Reducing Impacts from Fossil Fuel Projects
Report to the Whatcom County Council
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1 Introduction

The Whatcom County Council, with the concurrence of the Prosecuting Attorney, retained Cascadia Law Group to assist with reviewing options for ordinances to protect the local community from the impacts of proposed fossil fuel transshipment facilities in Whatcom County.

This project is intended to implement the following provision in the Whatcom County Comprehensive Plan:

> The County 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 limit the negative impacts on public safety, transportation, the economy, and environment from crude oil, coal, liquefied petroleum gases, and natural gas 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.
>
> 1. Based on the above study, develop proposed Comprehensive Plan amendments and associated code and rule amendments for Council consideration as soon as possible.
>
> 2. Until the above-mentioned amendments are implemented, 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.

On September 26 and October 17, 2017, we gave preliminary oral reports to the Council focused on two topics:

- A summary of legal issues, constitutional and otherwise, the Council must bear in mind in considering such an ordinance, in light of efforts by, and litigation in, other jurisdictions around the country.
- A review of the legal issues surrounding the already-enacted moratorium ordinance 2017-011 and previous versions of that moratorium.[1]

In this written report, we provide the following research and analysis:

- We describe in more detail legal issues Whatcom County may face in undertaking any regulation to reduce impacts of fossil fuel facilities. We have conducted a review of similar efforts by other jurisdictions, some of which have resulted in litigation. We outline two of the most significant of those in the section below entitled "Lessons from Review of Activity and Litigation in Other Jurisdictions," and Appendix 1 of this report includes a more complete listing of our survey results.
- We include as Appendix 2 selected articles reporting on some of the recent activities in several jurisdictions involved in similar fossil fuel export reviews.
- We summarize options for the Council giving the pros and cons of each.
- We make recommendations regarding some of those options.

2 Legal Issues

The legal issues generally fall into two categories: constitutional (mainly federal constitutional issues) and state land use.

[1] In preparing the presentations to the Council, we noted, in part from experience in other jurisdictions, that litigation over any such ordinance is reasonably probable, and public discussion of potential litigation and legal risks is likely to result in adverse legal consequences to the County. Accordingly, it was appropriate that the presentations were conducted in executive session.

2.1 Federal & State Constitutional Issues

2.1.1 Commerce Clause

Article I, section 8, clause 3 of the United States Constitution lists one of the enumerated powers of Congress as the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is probably the constitutional issue of greatest concern to local governments attempting to protect their local interests in the face of proposed fossil fuel-related developments.

The Supreme Court has determined that this is more than just an enumeration of federal powers. It has found that there are "negative implications" to this assignment of power that serve as limits on state and local power. It has articulated a three-prong test for use in reviewing state or local laws under the Commerce Clause. If a state or local enactment violates any of these, it would be invalid:

Discrimination. First, the ordinance may not *discriminate* against interstate commerce. Essentially, this means that the ordinance may not treat out-of-state business interests less favorably than in-state interests. Typical of suspect legislation challenged under this prong are tax preferences for businesses located within a state. The discrimination may either be "facial," meaning that the text of the ordinance favors in-state interests, or the ordinance can have a "discriminatory purpose or effect."[2]

Regulation of Extra-Territorial Conduct. Second, the ordinance may not regulate extra-territorial (out-of-state) conduct. State and local enactments are rarely invalidated on this basis, but every circuit court of appeals, except for the 5th Circuit, has included this prong in its dormant Commerce Clause analysis. Arguments of extraterritorial effect are often made by challengers to state and local laws.

Balancing of Local Benefits and Impact on Commerce. Third, if the ordinance regulates interstate commerce, such regulation may not be "clearly excessive in relation to the putative local benefits." This is called the "*Pike* balancing test" after a Supreme Court case with that name. This last prong is where facts become important. It is

[2] This latter issue was significant in the City of Portland litigation discussed below.

important to focus on traditional land use and environmental considerations (e.g., public health and safety, compatibility of uses) to minimize exposure to claims that an ordinance is about restricting commerce. A clear record needs to be built around these traditional land use and public safety considerations and the Council must avoid findings, statements, or justifications that would lead to Commerce Clause concerns.

Commented [A1]: When discussing and providing direction to the Executive on what the County Council intends, a record is created regarding the County's rationale and intent that may be reviewed by a Court in a legal challenge. The Council should provide clear traditional police power reasons such as land use and environmental impacts on the local community and the Cherry Point aquatic area as the basis for taking action. Documenting these local concerns in reports and findings establishes a solid basis for action under the police powers recognized by the courts as traditional authorities of local government. There are a number of reports from the State Department of Natural Resources regarding the herring and aquatic resources that exist at Cherry Point. There are also Army Corps of Engineers' decision documents that document the treaty rights and fishing at and near Cherry Point that may be affected by additional development of piers and vessel traffic.

An example of how federal courts deal with land use context in Commerce Clause challenges is *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023 (E.D. Cal. 2007). The *Wal-Mart* court granted summary judgment in favor of the City in a facial challenge to zoning regulations that prohibited "discount superstores," defined as stores of over 100,000 square feet containing both a warehouse store and a grocery store. The rationale for prohibiting superstores was based on traffic flows, air quality and prevention of "blight." The City cited independent studies that found discount superstores were detrimental to the viability of existing small shops and could lead to their failure and resulting urban blight. The court found that the ordinance did not violate Commerce Clause restrictions or run afoul of substantive due process concerns, because the City created a detailed record of a well-stated "rational basis" for the regulations. The Commerce Clause analysis held that the City's regulation applied equally to both in- and out-of-state businesses and did not discriminate. *Wal-Mart* is attached to this report as Appendix 3.

