial and tribal fishing; and
- Prevent conflicts with vessel shipment operations of existing refineries that could lead to catastrophic oil or fuel spills.

Policy 2CC-16: The County will, through applicable permitting processes, ~~shall undertake a study to be completed if possible by December of 2017 to examine existing County laws, including those related to public health, safety, development, building, zoning, permitting, electrical, nuisance, and fire codes, and develop recommendations for legal ways the County may choose to~~ seek to limit the negative impacts on public safety, transportation, the economy, and environment from new or expanded crude oil, coal, liquefied petroleum gases, ~~and~~ natural gas, and radioactive substance exports from the Cherry Point UGA above levels in existence as of March 1, 2017.

~~To provide clear guidance to current and future county councils on the County's legal rights, responsibilities and limitations regarding interpretation and application of project evaluation under Section 20.88.130 (Major Projects Permits) of the Whatcom County Code.~~

~~The County should consider any legal advice freely submitted to the County by legal experts on behalf of a variety of stakeholder interests, and make that advice publicly available.~~

- ~~Based on the above study, develop proposed Comprehensive Plan amendments and associated code and rule amendments for Council consideration as soon as possible.~~
- ~~Until the above mentioned amendments are implemented, t~~The Prosecuting Attorney and/or the County Administration should provide the County Council written notice of all known pre-application correspondence or permit application submittals and notices, federal, state, or local that involve activity with the potential to expand the export of fossil fuels from Cherry Point.

Policy 2CC-17: Policy 2CC-16 shall not limit existing operations or maintenance of existing facilities as of March 1, 2017.

Amend the Whatcom County Comprehensive Plan (Appendix A – Glossary) as follows:

Hazardous Substance: Any liquid, solid, gas, or sludge, including any material, substance, product, commodity, or waste, regardless of quantity, that exhibits any of the physical, chemical or biological properties described in WAC 173-303-090 and/or 173-303-100.

Exhibit B

Whatcom County Code Title 20 Amendments

Light Impact Industrial (LII) District

Amend WCC 20.66.050, LII Permitted Uses, as follows:

.063 Rail, truck and freight terminals; warehousing and storage; parcel delivery service; freight forwarding; inspection weighing services; and packaging and crating; except that new or expanded crude oil, other unrefined fossil fuel, liquefied petroleum gas, and natural gas facilities require a conditional use permit.

.067 Construction contractors' business offices and related storage and equipment yards.

.068 Wholesale trade or storage of durable and nondurable goods including automobile parts and supplies; tires and tubes; furniture and home furnishings; lumber and other construction materials; sporting goods, toys and hobby goods; metal service centers and offices; electrical goods; hardware, plumbing and heating equipment; machinery equipment and supplies; jewelry, watches and precious stones; other durable goods; paper and paper products; drugs, proprietaries and sundries; apparel, piece goods and notions; groceries and related products; beer, wine and distilled beverages; waste bottles; waste boxes; rags; waste paper; wiping rags and miscellaneous nondurable goods; ~~provided, however,~~ except that:

(1) ~~trade, s~~Storage or processing of sulphur shall be prohibited. Storage or processing of bulk coal shall be prohibited.

(2) New or expanded crude oil, other unrefined fossil fuel, liquefied petroleum gas, and natural gas facilities require a conditional use permit.

.081 Freight railroad switching yards and terminals; except that new or expanded crude oil, other unrefined fossil fuel, liquefied petroleum gas, and natural gas facilities require a conditional use permit.

Amend WCC 20.66.150, LII Conditional Uses, as follows:

.170 New or expanded transportation, storage, and distribution facilities for crude oil, other unrefined fossil fuel, liquefied petroleum gas, and/or natural gas.

Amend WCC 20.66.200, LII Prohibited Uses, as follows:

.204 Storage or processing of bulk coal.

Heavy Impact Industrial (HII) District

Amend WCC 20.68.050, HII Permitted Uses, as follows:

.054 The following are permitted uses except as otherwise prohibited:

(1) The manufacture and process of paper including pulp, paper and paperboard mills; and building paper and board mill products.

(2) The manufacture and processing of chemicals and allied products including industrial inorganic and organic chemicals; synthetic resins, rubber, fibers and plastic materials; soap, detergents and cleaning preparations; paint, linseed oil, shellac, lacquer and allied products; chemicals from gum and wood; and agricultural chemicals.

(3) Refining and accessory storage of petroleum and asphalt.

On July 10, 2018, the County Council's Special Committee of the Whole provided direction to continue to allow accessory storage of refined petroleum products (such as gasoline) as a permitted use.

Question: Storage of crude oil for export would require a conditional use permit. Is it Council's intent to allow new or expanded storage facilities for crude oil that will be refined on-site as a permitted use or require a conditional use permit in the Heavy Impact Industrial zone?

(4) The manufacture and processing of rubber and plastic products.

(5) Leather tanning and finishing.

(6) The manufacture and processing of cement and glass; and concrete, gypsum, plaster, abrasive, asbestos and nonmetallic mineral products.

(7) Primary metal industries including blast furnaces and steel works; mills for primary smelting, secondary smelting, refining, reducing, finishing, rolling, drawing, extruding, and casting of ferrous and nonferrous metals; and the manufacture of miscellaneous metal products.

.059 Bulk commodity storage facilities, and truck, rail, vessel and pipeline transshipment terminals and facilities; except that new or expanded crude oil, other unrefined fossil fuel, liquefied petroleum gas, and natural gas facilities require a conditional use permit. Bulk coal storage facilities are prohibited.

.081 Freight railroad switching yards and terminals; except that new or expanded crude oil, other unrefined fossil fuel, liquefied petroleum gas, and natural gas facilities require a conditional use permit.

~~**.082** Marine port facilities.~~

WCC 20.68.100, HII Accessory Uses, currently allows:

.105 Other accessory uses and buildings, including security services, customarily appurtenant to a principally permitted use.

Note: No changes are currently proposed to WCC 20.68.105. It is included for informational purposes.

Amend WCC 20.68.150, HII Conditional Uses, as follows:

.170 New or expanded transportation, storage, and distribution facilities for crude oil, other unrefined fossil fuel, liquefied petroleum gas, and/or natural gas.

Amend WCC 20.68.200, HII Prohibited Uses, as follows:

.201 New piers in the Cherry Point Urban Growth Area. ~~Reserved.~~

.204 Storage or processing of bulk coal.

Public Utilities Chapter

Amend WCC 20.82.030, Conditional Uses in the Public Utilities Chapter, as follows:

20.82.030 Conditional uses.

The following uses shall require a conditional use permit ~~or major project permit and shall be subject to a threshold determination in accordance with the Whatcom County SEPA Ordinance~~:

(1) Petroleum Pipelines – Pipelines carrying petroleum, petroleum products, and/or liquefied petroleum gas, except for:

(a) Replacement pipelines in the same right-of-way that do not increase the capacity of the pipelines being replaced, which are permitted.

(b) Natural gas pipelines, which are regulated as set forth in (2) below.

~~Transmission pipelines, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline, carrying petroleum and petroleum products other than natural gas when such pipelines will be located outside the zoning district classified as Heavy Impact Industrial.~~

(2) Natural Gas Pipelines – Pipelines carrying natural gas, except for:

(a) Replacement pipelines in the same right-of-way that do not increase the capacity of the pipelines being replaced, which are permitted.

(b) Distribution lines that provide service directly to customers for consumption, which are permitted.

