From:	Council
To:	Barbara Brenner; Barry Buchanan; Carol Frazey; Rud Browne; Satpal Sidhu; Todd Donovan; Tyler Byrd
Cc:	Mark Personius; Matt Aamot; Ashley Ubil; Dana Brown-Davis; Jill Nixon; Kristi Felbinger; Marina Engels; NaDean Hanson
Subject:	FW: Phillips 66 Ferndale Refinery Letter to Whatcom County Council - 2-11-19
Date:	Monday, February 11, 2019 2:10:15 PM
Attachments:	Whatcom County Letter 11-02-2019.pdf

From: Johnson, Tim [mailto:tim.d.johnson@p66.com]
Sent: Monday, February 11, 2019 1:57 PM
To: Council
Cc: Jack Louws; Rhinehart, Jolie:
Subject: Phillips 66 Ferndale Refinery Letter to Whatcom County Council - 2-11-19

Dear Whatcom County Council:

Please find attached a copy of the February 11, 2019 letter from Phillips 66 Ferndale Refinery to the Council regarding the January 15, 2019 Comprehensive Plan proposed amendments and the January 29, 2019 Council Resolution 2019-004.

Thank you.

Tim Johnson
Director, Public & Government Affairs

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Jolie A. Rhinehart
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February 11, 2018

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

Via First-Class U.S. Mail, Certified

RE: Whatcom County Donovan Proposal and Resolution

Honorable Council Members:

Phillips 66 Company ("Phillips 66") provides the following comments on the January 15, 2019 Comprehensive Plan proposed amendments ("the January 15th Proposal") and the January 29, 2019 Browne, Donovan and Sidhu Resolution ("the Resolution") related to the shipment, processing and use of fossil fuels within the county. Our comments cover both actions as it appears from the transcript of the January 29th Council meeting that at least one action authorized by the Resolution was a legal review of the January 15th Proposal. Our comments also assume that the "existing facility" referred to in the Resolution means an existing "fossil fuel facility" as that term is defined in the January 15th Proposal.

Phillips 66 operates the Ferndale Refinery, which is located in Whatcom County. The Refinery employs approximately 435 employees and on-site contractors (many of whom live in the county). These are good family wage paying jobs. The Refinery also provides fuel for the county, the rest of Washington State, and neighboring Oregon and California as well into British Columbia, Mexico, Singapore and other countries. Additionally, the Refinery supports a variety of Whatcom County community enhancement initiatives including STEM grants and educational funding support for local Boys & Girls Clubs, scholarships and program support for Whatcom County technical and community colleges as well as Western Washington University and NW Indian College, and equipment donations and support for local first responders. Phillips 66 has provided an annual average of approximately $450,000 in community contributions over the past five years, and our employees annually give more than $100,000 and 1000 hours of volunteer time to community organizations. Further, the Refinery has contributed nearly $28 million in property taxes to Whatcom County and nearly $190 million in taxes over the past five years.

Phillips 66 has also recently announced that it and Renewable Energy Group, Inc., are working together to plan for the construction of a large-scale renewable diesel plant adjacent to the Ferndale Refinery. The plant would use REG's proprietary BioSynfining® technology to produce renewable diesel fuel. Planned feedstocks include a mix of waste fats, oils, and greases, including regionally-sourced vegetable oils, animal fats, and used cooking oil. This is exactly the type of project that the County apparently wants to encourage. However, as discussed further, this potentially transformative renewable diesel project could be jeoparized by the County's proposed permitting changes.

We have actively participated in the County's comprehensive plan update process since scoping for the plan's Environmental Impact Statement (EIS) was initiated on March 3, 2015. We reviewed the 2015 draft comprehensive plan update materials, commented on the draft EIS, and reviewed the final EIS published on November 12, 2015, which studied a final preferred alternative. We also provided specific written comments on the Council's July 5, 2016, proposal.

The proposed changes within the County Comprehensive Plan regarding Cherry Point, released by the County Council on July 5, 2016 were a significant departure from the alternatives previously discussed by the Council. The proposed changes would have effectively made operation of the Phillips 66 Ferndale Refinery (as well as the other major industrial sites in the County) non-conforming uses. This would foreclose the possibility of expanding operations and seriously undermine the ability of the Refinery to adapt to changing market conditions and make it difficult to even maintain the existing infrastructure as well as meet state and federal mandates.