2.1.2 Supremacy Clause (Preemption)

Article VI, clause 2, of the United States Constitution establishes that federal laws and treaties are "the supreme law of the land." Federal law "preemption" may be either "express" in that the federal statute prohibits certain state or local regulation, or it can be implied in one of two ways. It can "conflict" with local regulation, meaning that both the federal and the state regulatory provisions cannot co-exist, or it can be "field preemption," meaning that the federal regulatory program is so pervasive that there is no room for state regulation to operate.

A number of federal statutes that regulate aspects of transportation or safety could preempt state or local regulation relating to fossil fuel projects. These include:

Federal Railway Safety Act (49 U.S.C. §20106(a)). The relevant language includes:

> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

Interstate Commerce Commission Termination Act (49 U.S.C. §10101 et seq.). The ICCTA preempts laws that prevent or unreasonably interfere with railroad transportation, including matters regulated by the Surface Transportation Board (STB), such as the construction, operation, and abandonment of rail lines.

Commented [A2]: The County should stay away from directly regulating railway and pipeline safety concerns addressed directly by federal statutes as those are clearly within the province of the Federal government and locally pre-empted.

Natural Gas Act (15 U.S.C. §717). The NGA preempts state and local regulation of pipelines approved by FERC. However, this does not preempt states from applying federal laws that are delegated to the states, such as the Clean Water Act's Section 401 water quality certification or the Coastal Zone Management Act (CZMA). Note that the CZMA incorporates local Shoreline Master Programs.

Pipeline Safety Act (49 U.S.C. §60104(c)). The Pipeline Safety Act preempts states from regulating interstate pipelines. It states: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." However, a state may adopt more stringent safety standards for intrastate pipelines if the standards are compatible with the federal standards.

Hazardous Materials Transportation Act (49 U.S.C. §5125(a)-(b)). The HMTA preempts acts of states or localities that are inconsistent with federal regulations, would be an obstacle to carrying out the federal act, or, for a defined set of requirements, are not "substantively the same" as federal requirements.

Ports and Waterways Safety Act (33 U.S.C. §1221 et seq.). The PWSA preempts state laws and regulations regarding vessel traffic in United States ports and waterways. *See United States v. Locke*, 529 U.S. 89 (2000).

In addition, one recent court challenge to various state actions surrounding the proposed Millennium Bulk Terminal for coal export argues that the General Agreement on Tariffs and Trade (GATT) has a preemptive effect, since GATT Article XI states that "[n]o prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party . . . on the exportation or sale for export of any product destined for the territory of any other contracting party." *See Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-05005-RJB (W.D. Wash. Filed Jan. 3, 2018), the Complaint in which is attached to this report at Appendix 4. However, GATT's own Article XX does provide for exceptions where such restrictions may be necessary to protect human, animal or plant life, or health.

2.1.3 Equal Protection Clause

The Equal Protection Clause of the 14th Amendment to the United States Constitution requires that no person be denied equal protection of the laws. Its counterpart in Article I, Section 12 of the Washington Constitution requires that no law grant to any citizens or corporation any privilege or immunity not also granted equally to other citizens or corporations. This is similar to the limitation in the Commerce Clause against discrimination against out-of-state interests.

2.1.4 Due Process Clause and the Takings Clause

The Due Process Clause of the 14th Amendment to the United States Constitution and its counterpart in Article I, Section 3 of the Washington Constitution have both a procedural and a substantive component.

Any state or local law regulating land use must provide procedural protections for those regulated. These procedural due process protections are typically met through notice, hearing, and public participation requirements of the Growth Management Act, the Shoreline Management Act, and the procedural provisions of local zoning and shoreline ordinances.

"Substantive Due Process" is more amorphous, but it has been applied to limit the reach of government regulation. State or local land use regulations must further some legitimate public purpose. In the context of land use and zoning cases the substantive due process requirement is met by establishing a police power or public health and safety purpose.

An ordinance must be a "reasonable" exercise of the county's police power in order to pass muster under Article 11, § 11 of the Washington Constitution. A law is a reasonable regulation if it promotes public safety, health or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued. The wisdom, necessity, and expediency of the law are not for judicial determination, and an enactment may not be struck down as beyond the police power unless it is shown to be clearly unreasonable, arbitrary, or capricious. *Weden v. San Juan County*, 135 Wn 2d 678, 692, 958 P.2d 273, (1998) (upholding a San Juan County ordinance banning jet skis on certain waters); *see also Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn.App. 344, 71 P.3d 233 (2003) (upholding an Edmonds ordinance banning new cardrooms and phasing out existing cardrooms over a five-year period).

The Fifth Amendment of the United States Constitution also prohibits "taking" of property without just compensation. The Supreme Courts of both Washington and the United States have established a multi-part test for determining whether a taking has occurred. See *Guimont v. Clarke*, 121 Wn 2d 585, 854 P.2d 1 (1993), *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn. App. at 362; *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S.Ct. 2886 (1992). There are two threshold questions. First, a court will determine whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable

use of the property. If the landowner claims less than a physical invasion or total taking and if a fundamental attribute of ownership is not otherwise implicated, the court proceeds to the second question. That question is whether the challenged regulation safeguards the public interest in health, safety, the environment, or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.

If the answer to both questions is no, there is no taking. If the answer to one or both questions is yes, then additional analysis is required. The additional analysis includes consideration of two additional points. First, the court must determine whether the regulation advances a legitimate state interest. Second, the court would apply a balancing test to determine if the state interest in the regulation is outweighed by its adverse economic impact to the landowner, with particular attention to the regulation's economic impact on the property, the extent the regulation interferes with investment-backed expectations, and the character of the government action.

