

Tim Johnson
Director, Public & Government Affairs



Phillips 66
Ferndale Refinery
P.O. Box 8 Ferndale, WA 98248
Phone 360.384.1011

September 12, 2019

Sent via email:
PDS_Planning_Commission@whatcomcounty.us

Whatcom County Planning Commission
311 Grand Avenue, Suite 105
Bellingham, WA 98225

RE: Resolution 2019-037—Proposed Amendments Governing Renewable and Fossil Fuel Facilities

Honorable Members of the Planning Commission:

Phillips 66 operates the Phillips 66 Refinery in Ferndale. This refinery will be directly affected by the County's proposed amendments to its development regulations and Comprehensive Plan governing fossil fuel and renewable fuel facilities (collectively, the "Proposed Amendments"). The Council transmitted the Proposed Amendments to the Planning Commission with Resolution 2019-037 ("the Resolution"). Phillips 66 opposes the Proposed Amendments based on the adverse impacts they would cause to its refinery and the Whatcom County community.

Phillips 66 is providing these initial comments now due to the Commissions scheduling of a "listening" session. The Company will provide additional comments throughout the review process. Phillips 66 is concerned that:

1. The Proposed Amendments as written raise significant legal concerns.

As currently written, this proposal raises several U.S. constitutional law issues. These issues are noted here and discussed in more detail in the comments submitted on September 12, 2019 by the Western States Petroleum Association, a trade association of which Phillips 66 is a member. For instance, the Proposed Amendments are subject to legal challenge because they require the County to impose mitigation that exceeds the impact of any proposal under review. This allows affected parties to challenge the rules on a nexus and proportionality basis. Additionally, the Proposed Amendments violate the takings clause of the Constitution because they require the County to impose mitigation on impacts that have already been mitigated. Similarly, the Proposed Amendments violate the Equal Protection Clause because they treat

fossil fuel and renewable fuel facilities differently from other facilities in the heavy industrial area that have similar potential impacts and environmental and public health and safety concerns. Further, because the products produced and sold by the affected industries are widely sold into interstate and international commerce, the Proposed Amendments impermissibly and unduly burden interstate commerce in violation of the Commerce Clause. Finally, the Proposed Amendments raise substantive due process issues because they deprive transportation fuel companies of constitutionally protected property rights.

The Proposed Amendments also purport to give the County authority that it does not have to enforce and implement federal and state statutes over which the County has no jurisdiction. For example, in several instances, the Proposed Amendments purport to give the County the authority to independently confirm consistency with the Endangered Species Act, the Magnuson Act, and evaluation of interference with Tribal treaty rights. The Proposed Amendments also attempt to grant the County authority in areas that are preempted by state and federal laws. They also impermissibly allow the County to determine that air or water permits issued by the delegated implementing agency are insufficient.

2. The proposed provisions for renewable fuel facilities will hinder rather than encourage renewable alternatives.

One of the stated purposes of the Proposed Amendments is to offset greenhouse gas effects. One important tool in this effort on the national level is the production and use of renewable fuels. The Proposed Amendments impede this activity rather than encourage it. Within the Proposed Amendments, renewable facilities are largely subject to the same onerous, uncertain, and unnecessary new requirements as would be an existing traditional fuel production facility. As noted and discussed in the WSPA comments, this is bad policy and short sighted.

Further, it is not entirely clear what requirements do and do not apply to new renewable facilities. For instance, proposed Section 20.68.054 (9) clearly allows the continued operation of renewable fuel facilities existing legally as of [the effective date]. Additionally, proposed Section 20.68.150.153 provides criteria that will apply to the expansion of existing legal renewable fuel operations under a conditional use permit. Proposed Section 20.68.159 then states that new [construction] and expansion activities at the renewable operations must comply with the noted Section 20.68.150.153 criteria. By comparison, the greenhouse gas emission analysis required under proposed Section 20.68.801(2) applies only to expansions.