Instead of attempting to work with industry to develop workable solutions, the Council's latest proposal invites additional, potentially more significant impacts. While Phillips 66 recognizes that the Resolution attempts to mitigate some of these potential impacts, the approach that the Council is taking is still flawed, and potentially illegal.

Phillips 66 has both practical and legal concerns. The most pressing of these are summarized below by category.

Practical Concerns

A. The Fossil Fuel Definition

The definition of "fossil fuel facilities" in the January 15th Proposal is so broad as to require any business that stores and/or uses petroleum products within the designated geographical areas to seek a conditional use permit. As noted in its own January 29th testimony before the Council, this even includes Puget Sound Energy. It also potentially affects "non-petroleum" based business including small businesses that may have on-site fuel for heating oil purposes or use natural gas for heating. It may capture farming businesses that on-site fuel for heating or equipment uses. Some service station owners could find themselves having to obtain a

conditional use permit solely because they have the misfortune of being in the identified geographical areas.

If the Resolution's reference to an "existing facility" is truly meant to apply to a smaller subset of facilities, (i.e., the Cherry Point refineries only), then Phillips 66 believes that this rulemaking is not about limiting any perceived negative impacts that these industries might impose upon county citizens, but truly a pretext to shut down these facilities. This concern is further supported by the January 15th Proposal that it is the County's policy to "promote and ultimately achieve energy use by public and private sectors that is 100% reliant on renewable energy."

B. Limit on Existing Refining Capacity

The Resolution directs the Cascadia Law Group to, among other things, develop draft Comprehensive Plan and code language that will limit expansion of refining capacity in proportion to specific criteria such as regional population growth. Phillips 66 foresees several problems with this potential provision. First, it believes such restrictions may interfere with interstate and foreign commerce because both existing Cherry Point refineries supply gasoline and other petroleum products to customers other than those in Whatcom County. Further, capacity increases are generally tied to the installation of new equipment for which permitting is required. Typical refinery units are not generally sized for "small, incremental" increases. Therefore, stating that refining capacity may only grow by some small (i.e., 1-2 percent) increments based on local projected growth inherently precludes some modernization and/or efficiency projects which are safer and use less energy (while also increasing processing) because the project cannot be "diminished" enough to stay within an arbitrary capacity growth limit. Neither the fuel needs of interstate commerce, nor the practicalities of infrastructure sizing, evenly follow population trends. Further, the local refineries were not established in the 1950's in Whatcom County because the County population in of itself could support such plants, but because of the access to the shore and interstate pipeline connections. These factors are still important to the economic viability of the Refinery and have no connection to the anticipated population growth of the area. Moreover, regulatory language restricting refining capacity to proportionate regional population growth (or other yet-to-be-dreamed-up criteria) may hamper, delay, or even outright eliminate future projects that serve as experimental springboards for new technologies that the County deems desirable.

C. Storage vs Refining Capacity

Implementing restrictions around storage capacity is clearly meant to restrict conversion of a refinery to a transshipment facility – in fact, the storage provisions within the Resolution are clearly tied to the alleged negative impacts to such a conversion (pg. 4, clause i). The Resolution already includes three separate provisions that would prohibit a new refinery, construction of any new transshipment facility and conversion of a facility to a transshipment facility (See pp. 2-3, clauses a, b, and c). Without addressing the legality of such prohibitions within this letter, measures restricting storage capacity based on refining capacity are not

necessary if there are lawful prohibitions against transshipment facilities in place. In fact, including the storage provisions are seemingly merely a pretext to limit further refinery expansion.

In any event, restricting storage capacity for a refining facility as outlined in the Resolution, is not and cannot be a function of the current ratio of the existing storage capacity to refining capacity. As discussed above, changes in refining capacity are generally the result of adding new processing equipment or operating existing equipment more efficiently. Additional tanks may or may not be needed when capacity is increased. Further, a refinery's need for additional storage capacity can increase even if refining capacity does not.

Likewise, more storage may be needed for intermediates even when overall refining capacity is unchanged. Crude oil does not become gasoline, diesel fuel, or marine fuel via processing within a single processing unit. Each processing unit produces one or more streams or "intermediates." These intermediates are then combined within one or more tanks to produce and/or store the finished product. The amount of storage for such blending or storage of the various intermediates and different finished products, including for example, different grades of gasoline, are not directly tied to refining capacity. Similarly, most opportunities for new blended biofuels will require additional storage tanks.