Though a takings issue can likely be avoided in local regulation of fossil fuel facilities, it remains a frequently used argument in Washington land use litigation. To overcome a takings challenge, it will be important to ensure that there are other reasonable uses of the properties subject to new zoning. Accordingly, it is important to pay particular attention to allowing existing uses to continue, or to making sure the properties have reasonable alternative future uses under the zoning and shoreline codes.

Commented [A3]: Allowing existing uses to continue and reasonably expand will prevent claims that property rights have been "taken" under applicable legal standards. Further conversation regarding what code provisions should provide is necessary to give additional direction to Executive staff. If the Council is wanting to focus on restricting new uses such as additional piers, pipelines that don't serve an existing use or establishment of export terminals those uses can be made conditional uses, prohibited uses or uses subject to a discretionary review under a revised Major Projects process. Thresholds for triggering discretionary reviews could also be set in the County's codes. As discussed further in sections below, a "change of use" provision should be added to the County's codes. That would require a review of whether a new use or even a major addition to an existing use should be subject to additional environmental or discretionary land use reviews. The Council should discuss the effect, if any, of prior settlement agreements on restrictions on additional piers in the Cherry Point area with the County Prosecutor.

These takings issues are discussed further in the section below on state land use issues.

2.2 Other Federal Issues

The County should consider other federal issues as possible limitations to its authority, but also perhaps to defend against Commerce Clause or preemption claims.

2.2.1 Treaty Fishing Rights

The treaties with Pacific Northwest Indian Nations protect a right to fish at usual and accustomed fishing grounds. *See United States v. Washington*, 443 U.S. 658

(1979). In "Phase II" of that litigation, the right to take fish has been interpreted by the Ninth Circuit Court of Appeals to limit actions by the State of Washington and its local governments that may adversely impact fisheries habitat. While the parameters of such limitations on state and local action are still unclear, the Ninth Circuit's decision may be applied to impose an affirmative duty on state and local governments to protect habitat.

The State of Washington has asked the United States Supreme Court to review a recent Ninth Circuit decision regarding treaty fishing rights violations caused by culverts the State built. *See United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *rehearing denied and rehearing, en banc, denied* 864 F.3d 1017, *cert. granted* Jan. 12, 2018 (Sup. Ct. No. 17-269). The case has now been accepted by the Supreme Court for review and may further refine the extent of the treaty fishing rights as applied to the facts presented by the culverts case. The State has argued, unsuccessfully so far, that the treaties do not create an affirmative duty in Washington to remedy defective culverts. The Western Washington Treaty Tribes can only bring such an action through a lawsuit initiated by the U.S. Department of Justice on their behalf as federal trustees. The U.S. and the Tribes have successfully asserted, up through appeals to the Ninth Circuit, that Washington does have an obligation under the treaties to remedy culverts that block fish passage. If their arguments prevail, then it may be possible that the treaty-rights rationale could be extended to other State actions impacting fisheries habitat.

To the extent that state or local action is taken to protect fisheries habitat, the treaty rights decisions may be used as a defense to preemption. Certainly, in the context of any application of the *Pike* balancing test, the benefits of protection of fisheries habitat can be useful. For example, should the County decide to prohibit additional piers in its new shoreline or land use regulations, it might make a strong and justifiable rationale for that land use decision by citing treaty fishing rights as interpreted by the federal government in past decisions. As another option, the County could also defer to Federal interpretations of treaty rights in the context of necessary federal permits such as those of the Corps of Engineers. The treaty rights of the Lummi Nation were the basis for a Corps permit denial of the Gateway Pacific project's proposed pier. The County could decide not to change its land use and shoreline permitted uses and

make a reference to having federal decisions made prior to a final county decision on new projects, or could make County decisions contingent on receiving federal approvals wherever treaty rights are considered as a matter of federal law.

Commented [A4]: The County may wish to make findings that one reason new regulations of additional piers and uses that create significant additional vessel activity are needed is to protect herring stocks and traditional fisheries that exist off of Cherry Point. Citing past federal decisions as an additional rationale would bolster the findings by the County. The County could also make one of its decision making criterion be that project applicants provide a clear demonstration that a project affecting aquatic areas is consistent with tribal treaty rights through having obtained a Corps of Engineers' permit in advance of the County taking any action on new project permits. Once again, the Council should discuss the effect of prior settlement agreements with the County Prosecutor.

2.2.2 The Magnuson Amendment

Enacted to protect Puget Sound from adverse impacts of oil imports, the late Sen. Warren Magnuson's 1977 amendment to the Marine Mammal Protection Act likely would apply to exports of oil as well. It reads:

> Notwithstanding any other provision of law, on and after October 18, 1977, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.

It limits federal authority to grant or issue permits that would result in an increase of the volume of crude oil handled at any given facility. If a local ordinance imposed a similar limit, the Magnuson Amendment could be used to defend it from any Commerce Clause or preemption claim, in that the local ordinance would not conflict with the federal law. The Amendment is attached to this report at Appendix 9.

Commented [A5]: The Magnuson Amendment is a limitation on the authority of federal agencies to issue permits that increase the volume of crude oil handled at any facility east of Port Angeles. The County could cite the Magnuson Amendment in its findings and could adopt decision making criteria that would require a showing that federal agencies have determined through a federal permitting decision that a new facility or expansion is consistent with the Magnuson Amendment. Similar to our recommendation on treaty rights, there could be a requirement that this be demonstrated prior to the County spending time and resources on making a local permitting decision.