~~Regional transmission pipelines for the bulk conveyance of natural gas, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline. Except for the above conditions, natural gas pipelines which are owned and operated by a gas utility company regulated by the State Utilities and Transportation Commission and which are distribution lines owned by the utility that provide natural gas service directly to county citizens and businesses shall not be considered regional transmission lines.~~

Major Project Permits Chapter

Amend WCC 20.88.100, Major Project Permits, as follows:

.130 Pursuant to WCC 22.05.120 the hearing examiner shall recommend to the county council project approval, approval with conditions, or denial, based upon written findings and conclusions supported by the evidence of record. The hearing examiner's recommendation and county council's decision shall determine the adequacy of a major project permit application based on the following criteria:

(1) Will comply with the development standards and performance standards of the zone in which the proposed major development will be located; provided where a proposed major development has obtained a variance from the development and performance standards, standards as varied shall be applied to that project for the purposes of this act.

(2) Where the project is conditionally permitted in the zone in which it is located, the project must satisfy the standards for the issuance of a conditional use permit for the zone in which the project is located.

(3) Will be consistent with applicable laws and regulations.

(4) Will not substantially interfere with the operation of existing uses.

(5) Will be served by, or will be provided with essential utilities, facilities and services necessary to its operation, such as roads, drainage facilities, electricity, water supply, sewage disposal facilities, and police and fire protection. Standards for such utilities, facilities and services shall be those currently accepted by the state of Washington, Whatcom County, or the appropriate agency or division thereof.

(6) Will not impose uncompensated requirements for public expenditures for additional utilities, facilities and services, and will not impose uncompensated costs on other property owned.

(7) Will be appropriately responsive to any EIS prepared for the project.

(8) Will have obtained, if required, a state aquatic lands lease, a federal permit under Section 10 of the Rivers and Harbors Act (for structures in or over navigable waters of the U.S.), and/or a federal permit under Section 404 of the Clean Water Act (for fill into waters of the U.S.) prior to approval of the major project permit.

Amend WCC 20.88.215, Major Project Permit Procedures, as follows:

.215 Procedures. Major project permit ~~Master plan~~ review shall be conducted under current review procedures. Other land use reviews may be conducted concurrently with the major project permit~~master plan~~ review.

(a) Any ~~modifications, additions or~~ changes to an approved major project permit~~master plan~~ are subject to the following:

(i) Minor changes require approval of the zoning administrator, upon consultation with the technical committee. Minor changes are those amendments which may affect the dimensions, location and type of improvements of facilities; provided, the amendment maintains the basic character of the major project permit application approved by the county council including general type and location of dwellings and other land use activities, arrangement of buildings, density of the development, and provisions of the project to meet density bonus and open space requirements; and provided further, the standards of this chapter are met.

~~Minor changes shall be reviewed for compliance and compatibility with the approved master plan. A determination is made by the director.~~

(ii) Major changes require approval of the county council. Major changes are those amendments which, in the opinion of the zoning administrator, upon consultation with the technical committee, substantially change the basic land use, design, density, open space or other requirements of the major project permit. No building or other permit shall be issued without prior review and approval of major changes by the county council~~Major changes shall be subject to the original procedural application type~~, subject to the fees as contained in the unified fee schedule.

(iii) Major project permits~~Master plans~~ may include, as a condition of their approval, a requirement for periodic progress reports and mandatory updates on a predetermined interval.

Definitions Chapter

20.97.434.1 Technical committee.

"Technical committee" or "technical review committee" means the designated representatives of the Whatcom County Planning and Development Services Director, who shall act as chairperson, the Whatcom County Public Works Director, and the Whatcom County Health Department Director.

Exhibit C
Whatcom County Code Title 22 Amendments

Amend WCC 22.05, Project Permit Procedures, as follows:

22.05.110 Final decisions – Type I, II, and III applications.

(1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.

(2) The hearing examiner's final decision on all Type III applications per WCC 22.05.020 or appeals per 22.05.160(1) shall either grant or deny the application or appeal.

(a) The hearing examiner may grant Type III applications subject to conditions, modifications or restrictions that the hearing examiner finds are necessary to make the application compatible with its environment, carry out the objectives and goals of the Comprehensive Plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(b) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(c) Insurance Placeholder

(d~~c~~) The hearing examiner shall render a final decision within 14 calendar days following the conclusion of all testimony and hearings. Each final decision of the hearing examiner shall be in writing and shall include findings and conclusions based on the record to support the decision.

(e~~d~~) No final decision of the hearing examiner shall be subject to administrative or quasi-judicial review, except as provided herein.

(fe) The applicant, any party of record or any county department may appeal any final decision of the hearing examiner to superior court, except as otherwise specified in WCC 22.05.020.

22.05.120 Recommendations and final decisions – Type IV applications. ~~Recommended decisions to county council.~~

(1) For Type IV applications per WCC 22.05.020 the hearing examiner's recommendations to the county council may be to grant, grant with conditions or deny an application. The hearing examiner's recommendation may include conditions, modifications or restrictions as may be necessary to make the application compatible with its environment, carry out the objectives and goals of the Comprehensive Plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(2) Each recommended decision of the hearing examiner for an application identified as a Type IV application per WCC 20.05.020 shall be in writing to the clerk of the county council and shall include findings and conclusions based upon the record to support the decision. Such findings and conclusions shall also set forth the manner in which the decision carries out and conforms to the county's Comprehensive Plan and complies with the applicable statutes, ordinances or regulations.

(3) The deliberation of the county council on quasi-judicial actions shall be in accordance with WCC 22.05.090(4) and Chapter 42.36 RCW.

(4) For planned unit developments and major project permits the following shall apply:

(a) The recommendation of the hearing examiner regarding planned unit developments and major project permits shall be based upon the criteria set forth in WCC 20.85.335 and 20.88.130, respectively.

(b) The hearing examiner shall file the recommendation with the clerk of the county council within 21 calendar days following the conclusion of the open record hearing.

(c) The county council shall conduct the following within the specified timeframes, except as provided in subsection (iii):

(i) Hold a public meeting, not an open record public hearing, to deliberate on the project application within 28 calendar days after receiving the hearing examiner's recommendation.

(ii) Issue a final written decision within 21 calendar days of the public meeting.

(iii)The county council may exceed the time limits in subsection (i) or (ii) if the county council meeting schedule does not accommodate a meeting within the above timeframes, or if the county council makes written findings that a specified amount of additional time is needed to process a specific application or project type, per RCW 36.70B.080(1).

(5) The county council's final written decision may include conditions when the project is approved and shall state the findings of fact upon which the decision is based.

(a)Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(b) Insurance Placeholder

(6) Any deliberation or decision of the county council shall be based solely upon consideration of the record established by the hearing examiner, the recommendations of the hearing examiner and the criteria set forth in county code.

Exhibit D
Whatcom County Code Title 16 Amendments

Amend WCC 16.08, State Environmental Policy Act (SEPA), as follows:

16.08.121 Preparation of EIS – Greenhouse gas analysis.

If a draft EIS and final EIS or draft and final SEIS is required for new or expanded transportation, storage, or distribution facilities for crude oil, liquefied petroleum gas, or natural gas, the EIS or SEIS shall include a greenhouse gas analysis.

Exhibit A
Whatcom County Comprehensive Plan
Amendments

Amend the Whatcom County Comprehensive Plan (Chapter 2 – Land Use) as follows:

Major Industrial Urban Growth Area / Port Industrial

Cherry Point

The Cherry Point Urban Growth Area (UGA) contains approximately 7,000 acres of industrial land. The land has long been planned and designated by Whatcom County for industrial development and is currently the site of three major industrial facilities including two oil refineries and an aluminum smelter. Together, these three existing industries own about 4,400 acres of the total Cherry Point industrial lands. A fourth large tract of undeveloped land constituting approximately 1,500 acres is designated for industrial development.

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. General Petroleum constructed the Ferndale Refinery in 1954, Alumax/Pechiney/Howmet constructed the Aluminum Smelter in 1966, and the Atlantic Richfield Company constructed the Cherry Point Refinery in 1971. The existing industries in the Cherry Point UGA, which provide significant employment, have produced and shipped refined fossil fuels and other products for decades.