Further, refineries generally conduct scheduled major maintenance shutdowns (turnarounds) of their major processing units every four to five years. These maintenance periods are in addition to normal day-to-day maintenance and can last four to eight weeks. These planned shutdowns are part of ensuring continued safe operations for the entire refinery. In preparation for these shutdowns, the facility tends to temporarily produce and store additional intermediates or finished product so that it can continue to provide product to its customers even while the plant is not operating. In this case, product storage capacity is used and needed to limit fuel supply disruptions. Again, any additional storage used for this purpose is not tied to refining capacity.

Petroleum storage tanks must also be taken out of service and inspected periodically per specific environmental laws and building codes. Flexible storage capacity is needed to plan for these tank inspections.

New dedicated tanks are also needed for finished products that are subject to new EPA standards. For instance, renewable fuels must be stored separately to ensure proper tracking for EPA renewable fuel credits. Similarly, marine fuel will be subject to new sulfur limits next year. This "marine-compliant" fuel will need to be stored separately from other fuels and such storage will need to occur regardless of the refinery's "refining" capacity.

D. Worst Case Release and Related Scenario and Insurance

The Resolution directs the development of proposed regulations that would require the owner of an existing "facility" that seeks to increase its storage or refining capacity by 1 percent above baseline to identify all responsible parties involved in the transportation and refining of that

crude as part of the permitting process and to obtain insurance coverage for a worst possible scenario. If "facility" means "fossil fuel facilities." then this requirement would again appear to apply to the local electric provider as well as a small business that buys heating oil from either of the local refineries and is expanding its business and heating oil storage capacity. Further, as written, such provisions would apply whether any of those non-petroleum processing facilities has purchased, arranged for transport, stored or processed any crude shipped by rail.

Assuming for the sake of argument that the Council truly meant to target the two refineries in the County, it appears that the imposition of unreasonable insurance requirements based on a 1 percent capacity increase is again merely a pretext to halt all future refining development. Phillips 66 does not believe that there is any real basis for the 1 percent threshold, other than serving as an almost immediate trigger for the insurance and new State Environmental Policy Act ("SEPA") review conditions. It seems apparent that the Council intends to make any expansion so difficult that the plan amendments and code developed consistent with the Resolution effectively precludes the expansion.

Further it is unreasonable to tie facility storage or refining increases to a requirement to have insurance for a railroad accident for which a given facility might not have any actual legal liability. As shared with the Council on February 7, 2019, Phillips 66 legal liability for a rail accident involving crude intended to be delivered to Phillips 66 will depend upon whether Phillips 66's actions, the railroad's actions or the actions of a third party were at fault. Even if Phillips 66 obtains insurance, no claim will be paid by the insurer if the insured party (Phillips 66 in this example) is not at fault.

The worst-case scenario is clearly arbitrary. Among its flaws is that it requires an entity who is seeking insurance coverage to assume that it or its transportation partners are deliberately violating U.S. standards for train speeds, crude and other product volatility requirements, and U.S. tank car specifications. Further, it does not consider the North Dakota oil conditioning rules that were adopted and implemented after the Lac-Mégnatic event.

E. **Resolution Provisions Intended to Limit Unintended Consequences**

Phillips 66 appreciates that the Resolution includes provisions intended to ensure final plan or ordinance changes do not delay safety upgrades or improvements, including those designed to increase efficiency or reduce pollution. These provisions must be included in any final regulation promulgated by the County, but such a final resolution must also at a minimum have additional flexibility to avoid unintended consequences. Much of the work at a refinery is "project work," meaning that safety or efficiency projects are often implemented at the same time as other work which may result in capacity increases. Additionally, these projects are often performed at the same time as a planned maintenance turnaround. Phillips 66 is concerned that the regulations will inhibit safety and efficiency projects because the "entire work scope" could potentially result in a capacity increase.

Additionally, as noted above, Phillips 66 has announced that it and Renewable Energy Group, Inc are working together to plan for the construction of a large-scale renewable diesel plant adjacent to the Refinery. The plant would use REG's proprietary BioSynfining® technology to produce renewable diesel fuel. Planned feedstocks include a mix of waste fats, oils, and greases, including regionally-sourced vegetable oils, animal fats, and used cooking oil. It is not clear to Phillips 66 how the County will view this project, which is concerning.

Additionally, we are commenting on the various legal challenges presented by the Proposal and Resolution ranging from the inherent unfairness of the current plan development process to constitutional issues.

Legal Concerns

The Proposal and Resolution raises several legal issues, ranging from the inherent unfairness of the current plan development process to constitutional issues. These are noted below and are virtually the same issues outlined in Phillips 66's July 11, 2016 comments. They are repeated here because they are still valid.