This issue has been raised regarding proposed developments at Cherry Point in the past, and is still before the Corps of Engineers and the courts with respect to a BP pier addition that was previously constructed. *See Ocean Advocates, et al. v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005). We understand from discussions with the County Prosecutor's Office that a prior settlement agreement may have some bearing on the County's ability to impose limitations on additional docks within the Cherry Point Industrial District and adjacent shorelines. The Council should analyze this issue and seek advice from the County Prosecutor's Office regarding the intent, effect, and current applicability of the settlement agreement.

2.3 State Land Use Law Issues

Washington land use law provides multiple grounds for challenges. These include substantive and procedural due process claims, takings challenges, failure to maintain consistency with the Growth Management Act or the Shoreline Management Act, and failure to comply with the State Environmental Policy Act. We discuss each of these below.

2.3.1 Procedural Issues

Under Constitutional due process requirements and state land use laws, state and local actions regulating land use must provide procedural protections for those regulated and the public being impacted. These reflect the need to provide notice and an opportunity to be heard where there is a property interest at stake. These procedural due process protections are typically met through notice, hearing and public participation requirements of the Growth Management Act, the Shoreline Management Act and the procedural provisions of local zoning and shoreline ordinances. Failure to comply strictly with these procedural requirements can lead to a successful challenge. Here, adoption and extensions of the existing moratorium present this issue and any final ordinance provisions must also comply. These process issues are a melding of constitutional and statutory law. The procedural protections of the GMA and SMA, though generally intended to satisfy constitutional due process concerns, may go beyond what the constitution actually requires.

2.3.2 Takings Issues

Takings law remains one of the more confusing and difficult areas of land use law. The Fifth and Fourteenth Amendments of the United States Constitution prohibit "taking" of property without just compensation. The Growth Management Act incorporates these constitutional restrictions into state statute; among its development "goals" is RCW 36.70A.020(6): "Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions."

2.3.3 SEPA Compliance

The State Environmental Policy Act (SEPA), Chapter 43.21C RCW, requires state and local governments to review environmental impacts of proposed actions, including those under the Growth Management Act. Governments must make a threshold determination of whether the impacts of the proposed action are "significant adverse effects" that require preparation of an Environmental Impact Statement. The RCW was modified after adoption of the Growth Management Act to allow integration of SEPA analysis with GMA planning processes and documents. As it takes any final action, the County will need to carefully consider compliance with SEPA. *See, e.g.*, *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd*., 179 Wn. 2d 1015, 318 P.3d 279 (2014). This could involve either the adoption of a Declaration of Nonsignificance or the preparation of an Environmental Impact Statement. Following the proper procedures under SEPA and filing a timely "Notice of Action Taken" can limit County exposure to a SEPA challenge.

Commented [A6]: The County must initiate a proper SEPA review of any land use changes.

2.3.4 GMA & Shoreline Consistency Requirements

Washington case law and statutes require consistency of comprehensive plans, development regulations, and shoreline regulations with the enabling statutes and regulations. *See, e.g.*, *Olympic Stewardship Foundation v. Environmental and Land Use Hearings Office*, 199 Wn. App. 668, 399 P.3d 562 (2017) (interpreting the provisions of the Growth Management Act, RCW 36.70A). The County will have to make a careful effort to ensure there are adequate findings to establish that a new development regulation is consistent with the goals of the Growth Management Act, the county's adopted comprehensive plan, and the Shoreline Management Act and guidelines.

Commented [A7]: The County will need to review consistency of any zoning code or shoreline ordinance amendments with the Comprehensive Plan and the County's Shoreline Master Program as well as the Growth Management Act and the Shoreline Management Act. If amendments are required these must occur prior to any new regulations being finalized. A moratorium may be extended as long as the County is making reasonable progress in adopting final code provisions.

2.3.5 Protection of Fish Habitat Under State Law

Extending beyond treaty rights, the County could certainly identify protection of fisheries and habitat as a legitimate state and local interest. Policies of both the Shoreline Management Act and the Growth Management Act identify protection of valuable shoreline and aquatic resources and habitat as legitimate state and local

interests. *See, e.g.*, RCW 90.58.020, Legislative findings –State policy enunciated – Use preference; RCW 36.70A.172(1):

> In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Commented [A8]: As stated in an earlier comment, findings related to protection of fisheries could bolster a land use decision. Placing appropriate reports and studies in the record would bolster the defense of any new regulations intended to avoid impacts on important fisheries.

3 Lessons From Review of Activity and Litigation in Other Jurisdictions

In recent years many local governments have attempted to impose some type of limitation on facilities relating to fossil fuels. Here, we discuss how actions in two jurisdictions highlight the most important legal principles: in the City of Portland, Oregon, and in the City of Benicia, California. (In Appendix 1 we also discuss actions in a number of other communities.) Finally, we offer some "lessons learned" from these experiences in other jurisdictions.

3.1 Portland, Oregon

In December 2016, the Portland City Council adopted an ordinance that identified "Bulk Fossil Fuel Terminals" as a regulated land use, characterized (1) by marine, railroad, or pipeline access and (2) either (a) storage capacity in excess of 2 million gallons or (b) trans-load facilities. It prohibited new Bulk Fossil Fuel Terminals in base zones and the expansion of existing terminals. The record before the Council contains substantial articulations of local environmental and safety concerns, particularly regarding seismic risks.