Cherry Point is also important historically and culturally to the Coast Salish people, and part of the usual and accustomed fishing area for five treaty tribes, reserved under the Treaty of Point Elliot of 1855. The Lummi Nation and Western Washington University have identified an ancestral village dating back over 3,000 years ago in this area. The Cherry Point UGA contains sites of primary archeological and cultural significance.

Since the designation of this area for industrial development years ago, newer scientific study of the shoreline ecology has identified Cherry Point's unique function as part of the Fraser River/Georgia Strait and greater Salish Sea ecosystem and the associated Cherry Point Aquatic Reserve has been designated by the state Department of Natural Resources to recognize the ecological importance of the aquatic lands in this area.

Since adoption of earlier versions of this Comprehensive Plan, governments have increased their recognition of the observed and projected effects that fossil fuel extraction, transportation and use have on human health and the environment.

Policy 2CC-11: It is the policy of Whatcom County to limit the number of industrial piers at Cherry Point to the existing three piers, taking into account the need to:

- ~~Honor any existing vested rights or other legally enforceable agreements for an additional dock/pier;~~
- Act conservatively in land use matters at Cherry Point to prevent further harm to habitat important to the Cherry Point Herring stock and Southern Resident Killer Whales;
- Update the Whatcom County Shoreline Master Program to conform with this policy;
- Encourage the continued agency use of best available science;
- Support and remain consistent with the state Department of Natural Resources' withdrawal of Cherry Point tidelands and bedlands from the general leasing program and the species recovery goals of the Cherry Point Aquatic Reserve designation and Management Plan;
- Recognize federal actions upholding treaty rights;
- Protect traditional commercial and tribal fishing; and
- Prevent conflicts with vessel shipment operations of existing refineries that could lead to catastrophic oil or fuel spills.

Policy 2CC-16: The County will, through its adopted SEPA policies and applicable permitting processes, ~~shall undertake a study to be completed if possible by December of 2017 to examine existing County laws, including those related to public health, safety, development, building, zoning, permitting, electrical, nuisance, and fire codes, and develop recommendations for legal ways the County may choose to~~seek to limit the negative impacts on public safety, transportation, the economy, and environment from new fossil fuel facilities, including new or expanded crude oil, coal, liquefied petroleum gases, natural gas, and radioactive substance ~~exports from~~facilities within the Cherry Point UGA above levels in existence as of March 1, 2017.

~~To provide clear guidance to current and future county councils on the County's legal rights, responsibilities and limitations regarding interpretation and application of project evaluation under Section 20.88.130 (Major Projects Permits) of the Whatcom County Code.~~

~~The County should consider any legal advice freely submitted to the County by legal experts on behalf of a variety of stakeholder interests, and make that advice publicly available.~~

- ~~Based on the above study, develop proposed Comprehensive Plan amendments and associated code and rule amendments for Council consideration as soon as possible.~~

- ~~Until the above mentioned amendments are implemented, t~~The Prosecuting Attorney and/or the County Administration should provide the County Council written notice of all known pre-application correspondence or permit application submittals and notices, federal, state, or local that involve activity with the potential to expand ~~the export of fossil fuels from Cherry Point~~"Fossil Fuel Facilities," as defined in the Whatcom County Code (currently at WCC 20.97.159.1).

Policy 2CC-17: Policy 2CC-16 shall not limit existing operations or maintenance of existing facilities operating at levels as of March 1, 2017.

Amend the Whatcom County Comprehensive Plan (Appendix A – Glossary) as follows:

Hazardous Substance: Any liquid, solid, gas, or sludge, including any material, substance, product, commodity, or waste, regardless of quantity, that exhibits any of the physical, chemical or biological properties described in WAC 173-303-090 and/or 173-303-100.

Exhibit B

Whatcom County Code Title 20 Amendments

Light Impact Industrial (LII) District

Amend WCC 20.66.050, LII Permitted Uses, as follows:

.063 Rail, truck and freight terminals; warehousing and storage; parcel delivery service; freight forwarding; inspection weighing services; and packaging and crating; except that new or expanded fossil fuel facilities require a conditional use permit.

.067 Construction contractors' business offices and related storage and equipment yards.

.068 Wholesale trade or storage of durable and nondurable goods including automobile parts and supplies; tires and tubes; furniture and home furnishings; lumber and other construction materials; sporting goods, toys and hobby goods; metal service centers and offices; electrical goods; hardware, plumbing and heating equipment; machinery equipment and supplies; jewelry, watches and precious stones; other durable goods; paper and paper products; drugs, proprietaries and sundries; apparel, piece goods and notions; groceries and related products; beer, wine and distilled beverages; waste bottles; waste boxes; rags; waste paper; wiping rags and miscellaneous nondurable goods; ~~provided, however,~~ except that:

(1) ~~trade, s~~Storage or processing of sulphur shall be prohibited.

(2) Storage or processing of bulk coal shall be prohibited.

(3) Fossil Fuel Facilities, New or modified, require a County conditional use permit, unless the user applies for and the Director authorizes an exemption from conditional use permit review, under 20.84.230 WCC.

.081 Freight railroad switching yards and terminals; except that Fossil Fuel Facilities, New or Modified, require a county conditional use permit, unless the user applies for and the Director authorizes an exemption from conditional use permit review, under 20.84.230 WCC.

Amend WCC 20.66.150, LII Conditional Uses, as follows:

.170 Fossil Fuel Facilities, New or Modified, require a County conditional use permit, unless the user applies for and the Director authorizes an exemption from conditional use permit review, under 20.84.230 WCC.

Amend WCC 20.66.200, LII Prohibited Uses, as follows:

.204 Storage or processing of bulk coal.

Heavy Impact Industrial (HII) District

Amend WCC 20.68.050, HII Permitted Uses, as follows:

20.68.050 Permitted uses.

This section lists the uses that are permitted outright in the HII District subject to obtaining all required permits and approvals. In the case of fossil fuel facilities, including both new or modified uses, the county has a process for determining the severity of impacts associated with the proposal and the corresponding appropriate level of public review. Under this process, if the proposed uses fall below a level of defined impacts and criteria, the Director of Planning may issue a permit exempting the proposed uses from a conditional use permit review and approval. The application procedures and criteria for this CUP exemption permit are found in 20.84.230 WCC. The CUP exemption permit, when granted, is a Type II decision appealable to the Hearing Examiner.

Unless otherwise provided herein, permitted and accessory uses shall be administered pursuant to the applicable provisions of Chapter 20.80 WCC, Supplementary Requirements, and Chapter 20.84 WCC, Variances, Conditional Uses, Administrative Uses and Appeals, the Whatcom County SEPA Ordinance, the Whatcom County Subdivision Ordinance and the Whatcom County Shoreline Management Program and implementing regulations. The purpose of the SIC numbers listed within this chapter is to adopt by reference other activities similar in nature to the use identified herein, except that some of those SIC number uses and "other activities similar in nature" may be precluded by or do not otherwise meet the requirements of the WCC or the county Comprehensive Plan. Uses that are not expressly permitted herein are not permitted if they are precluded elsewhere in the code or in the Comprehensive Plan and any applicable subarea Comprehensive Plan. Please refer to the policies of the applicable subarea plan to determine whether a land use activity is consistent with the subarea plan. ~~(Policies of the subarea Comprehensive Plan may preclude certain permitted uses to occur in particular subareas. Please refer to the policies of the applicable subarea plan to determine the appropriateness of a land use activity listed below.)~~

.054 The following are permitted uses except as otherwise prohibited:

(1) The manufacture and process of paper including pulp, paper and paperboard mills; and building paper and board mill products.

(2) The manufacture and processing of chemicals and allied products including industrial inorganic and organic chemicals; synthetic resins, rubber, fibers and plastic materials; soap, detergents and cleaning preparations; paint, linseed oil, shellac, lacquer and allied products; chemicals from gum and wood; and agricultural chemicals.