A. The Proposed Changes Violate the U.S. Constitution by Attempting to Improperly Restrict or Regulate Commerce.

The Commerce Clause of the United States Constitution[1] both expressly authorizes Congress to regulate interstate and foreign commerce and implicitly limits the power of state and local governments to legislate in those same areas.[2] The implied limitation on state and local governments, known as the Dormant Commerce Clause, prohibits state and local governments from taking action that either (1) discriminates against interstate or foreign commerce, (2) regulates extraterritorially, or (3) unduly burdens interstate or foreign commerce.

County regulations including specifically those in question here that discriminate or regulate extraterritorially are "virtually" always invalid, and must withstand the "strictest scrutiny."[3] The term "discrimination" in commerce context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[4] An action regulates extraterritorially when, regardless of intention, the practical effect of the regulation is to control

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[1] U.S. Const., art. I, § 8, cl. 3.

[2] *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989).

[3] *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99, 101 (1994); *Healy*, 491 U.S. at 336.

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

(continued . . .)

conduct beyond the boundary of the state (or in this case, the county).[5] Finally, an action is unduly burdensome if its incidental burdens on interstate or foreign commerce are "clearly excessive" in relation to the putative local benefits.[6]

The Council's proposed changes regarding land use at Cherry Point raise all of these concerns. The Refinery is an interstate and foreign commerce hub. The Refinery receives crude oil for processing from multiple North American and foreign sources over the dock, as well as by train and pipeline. The Refinery provides its finished products to various cities within Washington State and exports products and intermediates by water to California, Oregon, British Columbia, Mexico and other nations, and to Washington and Oregon terminals by pipeline.

The County's proposed changes are plainly intended to regulate the flow of Phillips 66's and other fossil fuel facilities' interstate and foreign commerce stream. For example, the Resolution would completely prohibit specific activities. Further, refining and/or capacity expansions will be tied to local growth projections, which are not tied to the entirety of the markets that Phillips 66 supplies. Expansion controls based on local criteria inherently restrains interstate commerce.

Similarly, the Council's proposed path may amount to a *per se* violation of the Commerce Clause because of its deferential treatment of in-state and out-of-state economic interests. As written the Resolution would direct development of regulations that would essentially prohibit any capacity increase at the Refinery based on projected local growth. However, "[a] State may not accord its own inhabitants a preferred right of access over consumers in other States."[7] Said another way, the County's purported regulatory path forward would impose a burden on residents and interests in markets outside the County and the State while shielding County and State residents from that same burden. This kind of in-state preference is the kind of protectionism that the Commerce Clause traditionally prohibits.[8]

Implementation of any proposed provisions written consistent with the January 15th Proposal and the Resolution may be regulating extraterritorially by controlling conduct beyond the County's borders. By limiting crude oil imports and product exports through existing terminals, the County would, in effect, be unilaterally redirecting the traditional flows of interstate and foreign commerce. Exacerbating this problem is the proposed ban on new terminal developments, and

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[5] *Healy*, 491 U.S. at 336.

[6] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

[7] *See City of Phila. v. New Jersey*, 437 U.S. 617, 627 (1978).

[8] *City of Phila.*, 437 U.S. at 626 ("[T]he evil of protectionism can reside in legislative means as well as legislative ends."); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1377, 1384-85 (8th Cir. 1997) (invalidating county ordinance intended, in part, to fulfill state goal to protect the environment and public health because its effect limited the export of waste to out-of-state processing facilities).

(continued . . .)

the County's goal to "achieve energy use by the public and private sectors that is 100% renewable." In sum, the County may be impermissibly projecting its policy into other states and nations.[9]

Furthermore, the proposed amendments may place excessive burdens on interstate and foreign commerce in relation to the County's expressed environmental and public health goals. The connection between these goals and the proposed amendments appears tenuous. On the contrary, the proposed language would likely prevent imports and exports from passing through the most efficient point of access, but would not necessarily reduce the amount of crude oil being refined at Cherry Point.[10]

B. The Proposed Changes Require Update To The EIS.

The County may not proceed with any proposed amendments without first updating its EIS under SEPA. Ecology's SEPA regulations require a supplemental EIS when a proposal has changed and is likely to cause new or increased significant adverse impacts that were either not evaluated in the original EIS or new information becomes available indicating such impacts are likely. WAC 197-11-600(4)(d)(i), (ii). The January 15th Proposal and Resolution, which clearly have the goal of limiting refining and petroleum storage capacity as well as achieving 100 percent renewable energy use by Whatcom County residents, are significant changes to the proposed action. For the reasons discussed above, these changes are likely to have new or increased significant adverse impacts because they will result in increased transportation of materials, and increases in refining output and operations by less regulated (and likely less efficient and less regulated) refineries.