3. The provisions requiring additional reviews for certain facility expansions are unclear and potentially unworkable. Additionally, affected facilities must have the ability to easily make safe, reliable, energy-efficient and regulatory-driven projects.

The various new permitting/review provisions add unnecessary complexity and, in some cases, outright confusion, to the process of obtaining County permits. For instance, there is a definition provided for "Fossil-Fuel Refinery Capacity" that appears to indicate that a ratio must be calculated to determine if a particular proposed project is an "expansion" subject to additional permitting action. However, this term is never used. Additionally confusing is that Section 20.68.801 indicates that a SEPA review is required for "facility capacity expansions" and, for that purpose, an expansion is based on an arbitrary three-year throughput average.

The Proposed Amendments require a SEPA review and Conditional Use Permit (CUP) for nearly every improvement at fossil fuel and renewable fuel facilities. Under either the CUP criteria or SEPA review, the County can condition or even deny any application for an improvement at an existing facility for failing to meet the County's subjective criteria to the County's satisfaction. The new criteria and substantive policies create uncertainty in the current permitting process and may ultimately hinder the implementation of all facility projects, including those specifically needed for safety, reliability, energy conservation and compliance with new regulatory requirements. For instance, the following sections provide the County with discretion to deny a proposed project even after approval by the governmental body with clear authority to approve that activity:

- 16.08.160.E
- 16.08.160.F.1.a
- 16.08.160.F.1.b.i(a)
- 16.08.160.F.1.b.i(c)
- 16.08.160.F.1.c
- 16.08.160.F.2.c
- 20.68.153(3)
- 20.68.153(9)
- 20.68.801(3)

With these identified concerns, permitting will be uncertain, costlier, and delayed, and there will be fewer infrastructure improvements which can lead to reduced mechanical integrity, therefore compromising worker safety.

It appears that the Planning Commission has attempted to lessen the impact of the Proposed Amendments by carving out a list of activities in Section 20.68.802(2) (non-capacity expansions) to address safety, reliability, energy efficiency and regulatory driver projects. If final amendments are adopted, Phillips 66 requests that this list be expanded.

4. The insurance provisions are unworkable.

The Proposed Amendments will require existing fossil fuel and, presumably, new and existing renewable fuel facilities to carry insurance for both their own operations within Whatcom County and for transport of materials, products, goods or waste in and out of Whatcom County. These insurance requirements include at minimum a policy limit of \$100 million for sudden pollution conditions that emanate from the facility or arise from materials or waste being transported to and from facilities. Phillip 66's main concern is that it is being asked to carry insurance for activities for which it has no control and for products that it may not own. Additionally, these "outside our fence" activities are already subject to other state and federal financial assurance mechanisms.

As to the amount of coverage, we cannot provide assurance at this time that policies for \$100 million can be written. The County's legal expert also recognizes this issue.

There are also the following practical problems:

- The deductible language is not consistent with normal insurance policy writing.
- A 60-day cancellation notice is not consistent with normal insurance policy writing.
- Fines are not generally covered by insurance policies.

Further, the required policies would be publicly available. Public availability raises business confidentiality concerns that must be addressed. Other heavy industry facilities are not required to carry this type of insurance.

5. Greenhouse Gas Mitigation

The proposed provisions addressing greenhouse gas mitigation are unworkable. As a starting point, there are insufficient local greenhouse mitigation opportunities within the County. Regulating mitigation at the local level cannot deliver the benefit it seeks to achieve because it does not limit demand, nor replacement production from other facilities outside Whatcom County. Also, it is inappropriate to require facilities to provide such local greenhouse mitigation for greenhouse gases created by the production or transportation of the fuel feedstocks.

Conclusion

Given the noted legal and policy flaws, Phillips 66 requests that the Planning Commission recommend the denial of the Proposed Amendments. We urge the Commission to work with the potentially regulated industry, including Phillips 66, to understand the significant implications of the Proposed Amendments and identify potential resolutions.

Please contact Tim Johnson at (360) 384-8368 or by email at Tim.d.johnson@p66.com if you have any questions.

Sincerely,



Tim Johnson