(3) Refining and accessory storage of petroleum and asphalt~~.~~ are permitted if they qualify for an exemption from the conditional use permit requirements under 20.84.230 WCC.

(4) The manufacture and processing of rubber and plastic products.

(5) Leather tanning and finishing.

(6) The manufacture and processing of cement and glass; and concrete, gypsum, plaster, abrasive, asbestos and nonmetallic mineral products.

(7) Primary metal industries including blast furnaces and steel works; mills for primary smelting, secondary smelting, refining, reducing, finishing, rolling, drawing, extruding, and casting of ferrous and nonferrous metals; and the manufacture of miscellaneous metal products~~.~~

.059 Bulk commodity storage facilities~~, and~~ ; truck, rail, vessel and pipeline transshipment terminals and facilities; Fossil Fuel Facilities, New or Modified, require a County conditional use permit unless the user applies for and the Director authorizes an exemption from conditional use permit review and approval, under 20.84.230 WCC.

~~**.081** Freight railroad switching yards and terminals.~~

~~**.082** Marine port facilities.~~

Amend WCC 20.68.100, HII Accessory Uses, as follows:

.105 Other accessory uses and buildings, including security services, customarily appurtenant to a principally permitted use, provided that accessory uses and buildings that are accessory to or modify fossil fuel facilities require approval of a County conditional use permit, unless the user applies for and the Director authorizes an exemption from conditional use permit review and approval, under 20.84.230 WCC.

Amend WCC 20.68.150, HII Conditional Uses, as follows:

20.68.150 Conditional uses.

The following uses require a conditional use permit in the HII Zoning District.

.152 Uses allowed in the Light Impact Industrial zone as permitted, accessory or conditional uses, WCC Chapter 20.66~~.100, subject to the following:~~ which shall be approved only if the following is included, among other requirements:

(1) Outside of the Bellingham Urban Growth Area, approval shall be supported by a finding by the hearing examiner that allowing the use will not limit the supply of land available to meet the demand for future heavy industrial uses.

(2) Filing of a deed restriction acknowledging that heavy industrial uses are the preferred uses in the zone and agreeing not to protest proposed heavy industrial uses allowed in the zone in accordance with Chapter 20.68 WCC, and to refrain from legal action against any heavy industrial use in compliance with the regulations of WCC Title 20 and any conditions of approval which might have been proposed.

Add a New Section .153 to WCC 20.68, HII Conditional Uses as follows:

.153 Fossil Fuel Facilities, New or Modified, if a Type III conditional use permit is approved by the hearing examiner, with findings that the following and other applicable criteria are met:

(1) The nine CUP approval criteria listed under WCC 20.84.220 are met;

(2) Within shorelines, the Department of Ecology has approved the CUP;

(3) The applicant has documented to the satisfaction of the Hearing Examiner all of the anticipated sources, types, volumes and final disposition of substances transferred in bulk at the facility. The permit shall be limited exclusively to those types and volumes of materials or products as documented and approved.

(4) Total on-site facility shipping capacity shall be limited to volumes on parity with processing capacity.

(5) Prior to occupancy and/or operation of the facility, the State Department of Ecology shall certify to the county that the facility has been constructed consistent with any applicable state requirements, including but not limited to water rights and use, and that plans for stormwater and wastewater releases have been approved.

(6) As a condition of approval, the applicant shall be required to keep and maintain accurate and current records of the types, amounts, sources, and final disposition of liquid or gaseous petroleum products stored and transferred off the site. The applicant shall provide such records annually to the county, or sooner, upon county request. If the facility is found to be exceeding the conditional limitations or permit restrictions, the county staff shall so report to the Hearing Examiner, who shall have the authority to revoke the permit or suspend it pending an investigation, following a public hearing, if the limitation has been exceeded absent an emergency. Any emergency must be documented and verified by county staff.

(7) As a condition of approval, the applicant shall be deemed to have consented to annual inspections of the facility by the state. The applicant shall be required to forward copies of all facility inspection reports to the county. If deficiencies are found, the operator shall, within 15 days, submit to the county for approval an implementation schedule of corrective measures. Such schedule shall include specific completion dates and inspection reporting procedures. If the state does not inspect the facility within the year, the applicant shall be required to arrange and

bear all costs for an inspection by a qualified and independent inspection agency satisfactory to the county.

(8) Should the facility be found to consistently operate in a manner unsatisfactory to the county in regard to the conditions of approval, the permit may be revoked by the approving body following a public hearing. The permitee shall have the burden of proving at the hearing compliance with all applicable standards.

.154 Treatment and storage facilities for hazardous wastes subject to the following:

(1) The nine~~eight~~ criteria for a conditional use listed under WCC 20.84.200.

. . .

NOTE: Nothing else in this subsection is amended; only the correction from "eight" to "nine," to reflect the numbering in WCC 20.84.200.

.170 Freight railroad switching yards and terminals.

.171 Marine port facilities, including modifications or upgrades to piers, docks, or wharves.

Amend WCC 20.68.200, HII Prohibited Uses, as follows:

.201 New piers, docks or wharves in the Cherry Point Urban Growth Area and/or the Cherry Point Aquatic Reserve designated by the Department of Natural Resources. ~~Reserved.~~

.204 Storage or processing of bulk coal.

Cherry Point Industrial (CP) District

Add WCC 20.74.100, "Prohibited Uses" in the Cherry Point Industrial (CP) District Chapter, as follows:

20.74.100 Prohibited Uses.

The following uses are prohibited outright in the CP District:

.110 New piers, docks or wharves.

[Note: Include ordinance findings -- Both local and out-of-state interests are subject to this prohibition. For example: The intent of these prohibitions is to protect fisheries and unique marine habitat and to act consistent with federal treaty rights interpretations of the U.S. Army Corps of Engineers and U.S. Federal Courts. (See recommended findings in Pages 13-14 of the Cascadia Law Report (Feb. 12, 2018)).]

.112 Storage, transfer or processing of bulk coal.

[Note: Include ordinance findings -- Both local and out-of-state interests are subject to this prohibition. The prohibition is necessary in order to prevent new windborne and water-borne releases of particulates into the sensitive Cherry Point aquatic environment, which is a protected state Aquatic Reserve, a unique habitat for the Cherry Point Herring substock, and prime fisheries habitat relied upon by commercial and treaty tribe fishers.]

Public Utilities Chapter

Amend WCC 20.82.030, Conditional Uses in the Public Utilities Chapter, as follows:

20.82.030 Conditional uses.

The following uses shall require a conditional use permit~~ or major project permit and shall be subject to a threshold determination in accordance with the Whatcom County SEPA Ordinance~~:

(1) Petroleum Pipelines – Pipelines carrying petroleum, petroleum products, and/or liquefied petroleum gas, except for:

(a) Replacement pipelines in the same right-of-way that do not increase the capacity of the pipelines being replaced, which are permitted.

(b) Natural gas pipelines, which are regulated as set forth in (2) below.

~~Transmission pipelines, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline, carrying petroleum and petroleum products other than natural gas when such pipelines will be located outside the zoning district classified as Heavy Impact Industrial.~~

(2) Natural Gas Pipelines – Pipelines carrying natural gas, except for:

(a) Replacement pipelines in the same right-of-way that do not increase the capacity of the pipelines being replaced, which are permitted.

(b) Distribution lines that provide service directly to customers for consumption, which are permitted.