The Columbia Pacific Building Trades Council, the Portland Business Alliance, and other business groups challenged the ordinance before the Oregon Land Use Board of Appeals (LUBA) on a number of constitutional and statutory grounds. As part of a Commerce Clause argument, the challengers cited oral statements made by council members as evidence that the ordinance was intended to discriminate against interstate commerce. The LUBA invalidated the ordinance on Commerce Clause grounds and for inconsistency with Oregon's Growth Management Act. Note that only

one member of the LUBA decided the case; the other two members recused themselves. *See* LUBA Decision 2017-001, *Columbia Pacific Building Trades Council v. City of Portland*, attached as Appendix 5.

Regarding the Commerce Clause claim, the LUBA held that the ordinance was not discriminatory on its face. However, because the LUBA determined that the fossil fuel terminals also served as a regional hub for such fuels, it stated: "Under these circumstances, we do not believe the city can adopt zoning amendments that restrict FFTs to their existing number and capacity, without at least considering the impact of the amendments on the flow of fossil fuel to the region and the state." The LUBA also held that the ordinance did not satisfy the *Pike* balancing test, stating "[r]educed to essentials, the FFT amendments represent the city's attempt to isolate itself to some extent from the national and international economy in fossil fuels."

The LUBA also addressed issues regarding consistency with the Oregon Growth Management Act. Normally, the LUBA would decide state law issues first, and if there were violations, remand the matter without reaching constitutional issues. However, here, the LUBA decided it was more efficient to reach the Commerce Clause issue. However, it also gave what it termed "somewhat advisory" decisions on the state land use issues.

Accordingly, it held that the City did not demonstrate, through appropriate findings, that the Ordinance was consistent with the Portland Comprehensive Plan and various state planning requirements and goals, and was not "coordinated with the plans of affected governmental units" as required by a statewide planning goal.

The City appealed the LUBA decision to the Oregon Court of Appeals, which recently reversed the LUBA rulings on dormant Commerce Clause grounds and consistency with the transportation goals of the Oregon Growth Management Act. However, the Court upheld the LUBA finding that the City of Portland had not presented substantial evidence to support a finding that fossil fuel use is likely to plateau and decline in future years. *See Columbia Pacific Building Trades Council v. City of Portland*, 289 Or. App.739 (2018), included in Appendix 6. The dormant Commerce

Clause analysis in this case is helpful to understand how a similar challenge can be anticipated if Whatcom County adopts limits on fossil fuel terminals.

The Oregon Court indicated that the first step in the analysis is to determine whether the law regulates evenhandedly with only incidental effects on interstate commerce, or instead discriminates against interstate commerce. The Court states that discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. The Building Trades Council and the Western States Petroleum Association (WSPA) contended that the zoning amendments disfavored out-of-state sellers and advantaged in-state interests by creating exceptions for local terminal operators. However, the Court held that the in-state and out-of-state entities here were not similar entities, and that in the absence of actual or prospective competition between them there could be no local preference. The local entities were providers of petroleum products to in-state end users, but the possible newly prohibited facilities would cater to export and out-of-state markets. The Court further found that there could not be discrimination against large out-of-state refiners and exporters because Oregon has none of those in the state to favor.

The Court also rejected the argument that the zoning amendments illegally sought to prevent "unwanted commerce." The Building Trades Council and WSPA contended the Portland zoning regulations were similar to what had been found unlawful by the U.S. Supreme Court in a New Jersey landfill case where the state had excluded importation of out-of-state waste. *See Philadelphia v. New Jersey*, 437 US 617, 98 S. Ct.2531 (1978). The Court distinguished the New Jersey case by holding that the Portland zoning amendments do not bar importation of fossil fuels into the state but merely place restrictions on the size of terminals that may be used for exports. The Court further held that the burden was on the challengers to demonstrate that any burden on interstate commerce is clearly excessive in relation to the putative local benefits. The City of Portland had made numerous findings regarding the local benefits of the restrictions, and the Court held that local zoning ordinances have a presumption of validity.

The challengers to the Portland ordinance have filed a motion with the Oregon Court of Appeals asking it to reconsider its decision. Assuming that motion will be denied, an appeal to the Oregon Supreme Court is possible. However, even while that case continues, its rulings to date demonstrate several important legal principles. One is that setting forth the context for local regulations and making clear findings regarding the local police power rationale behind an ordinance can be important in overcoming a Commerce Clause challenge. Second, while it is crucial that local zoning regulations not be designed to protect substantially similar local interests over out-of-state competitors, courts will likely consider carefully whether entities that claim discriminatory effect actually are in fact competitors. And, finally, a presumption of validity is given to local zoning regulations, so it is the challenger to the regulations who bears the burden of proving discriminatory effect.

3.2 Benicia, California

The Benicia Planning Commission denied a conditional use permit for a crude oil off-loading facility proposed to serve an existing Valero refinery that historically received crude oil from Alaska and foreign sources. The environmental study found that the transport of crude oil by train on the 70 miles of track leading to the refinery was hazardous, although an accident was predicted only once every 110 years. The study also found that the crude intended to be shipped from North Dakota and the Canadian tar sands area was more flammable than most other crude oils.

Valero challenged the local land use decision before the federal Surface Transportation Board (STB) arguing that the local action was preempted by the Interstate Commerce Termination Act. The STB upheld the Planning Commission's land use decision. Though the STB recognized the broad preemptive effect of 49 U.S.C. §10501, it held that the local decision did not attempt to regulate transportation by a rail carrier. The STB noted that federal preemption could extend to off-loading facilities if the activities are performed or controlled by the rail carrier, but Valero "made no allegation that it is a rail carrier or that it would be performing off-loading under the auspices of a rail carrier."