C. The Proposed Changes Violate the Growth Management Act (the "GMA").

The Proposed amendments also violate the letter and spirit of the Growth Management Act ("GMA") for several reasons, including the following:

a. The GMA requires that the land use element identify areas and assumed densities sufficient to accommodate the 20-year population allocation.[11] Neither the January 15th Proposal nor the Resolution discloses how the language will change the adequacy of the already adopted 20-year population allocations studied in the EIS and what its effects will be on urban densities.

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[9] *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986).

[10] The County is further required by the GMA to ensure that its comprehensive plan amendments do not violate the state or federal constitution. *See* WAC 365-196-725.

[11] RCW 36.70A.070(1), RCW 36.70A.110(2).

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b. GMA regulations at WAC 365-196-305 require Comprehensive Plans to comply with adopted county-wide planning policies. The January 15th Proposal, to the extent it changes the land use policy for Cherry Point, has not been evaluated for consistency with the county-wide planning policies. Unless and until that review is complete, the Council should not take any action on the any proposed amendments.

c. The potentially broad impact of the January 15th Proposal is internally inconsistent with various other provisions of the Whatcom County Comprehensive Plan, including, Economics, Housing and other land use provisions.[12] Neither the county planning staff nor the public has had an opportunity to adequately assess all the inconsistences.

d. The GMA requires that comprehensive plans must be coordinated with and consistent with, the comprehensive plans of other counties and cities that share common borders.[13] Additionally, the county's plan must be consistent and coordinated with related regional issues in those other counties and cities. This analysis has not been undertaken.

e. The GMA incorporates the goals and policies of the Shoreline Management Act (SMA), Ch. 90.58 RCW.[14] The SMA establishes three goals: shoreline use, environmental protection, and shoreline access. RCW 90.58.020. Under the SMA, water-dependent uses must be prioritized, not banned. Nevertheless, this is precisely what the January 15th Proposal attempts to do – prioritize environmental protection at the absolute and complete expense of water-dependent shoreline uses. This is facially inconsistent with the goals and policies of the SMA, and therefore the GMA.

f. The County has a well-established duty to encourage and facilitate public participation.[15] Thus, GMA regulations encourage using a "visioning process" to "gain public input on the desired features of the community."[16] The comprehensive plan can then be designed to achieve these features. The Proposed Amendments contemplate an entire new vision for Cherry Point that curtails the historically dominant use of that area for the last several decades -- without any meaningful public input on that vision.

D. Whatcom County Proposal Process

Phillips 66 has attempted to follow the Council's process and procedures throughout the various machinations leading up to and including the January 15th Proposal and the Resolution.

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[12] *See* WAC 365-196-500.

[13] *See* WAC 365-196-510, -520.

[14] WAC 365-196-580

[15] WAC 365-196-600.

[16] WAC 365-196-600(3)(b).

Respectfully and colloquially, following the action has been "tough sledding." Much of what has transpired does not follow the County's safeguards and requirements for a clear and transparent process. Itemizing the flaws thus far in the "process" is difficult due to the jumbled nature, last-minute, and apparently "behind-closed-door" maneuvering that has taken place. These flaws were evident and expressed by the Council itself during the January 29th Council meeting. We look forward to a "reset" and a much more carefully planned out and transparent rulemaking should the Council wish to proceed. Phillips 66 stands by willing and ready to engage in that process.

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For all the reasons provided within these comments, Phillips 66 strongly opposes the proposed changes. We believe that the changes are legally flawed and should not go forward under any circumstances. Accordingly, Phillips 66 urges the Council to reject the proposed changes outlined in the January 15th Proposal and many of the conditions listed within the Resolution. If the Council wants to consider this kind of a major change to the land use at Cherry Point, the County should follow the prescribed process for such revisions, beginning with the Planning Commission and allowing for meaningful engagement by stakeholders. Only after such a process has been fully vetted, should the Council consider public hearings to formulate legal, reasonable changes to land use at Cherry Point.

Best regards,

Jolie A. Rhinehart
Refinery Manager

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