~~Regional transmission pipelines for the bulk conveyance of natural gas, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline. Except for the above conditions, natural gas pipelines which are owned and operated by a gas utility company regulated by the State Utilities and Transportation Commission and which are distribution lines owned by the utility that provide natural gas service directly to county citizens and businesses shall not be considered regional transmission lines.~~

Variances, Conditional Uses, Administrative Approval Uses and Appeals Chapter

Add a new section WCC 20.84.230, Exemption From Fossil Fuel Facilities Conditional Use Permit, as follows:

20.84.230 Exemption From Fossil Fuel Facilities Conditional Use Permit ~~Reserved~~

(1) Fossil Fuel Facilities, New or Modified, require a conditional use permit under this chapter, unless the Director issues a Type II written decision granting the applicant an exemption from this requirement.

(2) Applications for a Type II exemption from a Fossil Fuel Facility (new or modified) CUP requirement shall be submitted in writing on a form supplied by the Department, containing the original notarized signatures of all owners of the real property and of the applicant or the applicant's authorized agent.

(3) In addition to complying with other applicable notice requirements, the Department shall issue a special notice by U.S. Mail or electronic mail to all persons who have requested notice of applications for exemptions concerning Fossil Fuel Facilities and who have provided a mailing address or electronic mail address. The Department shall issue the notice of application prior to making a determination of completeness and shall request agency and public comments on the completeness of the application, which shall be considered prior to issuing a final decision. The Department shall also mail a copy of its final decision on the application for exemption to these same parties on the effective date of the decision, along with a notice of decision describing a fourteen-day appeal period for filing an appeal to the Hearing Examiner, with notice of the place for filing the appeal.

(4) The Whatcom County SEPA Checklist requires disclosure of any probable significant adverse environmental impacts related to a development's air emissions. As part of the application for an exemption the applicant shall submit a signed and completed Whatcom County SEPA Checklist, including the County's SEPA Worksheet for Fossil Fuel Facilities within the HII or LII zones, which shall be considered a part of the Checklist.

5) The SEPA Worksheet for Fossil Fuel Facilities, New or Modified, shall be approved by the Director and updated annually as needed. The SEPA Worksheet shall be in substantially the same form as the worksheet attached to this ordinance.

(6) The Department shall not issue a completeness determination for a Fossil Fuel facility application without a written statement by the Director finding the

applicant's SEPA Worksheet for Fossil Fuel Facilities, New or Modified, to be complete.

(7) The effective date of the Department's Type II decision on the exemption shall be stayed until all applicable appeal periods have expired; an appeal is dismissed, with no further right of appeal; or an appeal is withdrawn.

(8) An exemption from the Fossil Fuel Facility (new or modified) CUP application process shall be granted by the Director within sixty days of application if the application meets all of the following criteria:

(a) No portion of the property is located within the Heavy Impact Industrial (HII), Light Impact Industrial (LII), or Cherry Point Industrial (CP) Districts; and

(b) The project does not include or trigger the need for a natural gas, crude oil, or petroleum pipeline; and

(c) The project is not functionally related to a facility that includes facilities for shipment of fossil fuels or their byproducts over or under the Salish Sea; and

(d) The Director has issued a lawful SEPA determination of Nonsignificance or Mitigated Determination of Nonsignificance and therefore the proposal does not require an Environmental Impact Statement, based on a review of the SEPA Worksheet for Fossil Fuel Facilities and a written finding of the Director that the added level of total greenhouse gas emissions will not result in probable significant adverse environmental impacts that are either direct, indirect, or cumulative, including but not limited to the following:

- Impacts resulting from windborne transport of burned fossil fuel emissions into Whatcom County;
- Life cycle greenhouse gas emissions above existing levels;
- Transits of tankers or barges and their support vessels that have the potential to interfere with commercial and treaty tribe fishing areas;
- Releases of stormwater and wastewater to groundwater, marine waters, intertidal wetlands, streams within the shorelines, or to their headwaters.

Major Project Permits Chapter

Amend WCC 20.88.100, Major Project Permits, as follows:

.130 Pursuant to WCC 22.05.120 the hearing examiner shall recommend to the county council project approval, approval with conditions, or denial, based upon written findings and conclusions supported by the evidence of record. The hearing examiner's recommendation and county council's decision shall determine the adequacy of a major project permit application based on the following criteria:

(1) Will comply with the development standards and performance standards of the zone in which the proposed major development will be located; provided where a proposed major development has obtained a variance from the development and performance standards, standards as varied shall be applied to that project for the purposes of this act.

(2) Where the project is conditionally permitted in the zone in which it is located, the project must satisfy the standards for the issuance of a conditional use permit for the zone in which the project is located.

(3) Will be consistent with applicable federal, state and local laws and regulations, including but not limited to state aquatics land lease management programs, federal treaty rights review, endangered species protections, and the protection of archeological and sensitive cultural resources.

(4) Will not substantially interfere with the operation of existing uses.

(5) Will be served by, or will be provided with essential utilities, facilities and services necessary to its operation, such as roads, drainage facilities, electricity, water supply, sewage disposal facilities, and police and fire protection. Standards for such utilities, facilities and services shall be those currently accepted by the state of Washington, Whatcom County, or the appropriate agency or division thereof.

(6) Will not impose uncompensated requirements for public expenditures for additional utilities, facilities and services, and will not impose uncompensated costs on other property owned.

(7) Will be appropriately responsive to any EIS prepared for the project.

(8) Will have obtained, if required, a state aquatic lands lease, and all other necessary permits and authorizations, including federal determinations that the project will not interfere with treaties with applicable U.S. fishing tribes; the limits set forth in the "Magnuson Amendment" under 33 U.S.C. § 476(b) (2004); Section 10 of the Rivers and Harbors Act (for structures in or over

navigable waters of the U.S.); the Coastal Zone Management Act (including any state Department of Ecology shoreline conditional use or variance approval); the Clean Air Act; and/or under the Clean Water Act, including but not limited to a federal Section 404 authorization (for fill into waters of the U.S.) and a state Section 401 water quality certification, prior to approval of the major project permit.

Amend WCC 20.88.215, Major Project Permit Procedures, as follows:

.215 Procedures. Major project permit~~Master plan~~ review shall be conducted under current review procedures. Other land use reviews may be conducted concurrently with the major project permit~~master plan~~ review.

(a) Any ~~modifications, additions or~~ changes to an approved major project permit~~master plan~~ are subject to the following:

(i) Minor changes require approval of the zoning administrator, upon consultation with the technical committee. Minor changes are those amendments which may affect the dimensions, location and type of improvements of facilities; provided, the amendment maintains the basic character of the major project permit application approved by the county council including general type and location of dwellings and other land use activities, arrangement of buildings, density of the development, and provisions of the project to meet density bonus and open space requirements; and provided further, the standards of this chapter are met, with the exception of Fossil Fuel Facilities, New or Modified, which require a conditional use permit approval from the Hearing Examiner and preparation of a SEPA environmental impact statement, unless the user applies for and the Director authorizes an exemption from conditional use permit review, under WCC 20.84.230.

~~Minor changes shall be reviewed for compliance and compatibility with the approved master plan. A determination is made by the director.~~

(ii) Major changes require approval of the county council. Major changes are those amendments which, in the opinion of the zoning administrator, upon consultation with the technical committee, substantially change the basic land use, design, density, open space or other requirements of the major project permit. No building or other permit shall be issued without prior review and approval of major changes by the county and compliance with a new SEPA Threshold Determination, subject to the fees as contained in the unified fee

schedule. Major changes to Fossil Fuel Facilities, New or Modified, also require a conditional use permit approval from the Hearing Examiner and preparation of a SEPA environmental impact statement, unless the user applies for and the Director authorizes an exemption from conditional use permit review, under WCC 20.84.230.

~~Major changes shall be subject to the original procedural application type, subject to the fees as contained in the unified fee schedule.~~

(iii) Major project permits~~Master plans~~ may include, as a condition of their approval, a requirement for periodic progress reports and mandatory updates on a predetermined interval.