The STB also provided guidance for future cases, finding that state and local regulation is permissible where it does not unreasonably interfere with rail transportation (such as generally applicable electrical or fire codes), and that if the off-loading facility were to be built, any mitigation conditions unreasonably interfering with the railroad's operations would be preempted.

After the STB ruled, the City Council adopted the decision of the Planning Commission. Valero informed the City that it would not be taking further action to challenge the City's decision.

3.3 Some Preliminary Lessons Learned

After reviewing these actions and ensuing litigation, those described in Appendix 1, and our earlier analysis of legal issues here, the following lessons emerge:

- Where there is a project opponent to a given ordinance, litigation challenging it is likely.
- Whatcom County would need to build a strong factual record to support any ordinance. It should focus on local environmental and health impacts. Such findings are important in defenses against Commerce Clause challenges and to support compliance with state land use laws.
- The County should emphasize truly unique impacts. Portland tried this by focusing on the seismic sensitivity of its industrial area where the fuel terminals would be located. (Though this apparently was not enough for the LUBA decision, Portland officials believe that this was important to justify its ordinance.) Here, the County could consider fisheries and other unique characteristics that the County is trying to protect. (And under Ninth Circuit treaty rights cases, it is possible that the County may have an affirmative obligation to protect fish habitat.)
- The County should consider making a "fair share" argument in order to justify restrictions on future projects without imperiling existing operations in the County. In other words, the County is happy to accept its fair share of impacts from fossil fuel facilities, but the new projects create impacts that are more than what is fair.
- The County may not "intend" to discriminate or otherwise regulate interstate commerce. Accordingly, county officials should avoid making public comments on any "purpose" that goes beyond protection of local impacts,

such as need to limit use of fossil fuels in other countries. Those comments can find their way into a court record and could support a Commerce Clause claim. An example is the City of South Portland, Maine litigation (described in Appendix 1) where the trial court was unable to grant a summary judgment in favor of the City on dormant Commerce Clause grounds because there were statements on the record that made it unclear whether the purpose of local zoning regulations was based on a police power rationale or another impermissible purpose.

- The County should avoid any regulation of rail traffic, or at least should evaluate rail regulations very carefully. So many federal statutes govern rail that a limited legal area is left in which states and localities can properly regulate.
- Because the State has powers that are not preempted by federal law, the County should work with the Governor's Office and the Department of Ecology to reach agreement on the applicability of the State's authority under the Clean Water Act Section 401 and Coastal Zone Management Act. Note that these State powers have led to the recent denials of major coal and oil projects.
- Future decisions in pending litigation, such as decisions in any further appeal regarding the City of Portland's ordinance and the South Portland, Maine zoning provisions (outlined in Appendix 1), will likely give more guidance to Whatcom County.

4 Recommendations

In the paragraphs below, we outline the key options we recommend the County Council take under consideration. Each has differing policy implications, and the County must decide which best meet its overall objectives. The options range from bolstering the discretionary authority of the County Council with respect to approving and mitigating the impacts of proposed uses, to possibly prohibiting certain uses.

4.1 Bolster County Authorities Under the Major Projects Permit Review Process

The current Cherry Point Heavy Industrial District requires new projects to undergo a County Council review under the provisions of Chapter 20.88 for Major Project Permits. We suggest that the current code provisions be substantially bolstered by making it clearer that this is a discretionary review that must meet key decision-

making criteria. We also recommend providing clearer authority in the process for requiring mitigation of project impacts on the community and the environment. One new element would be adding a requirement that a "Development Agreement" be negotiated with project proponents to agree on the required mitigation. The code could also provide authority for bonding and insurance to ensure that any agreed-upon community improvements are installed on a timely basis, and that a liability insurance requirement for potentially hazardous activities guards against risks to the community. While there would still be a legal requirement that a rational nexus exist between any project impacts and required mitigation, establishing clearer authorizing language in the Major Project Permit process would create clearer expectations from the County for project applicants.

Commented [A9]: The Major Projects Review process should be revised to make it clear that it is a discretionary review. The County should develop decision making criteria that provide the ability to deny a permit if it does not meet land use compatibility criteria. For projects that are approvable, the Major Projects provisions should establish clear requirements that a "Development Agreement" be negotiated that provides for a bond or other appropriate financial assurance from project sponsors to ensure required community improvements are provided on a timely basis. A liability insurance requirement should also be required to provide appropriate coverage for local emergency response or damages that might result from hazardous activities. Clear guidance should be given to Executive Staff regarding what uses will be required to have discretionary reviews and what thresholds for expansion of existing uses should be established. The Council could decide that no additional limits are necessary for expansion of existing uses or that a threshold be set for requiring discretionary review.

Codes of other jurisdictions offer many examples for the kinds of discretionary decision-making criteria that could be added to the Major Project Permit process. The list below is provided as a generic set of example discretionary provisions for consideration, paraphrased from other Western Washington local zoning codes:

- Any use established shall be consistent with the Comprehensive Plan, the Shoreline Master Program, and all standards established under zoning and shoreline regulations.
- Any use shall be located, planned and designed in such a manner that it is consistent with the health, safety, convenience, and general welfare of citizens residing or working in the community.
- A use shall not be approved if it would generate excess noise, noxious or offensive emissions or other nuisances that may be injurious or to the detriment of a significant portion of the community.
- A use shall only be approved after a clear demonstration that public services necessary or desirable for support of the use are available or will be provided by the project developer. These may include, but shall not be limited to, the availability of utilities to serve the site, transportation systems including vehicular, pedestrian and public transportation systems, educational, police and fire facilities and necessary social and health services.
- There shall be a demonstrated need for the use within the community at large which shall not be contrary to the public interest.

- Any use will be designed, constructed, operated, and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity.
- Any use must demonstrate that it will not be hazardous or disturbing to existing or future uses of the neighborhood.
- Any use must demonstrate that it will be serviced adequately by essential public facilities such as highways, streets, police and fire protection, drainage facilities, refuse disposal, water and sewers, and schools or that the persons or agencies responsible for the establishment of the proposed use shall be able to adequately provide for any such services.
- Any use must demonstrate that it will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community; alternately, the applicant must provide mitigation for such added public costs.
- Any use must demonstrate that it will not result in the destruction, loss, or damage of any natural, scenic, or historic feature of major importance.

The list above provides only generic examples of what some other local codes have included. The Major Project Permits criteria here could also include provisions tailored to Whatcom County and to the issues the Cherry Point Heavy Industrial District presents. A decision-making criterion could be added that requires any necessary state leases to have been already acquired for any piers or aquatic lands improvements, and to have already met any federal permitting needs, including properly addressing tribal treaty rights or the provisions of the Magnuson Amendment. This would not have the County enforcing the provisions of state or federal law; it would merely have the County requiring a demonstration in advance of County approvals that all federal and state approvals have been completed. Alternatively, the County could make acquisition of such state or federal approvals a condition of perfecting any local approval. The County could add other specific decision-making criteria too, for such issues as requiring it to be established that a new use would create no adverse effects on the endangered Cherry Point herring stocks or salmon fisheries, or other such specific concerns the County may wish a discretionary review to address.

Commented [A10]: Similar to the comments above regarding federal permitting, we would recommend one of the County's decision-making criterion for piers or uses that impact aquatic lands adjacent to Cherry Point be that State approvals for tideland leases by the Department of Natural Resources and by the Department of Ecology for Coastal Zone Management and 401 water quality certifications be completed in advance of permit applications to the County. While there is an option to allow state permits and approvals to be acquired in parallel with county permitting processes, because of the strict State leasing provisions for additional piers the County could expend very substantial time and resources without any assurance a project will meet federal and state standards. If the County Council wishes to allow parallel permit processing, a discretionary criterion could still be added to County codes requiring acquisition of State and Federal permits and certifications before any local permits become effective.

4.2 Require a Conditional Use Permit for Certain Identified Uses

This option would require amending the County's Cherry Point Heavy Industrial District and the Shoreline Master Program regulations to require that a conditional use permit be acquired for uses such as new petroleum tank farms, fossil fuel distribution facilities, additional piers, and other uses that can be further defined. As set forth previously, the Council will need to consult with the County Prosecutor's Office regarding the potential effect of prior settlement agreements on further regulation of additional piers. For the land use code amendments, the decision-making criteria for a conditional use discretionary process could be the same, or nearly the same, as the type identified above for a discretionary Major Project Permit process. The conditional use criteria would need to focus on traditional police power concerns such as public health and safety, environmental impacts, and compatibility of the proposed use with the community. However, under the Shoreline Management Act requiring a conditional use permit for shoreline uses has special status. Shoreline Conditional Use Permits must be reviewed and approved by the Department of Ecology's shoreline permit review staff, and must meet the state rule criteria found at WAC 173-27-160:

> **Review criteria for conditional use permits.** The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use regulations in a manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program.
>
> (1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided the applicant demonstrates all of the following:
>
> (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
>
> (b) That the proposed use will not interfere with the normal public use of public shorelines;
>
> (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
>
> (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

Commented [A11]: We recommend the County put discretionary criteria into the Major Projects review process rather than create a new land use code conditional use permit process. The effect would ultimately be the same, which is providing a discretionary review for land use compatibility before a permit is issued. The discretionary criteria for a Major Projects permit could be the same as those normally required for a conditional use permit. Because the land use code already has a Major Projects review process the code can be amended to add new discretionary review criteria and clear process structure. However, as noted below, we recommend that new facilities within the jurisdiction of the Shoreline Management Act be required to obtain a shoreline conditional use permit as that is typically the device used under the Shoreline Management Act for review of sensitive aquatic uses.

(e) That the public interest suffers no substantial detrimental effect.

(2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

(3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.

(4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

Requiring certain defined uses to obtain a land use code conditional use permit and a shoreline conditional use permit can be an effective means for the County to exercise its discretion when hard and fast "one size fits all" criteria may be difficult to apply. Affirmative findings of consistency with the decision-making criteria must be made, and the potential for denial of a use inconsistent with the criteria is implicit. Of course, the record must demonstrate a rational basis for such a decision. This would also create solid arguments that a legal challenge to the provisions would be premature prior to a specific application of the regulations to a specific project.

Requiring a shoreline conditional use creates the opportunity to make a decision on the basis of impacts to the important aquatic uses of the shoreline areas adjacent to Cherry Point. These include the herring fishery and other treaty fisheries that have been the subject of recent Corps of Engineers decision making. (The 2016 Corps denial of the Gateway Pacific permit in favor of Lummi Nation treaty fishing rights is attached at Appendix 7; at Appendix 8 is the seminal court decision underlying the Corps' *de minimis* analysis, *NW*). This also would allow consideration of the analysis contained in documents completed by the State Department of Natural Resources for the Cherry Point Aquatic Reserve, which has been extensive. (The 2017 Commissioner's order enlarging the Reserve is attached at Appendix 9, and a PDF of the Reserve's amended 190-page Management Plan for the Reserve may be downloaded from DNR at

https://www.dnr.wa.gov/publications/aqr_resv_cp_mgmtplan_amend_201702.pdf?id7oms.) And finally, since the Department of Ecology must review shoreline conditional use permits, this would allow another state agency to consider the impact of the leasing restrictions DNR recently adopted for the Reserve.