Definitions Chapter

20.97.434.1 Technical committee.

"Technical committee" or "technical review committee" means the designated representatives of the Whatcom County Planning and Development Services Director, who shall act as chairperson, the Whatcom County Public Works Director, and the Whatcom County Health Department Director. On matters related to Fossil Fuel Facilities, New or Modified, or preparation of SEPA environmental impact statements related to greenhouse gas emissions, the Technical committee shall consult with and periodically brief the Council-appointed Climate Impacts Advisory Group on actions by the Technical Committee and the criteria for decisions and recommendations made by that Committee.

20.97.159.1 "Fossil fuel facilities"

Within the Heavy Impact Industrial (HII) District, Light Impact Industrial (LII) District, or Cherry Point Industrial (CP) District, stationary facilities for (a) the transshipment, storage, receipt, processing, or combustion of crude oil or natural gas; (b) the transshipment, storage, receipt, processing, or combustion of their liquid or gaseous products, whether refined, manufactured or the result of petrochemical processes, regardless of origin; and (c) the servicing, bunkering, lightering, or refueling of ships of any kind used in transportation of any of the above.

20.97.159.2 "Fossil fuel facilities, new or modified"

Any new or modified activity directly related to or supporting Fossil Fuel Facilities, including but not limited to any new facilities, new uses within existing or new facilities, changes in type of refining, manufacturing and processing use, increases in use volume authorized by prior permit, changes in the location of facilities, replacement of existing facilities, increases in storage volume or change in location of storage, increases in power or water demands, increases in volume or type of stormwater or wastewater releases, increases in production capacity, or changes in methods or volumes of transport of raw materials or processed product.

Exhibit C
Whatcom County Code Title 22 Amendments

Amend WCC 22.05, Project Permit Procedures, as follows:

22.05.110 Final decisions – Type I, II, and III applications.

(1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.

(2) The hearing examiner's final decision on all Type III applications per WCC 22.05.020 or appeals per 22.05.160(1) shall either grant or deny the application or appeal.

(a) The hearing examiner may grant Type III applications subject to conditions, modifications or restrictions that the hearing examiner finds are necessary to make the application compatible with its environment, carry out the objectives and goals of the Comprehensive Plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(b) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(c) Fossil Fuel Facilities, New or Modified, require a Type III County conditional use permit, unless the user applies for and the Director authorizes an exemption from conditional use permit review.

(d) Exemptions from the conditional use permit review for Fossil Fuel Facilities, New or Modified, are processed as a Type II decision, appealable to the Hearing Examiner, under WCC 20.84.230.

(e) [Insurance Placeholder]

(f~~e~~) The hearing examiner shall render a final decision within 14 calendar days following the conclusion of all testimony and hearings. Each final decision of the hearing examiner shall be in writing and shall include findings and conclusions based on the record to support the decision.

(g~~d~~) No final decision of the hearing examiner shall be subject to administrative or quasi-judicial review, except as provided herein.

(h~~e~~) The applicant, any party of record or any county department may appeal any final decision of the hearing examiner to superior court, except as otherwise specified in WCC 22.05.020.

22.05.120 Recommendations and final decisions – Type IV applications. ~~Recommended decisions to county council.~~

(1) For Type IV applications per WCC 22.05.020 the hearing examiner's recommendations to the county council may be to grant, grant with conditions or deny an application. The hearing examiner's recommendation may include conditions, modifications or restrictions as may be necessary to make the application compatible with its environment, carry out the objectives and goals of the Comprehensive Plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(2) Each recommended decision of the hearing examiner for an application identified as a Type IV application per WCC 20.05.020 shall be in writing to the clerk of the county council and shall include findings and conclusions based upon the record to support the decision. Such findings and conclusions shall also set forth the manner in which the decision carries out and conforms to the county's Comprehensive Plan and complies with the applicable statutes, ordinances or regulations.

(3) The deliberation of the county council on quasi-judicial actions shall be in accordance with WCC 22.05.090(4) and Chapter 42.36 RCW.

(4) For planned unit developments and major project permits the following shall apply:

(a) The recommendation of the hearing examiner regarding planned unit developments and major project permits shall be based upon the criteria set forth in WCC 20.85.335 and 20.88.130, respectively.

(b) The hearing examiner shall file the recommendation with the clerk of the county council within 21 calendar days following the conclusion of the open record hearing.

(c) The county council shall conduct the following within the specified timeframes, except as provided in subsection (iii):

(i) Hold a public meeting, not an open record public hearing, to deliberate on the project application within 28 calendar days after receiving the hearing examiner's recommendation.

(ii) Issue a final written decision within 21 calendar days of the public meeting.

(iii)The county council may exceed the time limits in subsection (i) or (ii) if the county council meeting schedule does not accommodate a meeting within the above timeframes, or if the county council makes written findings that a specified amount of additional time is needed to process a specific application or project type, per RCW 36.70B.080(1).

(5) The county council's final written decision may include conditions when the project is approved and shall state the findings of fact upon which the decision is based.

(a) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(b) [Insurance Placeholder]

(6) Any deliberation or decision of the county council shall be based solely upon consideration of the record established by the hearing examiner, the recommendations of the hearing examiner ~~and the criteria set forth in county code~~, and the criteria set forth in applicable state laws and regulations, county code, the county comprehensive plan if applicable, and the county shoreline management master program, including but not limited to compliance with SEPA, WAC 197-11 (SEPA Rules) as adopted and modified in the county code, and the county's adopted SEPA policies.

Exhibit D

Whatcom County Code Title 16 Amendments

Amend WCC Chapter 16.08, State Environmental Policy Act (SEPA), as follows:

16.08.065 Purpose of this article and adoption by reference.

A. This article contains the rules for deciding whether a proposal has a "probable significant, adverse environmental impact" requiring an EIS to be prepared. This article also contains rules for evaluating the impacts of proposals not requiring an EIS. The county adopts the following sections by reference, as supplemented in this part:

WAC

197-11-300 Purpose of this part.

197-11-305 Categorical exemptions.

197-11-310 Threshold determination required.

197-11-315 Environmental checklist.

197-11-330 Threshold determination process.

197-11-335 Additional information.

197-11-340 Determination of nonsignificance (DNS).

197-11-350 Mitigated DNS.

197-11-355 Optional DNS process.

197-11-360 Determination of significance (DS)/initiation of scoping.

197-11-390 Effect of threshold determination.

197-11-800 Categorical exemptions.

197-11-880 Emergencies.

197-11-890 Petitioning Ecology to change exemptions.

B. The County also adopts supplemental procedures that shall be incorporated into SEPA review, including, but not limited to Whatcom County's SEPA Worksheet for Fossil Fuel Facilities, New or Modified.

16.08.080 Use of exemptions.

A. Each department within the county that receives an application for a license, or, in the case of governmental proposals, the department initiating the proposal, shall determine whether the license and/or the proposal is exempt. The department's determination that a proposal is exempt shall be final and not subject to administrative review. If a proposal is exempt, none of the procedural requirements of this chapter apply to the proposal. The county shall not require completion of an environmental checklist for an exempt proposal.

B. In determining whether or not a proposal is exempt, the department shall make certain the proposal is properly defined and shall identify the governmental licenses required (WAC 197-11-060). If a proposal includes exempt and nonexempt actions, the department shall determine the lead agency, even if the license application that triggers the department's consideration is exempt.

C. If a proposal includes both exempt and nonexempt actions, the county may authorize exempt actions prior to compliance with the procedural requirements of this chapter, except that:

1. The county shall not give authorization for:

a. Any nonexempt action,

b. Any action that would have an adverse environmental impact, or

c. Any action that would limit the choice of alternatives;

2. A department may withhold approval of an exempt action that would lead to modification of the physical environment, when such modifications would serve no purpose if nonexempt action(s) were not approved; and

3. A department may withhold approval of exempt actions that would lead to substantial financial expenditures by a private applicant when the expenditures would serve no purpose if nonexempt action(s) were not approved.

D. Proposals for Fossil Fuel Facilities, new or modified, are not exempt actions.

(Ord. 98-048 Exh. A; Ord. 84-122 Part 3 (part)).

16.08.090 Environmental Checklist

A. Except as provided in subsection D of this section, a completed environmental checklist (or a copy), in the form provided in WAC 197-11-960, shall be filed at the same time as an application for a permit, license, certificate, or other approval not specifically exempted in this chapter; except, a checklist is not needed if the county and applicant agree an EIS is required, SEPA compliance has been completed, or SEPA compliance has been initiated by another agency. The county shall use the environmental checklist to determine the lead agency and, if the county is the lead agency, for determining the responsible official and for making the threshold determination.

B. For private proposals, the county will require the applicant to complete the environmental checklist, providing assistance as necessary. For county proposals, the department initiating the proposal shall complete the environmental checklist for that proposal.

C. The county may require that it, and not the private applicant, will complete all or part of the environmental checklist for a private proposal, if any~~either~~ of the following occurs:

1. The county has technical information on a question or questions that is unavailable to the private applicant; or

2. The applicant has provided inaccurate information on previous proposals or on proposals currently under consideration; or

3. The proposal is for a Fossil Fuel Facility, new or modified.

D. For proposals submitted as planned actions under WAC 197-11-164, the county shall use its existing environmental checklist form or may modify the environmental checklist form as provided in WAC 197-11-315. If a modified form is prepared, it must be sent to the Department of Ecology to allow at least a 30-day review prior to use. (Ord. 98-048 Exh. A; Ord. 84-122 Part 3 (part)).

E. For any proposed Fossil Fuel Facility, new or modified, the proponent will complete Whatcom County's SEPA Checklist, including the County's SEPA Worksheet for Fossil Fuel Facilities, New or Modified which shall be considered a part of the Checklist.

[NOTE: The Worksheet for Fossil Fuel Facilities, new or modified, will be developed and codified with the ordinance. The worksheet assists the Responsible Official and applicant to analyze the "significance" of impacts that may occur from continued or increased activity, including but not limited to analysis of both direct, indirect and cumulative impacts resulting from:

- *windborne transport of burned fossil fuel emissions into Whatcom County;*
- *life cycle greenhouse gas emissions above existing levels;*
- *transits of tankers or barges and their support vessels that have the potential to interfere with commercial and treaty tribe fishing areas;*
- *releases of stormwater and wastewater to groundwater, marine waters, intertidal wetlands, streams within the shorelines, and to their headwaters].*

16.08.105 Determination of Significance for Fossil Fuel Facilities, New or Modified.

The SEPA Responsible Official shall issue a determination of significance, requiring preparation of an EIS, for any Fossil Fuel Facility, new or modified, that does not apply for or qualify for the CUP exemption made available in WCC 20.84.230. The decision not to apply for a CUP exemption, or the Director's determination that a Fossil Fuel Facility does not qualify for a CUP exemption, shall be determinative that an EIS is required under SEPA to address the environmental impacts described in WCC 16.08.121, in addition to other factors required by this chapter.

16.08.120 Preparation of EIS – Additional considerations.

A. Preparation of draft and final EISs (DEIS and FEIS) and draft and final supplemental EISs (SEIS) is the responsibility of planning and development services under the direction of the responsible official. Before the county issues an EIS, the responsible official shall be satisfied that it complies with this chapter and Chapter 197-11 WAC.

B. The DEIS and FEIS or draft and final SEIS shall be prepared by county staff, the applicant, or by a consultant selected consistent with WCC 16.08.200.B.2. If the responsible official requires an EIS for a proposal and determines that someone other than the county will prepare the EIS, the responsible official shall notify the applicant immediately after completion of the threshold determination. The responsible official shall also notify the applicant of the county's procedure for EIS preparation, including approval of the DEIS and FEIS prior to distribution.

C. The county may require an applicant to provide information the county does not possess, including specific investigations. However, the applicant is not required to supply information that is not required under this chapter or that is being requested from another agency. (This does not apply to information the county may request under another ordinance or statute.

D. The SEPA responsible official shall administer and have signatory authority for all EIS bank accounts.

E. Documents prepared by the applicant or their third party consultants, including draft reports (which shall be stamped "draft"), submitted to the County during the Draft EIS or Draft SEIS preparation process shall become public records to be posted on any county project websites and otherwise disclosed to the public, simultaneous with the first review of the documents by any County staff.

(Ord. 98-048 Exh. A; Ord. 84-122 Part 4 (part)).

16.08.121 Preparation of EIS – Analysis of Greenhouse Gases, Habitat and Species of Significance and Tribal Treaty Rights.

A. If a draft and final EIS or SEIS is required for a proposal, the EIS or SEIS shall include a greenhouse gas analysis which includes at a minimum:

(1) All direct, on-site, emissions related to the project;

(2) All emissions from electricity--to be generated off-site but used on-site--related to the project;

(3) All indirect or lifecycle emissions associated with the extraction, transport and refining or processing of the bulk fossil fuel;

(4) The emissions associated with combustion of the fuel;

(5) If the project is a change in use, an analysis of the change in emissions compared to the existing use;

(6) A plan to mitigate, through verified offsets, 100% of emissions in sections (1) through (4), herein, with a preference for mitigation that will occur in, or near, Whatcom County;

Nothing in this section will be used to justify the use of emissions offsets to allow for increases in toxic or air criteria pollution sources affecting human health. The Director shall consult regularly with the Council-appointed Climate Impacts Advisory Group on the adequacy of these criteria and the need for code amendments adding to or modifying these SEPA EIS requirements.

B. For Fossil Fuel Facilities, New or Modified, proposed within the county's shoreline jurisdiction or associated wetlands and streams and if a draft and final EIS or SEIS is required, the EIS or SEIS shall include an analysis of:

Any probable significant adverse environmental impacts on fisheries and marine mammals, including Cherry Point Herring, Chinook Salmon and Southern Resident Killer Whales. Any adverse impact to these species and their habitat in the Salish Sea will be presumed to be "significant" under SEPA in the absence of specific scientific proof to the contrary as to causation or probability; and

To ensure consistency with federal law, an analysis of proposal impacts on physical interference with past, current and future fishing rights of the Lummi, Nooksack, Suquamish, Swinomish and Tulalip Tribes, including data sets reviewed by these tribes in writing.

16.08.150 Purpose of this article and adoption by reference.

This article contains rules for using and supplementing existing environmental documents prepared under SEPA or National Environmental Policy Act (NEPA) for the county's own environmental compliance. The county adopts the following sections by reference:

WAC

197-11-164 Planned actions – Definitions and criteria.

197-11-168 Ordinances or resolutions designating planned actions – Procedure for adoption.

197-11-172 Planned actions – Project review.

197-11-600 When to use existing environmental documents.

197-11-610 Use of NEPA documents.

197-11-620 Supplemental environmental impact statement – Procedures.

197-11-625 Addenda – Procedures.

197-11-630 Adoption – Procedures.

197-11-635 Incorporation by reference –Procedures.

197-11-640 Combining documents.

(Ord. 98-048 Exh. A; Ord. 84-122 Part 6).

In the case of SEPA review for Fossil Fuel Facilities, New or Modified, the County hereby declines to exercise its option of adopting NEPA documents. The Department shall not utilize the Planned action or Addenda procedures in the evaluation of these facilities, in order to ensure that SEPA environmental review and SEPA appeals take place at the same time as review and appeals of the underlying project permit.

16.08.160 Substantive authority.

A. The policies and goals set forth in this chapter are supplementary to those in the existing authorization of Whatcom County.

B. The county may attach conditions to a permit or approval for a proposal so long as:

1. Such conditions are necessary to mitigate specific probable adverse environmental impacts identified in environmental documents prepared pursuant to this chapter; and

2. Such conditions are in writing; and

3. The mitigation measures included in such conditions are reasonable and capable of being accomplished; and

4. The county has considered whether other local, state, or federal mitigation measures applied to the proposal are sufficient to mitigate the identified impacts; and

5. Such conditions are based on one or more policies in subsection D of this section and cited in the license or other decision document.

C. The county may deny a permit or approval for a proposal on the basis of SEPA so long as:

1. A finding is made that approving the proposal would result in probable significant adverse environmental impacts that are identified in a FEIS or final SEIS prepared pursuant to this chapter; and

2. A finding is made that there are no reasonable mitigation measures capable of being accomplished that are sufficient to mitigate the identified impact; and

3. The denial is based on one or more policies identified in subsection D of this section and identified in writing in the decision document.

D. The county designates and adopts by reference the following policies as the basis for the county's exercise of SEPA authority pursuant to this section:

1. The county shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

a. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

b. Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

c. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

d. Preserve important historic, cultural, and natural aspects of our national heritage;

e. Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

f. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

g. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

2. The county recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

3. [Placeholder: citing protection of treaty rights, clean water rights, and ESA as basis for action]

4. [Placeholder: archeological and cultural significance]

5. The County acknowledges the Nooksack River is critical habitat for important marine and freshwater species such as Chinook Salmon which are listed as threatened under the Endangered Species Act.

6. The county adopts by reference the policies in the following federal and state documents:

The WA Growth Management Act, RCW ch. 36.70A.

The WA Shoreline Management Act, RCW ch. 90.58.

The WA Water Pollution Control Act, RCW ch. 90.48.

The WA Clean Air Act, RCW ch. 70.94.

The Federal Clean Air Act, 42 U.S.C. § 7401, et seq.

Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251, et seq.

7~~3~~. The county adopts by reference the policies in the following county and state documents:

Washington State Archeological and Historic Preservation Laws, RCW ch. 27.53; ch. 43.334; ch. 68.60.

Whatcom County Comprehensive Land Use Plan (inclusive of goal statements and all subarea components)

Whatcom County Shoreline Management Program

Whatcom County Subdivision Ordinance

Whatcom County Solid Waste Management Plan

Whatcom County Critical Areas Ordinance

Washington State Department of Natural Resources Cherry Point Aquatic Reserve Management Plan;

All official land use controls adopted by Whatcom County, including this chapter.

8. It is the policy of Whatcom County to ensure that actions do not increase probable significant adverse environmental impacts on: (a) the populations of fisheries and marine mammals, including Cherry Point Herring, Chinook Salmon and Southern Resident Killer Whales; (b) the effectiveness of population recovery efforts in the Salish Sea for Cherry Point Herring, Chinook Salmon and Southern Resident Killer Whales; or (c) net habitat recovery efforts within Whatcom County or adjacent jurisdictions. Any adverse impact to these species and their habitat in the Salish Sea will be presumed to be "significant" under SEPA in the absence of specific scientific proof to the contrary as to causation or probability.

9. It is the policy of Whatcom County, consistent with federal law, to ensure that actions do not interfere with current and future treaty-reserved fishing rights of the Lummi, Nooksack, Suquamish, Swinomish and Tulalip Tribes, and to ensure that project impact analysis under this policy include data sets reviewed by these tribes in writing.

10. It is the policy of Whatcom County to promote and ultimately achieve energy use by the public and private sectors that is 100% reliant on renewable energy. In furtherance of this goal, the County defines SEPA probable significant adverse environmental impacts related to air quality to mean emissions that result in an increase in one percent of County emissions (total County emissions identified in the most recent greenhouse gas inventory published by Whatcom County, as of the date of the application filing date), or twenty five thousand metric tons per year, whichever is less, based on single project emissions or the cumulative emissions for all projects applied for or approved on a single site (or aggregation of adjacent sites under common control) applied for over a period of five years.

(Ord. 98-048 Exh. A; Ord. 92-33 § 3; Ord. 84-122 Part 7 (part)).

Article VIII. Definitions

16.08.175 Purpose of this article and adoption by reference.

This article contains uniform usage and definitions of terms under SEPA. The county adopts the following sections by reference, as supplemented by WAC 173-806-040:

WAC

197-11-700 Definitions.

197-11-702 Act.

197-11-704 Action.

197-11-706 Addendum.

197-11-708 Adoption.

197-11-710 Affected tribe.

197-11-712 Affecting.

197-11-714 Agency.

197-11-716 Applicant.

197-11-718 Built environment.

197-11-720 Categorical exemption.

197-11-721 Closed record appeal.

197-11-722 Consolidated appeal.

197-11-724 Consulted agency.

197-11-726 Cost-benefit analysis.
197-11-728 County/city.
197-11-730 Decision maker.
197-11-732 Department.
197-11-734 Determination of nonsignificance (DNS).
197-11-736 Determination of significance (DS).
197-11-738 EIS.
197-11-740 Environment.
197-11-742 Environmental checklist.
197-11-744 Environmental document.
197-11-746 Environmental review.
197-11-750 Expanded scoping.
197-11-752 Impacts.
197-11-754 Incorporation by reference.
197-11-756 Lands covered by water.
197-11-758 Lead agency.
197-11-760 License.
197-11-762 Local agency.
197-11-764 Major action.
197-11-766 Mitigated DNS.
197-11-768 Mitigation.
197-11-770 Natural environment.
197-11-772 NEPA.
197-11-774 Nonproject.
197-11-775 Open record hearing.
197-11-776 Phased review.
197-11-778 Preparation.
197-11-780 Private project.
197-11-782 Probable.
197-11-784 Proposal.
197-11-786 Reasonable alternative.
197-11-788 Responsible official.
197-11-790 SEPA.

197-11-792 Scope.

197-11-793 Scoping.

197-11-794 Significant.

197-11-796 State agency.

197-11-797 Threshold determination.

197-11-799 Underlying governmental action.

In addition to those definitions contained within WAC 197-11-700 through 197-11-799, when used in this article, the following terms shall have the following meanings, unless the context indicates otherwise:

A. "Early notice" means the county's response to an applicant stating whether it considers issuance of a determination of significance (DS) likely for the applicant's proposal (mitigated determination of nonsignificance (MDNS) procedures).

B. "ERC" means environmental review committee established in WCC 16.08.045.

C. "Ordinance" means the procedure used by the county to adopt regulatory requirements.

D. "Responsible official" shall mean the director of the department which bears responsibilities for the SEPA process or his/her designee, except that in the case of SEPA determinations for Fossil Fuel Facilities, New or Modified, the signature of the director in the exercise of SEPA responsibilities may not be delegated to a designee.

E. "SEPA rules" means Chapter 197-11 WAC adopted by the Department of Ecology.

F. "Fossil Fuel Facilities"

Within the Heavy Impact Industrial (HII) District, Light Impact Industrial (LII) District, or Cherry Point Industrial (CP) District, facilities for (a) the transportation, storage, receipt, or processing of crude oil or natural gas; (b) the transportation, storage, receipt, or processing of their liquid or gaseous products, whether refined, manufactured or the result of petrochemical processes, regardless of origin; and (c) the servicing, bunkering, lightering, or refueling of ships of any kind used in transportation of any of the above.

G. "Fossil Fuel Facilities, New or Modified"

Any new or modified activity directly related to or supporting Fossil Fuel Facilities, including but not limited to any new facilities, new uses within existing or new facilities, changes in type of refining, manufacturing and processing use, increases in use volume authorized by prior permit, changes in the location of facilities, replacement of existing facilities, increases in storage volume or change in location of storage, increases in power or water demands, increases in volume or type of stormwater or wastewater releases, increases in production capacity, or changes in methods or volumes of transport of raw materials or processed product.

(Ord. 98-048 Exh. A; Ord. 84-122 Part 8).