Commented [A12]: Requiring a Shoreline Conditional Use permit recognizes the sensitive nature of adding uses that impact the endangered herring and tribal fisheries adjacent to Cherry Point. The state-specified shoreline conditional use criteria require consideration of cumulative impacts of past uses in the vicinity and also allow conditions to be attached to a shoreline conditional use permit should approval be appropriate. The additional layer of State Department of Ecology approval means the State agency would also be required to review consistency with the policies of the State Shoreline Management Act and the local Master Program. As noted in the text, this will require amendment of the County's Shoreline Master Program as it currently has use preferences for marine terminals with oil and gas transfer within the Cherry Point shoreline area.

This option will require amendments to the land use code and to the shoreline master program. Amendments to the shoreline master program are needed in any event, as it currently establishes a priority for marine terminals with oil and gas transfer within the Cherry Point shoreline area.

4.3 Prohibit Certain Uses

Another powerful option that would create immediate certainty would be to prohibit a defined set of uses in the zoning code and the shoreline regulations for the Cherry Point Heavy Industrial Zone and the adjoining shoreline areas. Such an option is similar to what has been done in Portland, Oregon, and in South Portland, Maine. This option would require a thoughtful discussion of the specific uses that could be prohibited. A clear record about why any uses are prohibited would be necessary to demonstrate that the regulations do not burden interstate commerce, and are consistent with substantive due process and other grounds such as consistency with Growth Management Act policies and the comprehensive plan, the State Shoreline Management Act, and the local Shoreline Master Program. The basis for such provisions should rely on concerns about local health and safety, land use compatibility, and environmental impacts of the prohibited uses, including considerations under the Growth Management Act and the Shoreline Management Act. Should the County decide to pursue this option, it should bolster the record by citing the desire for consistency with the DNR's adjoining Cherry Point Aquatic Reserve, recent decisions by the Corps of Engineers regarding treaty fishing rights, and the provisions of the Magnuson Amendment. See Appendices 7 through 10. The record could also make clear that the County wishes to allow the continued use of the Cherry Point area by the existing two refineries and the aluminum smelter and could even make clear that expansions of the existing facilities is viewed positively. There could even be findings made that the County has accepted its fair share of such facilities in the state and

region and wishes to limit the impacts on the community of a further concentration of such facilities.

While prohibiting a defined set of uses would create certainty, it might also provide an opportunity for an immediate facial challenge to the validity of the regulation from a property owner or litigant who could meet standing requirements. This is why it would be important to have a strong record showing why zoning certain uses out is rational and is based on legitimate land use and environmental considerations. Because the state and federal governments have made past decisions that limit the uses that they will allow, a good argument can be made about the need or desirability for consistency between County regulations and those past land use decisions at the state and federal level. It might also be possible to prohibit uses beyond those denied by the State and Federal governments, though this should be evaluated very carefully before proceeding.

4.4 A Hybrid Approach

The County could also choose to combine elements from each of the above options into a new ordinance. The paragraphs above create a menu of options that can be mixed and matched. For instance, the Major Project Permit provisions could be modified to provide additional discretionary criteria and the Shoreline regulations could be amended to require a shoreline conditional use for certain types of facilities. Either of these could be combined with making some uses prohibited as well. The County could also be explicit about how its policies protect existing uses and limit (or not) the expansion of existing uses under any of these options as well. Any final option will require findings that are clear about the basis for the County's actions and must take into account the legal tests for consistency with the Commerce Clause and adoption of land use regulations as set forth more completely in the Legal Issues section of this report.

Commented [A13]: The County Council should give the Executive and staff clear direction regarding what types of expansions of existing uses would be permitted. A distinction can be made regarding additions to the existing refineries and other existing Cherry Point uses that are consistent with existing Federal and State restrictions. The County Council should give direction regarding which uses would require new discretionary approvals under a revised Major Projects review process. For instance, those could include new pipelines, or new pipelines that do not serve local uses, fossil fuel terminals or other uses the Council believes should require additional discretionary review for land use and shoreline compatibility before being allowed. Of course, an alternative is providing direction that some uses should be completely prohibited rather than only requiring a discretionary review. Appropriate reports, studies and findings would bolster a decision to require the code revisions.

4.5 Adopt Franchise Ordinances

Finally, the County Council could also adopt a franchise ordinance relating to interstate pipelines. Other jurisdictions have adopted franchise ordinances aimed at interstate pipelines, but the courts have usually limited the local government's ability to

impose conditions beyond those relating to construction and maintenance. In other words, any attempt to impose safety conditions beyond those required by the federal government for interstate pipelines likely would be preempted. We have included further discussion of franchise authority in Appendix 11.

5 Overarching Recommendations

In this section, we make several overarching recommendations to the County regardless of which zoning and shoreline code amendments are selected.

5.1 Conformity and Internal Consistency

The Washington State Growth Management Act (GMA) requires consistency with the policies of the GMA and local comprehensive plans and land use regulations. An effort needs to be made to ensure that whatever option is chosen is consistent with GMA policies and that the various provisions are internally consistent. That is, the Shoreline Master Program, the zoning ordinance provisions, and any procedural requirements must be consistent with each other and with the applicable provisions of Whatcom County's land use ordinances. An amendment process must ensure that the final option chosen is consistent throughout Whatcom County's various Comprehensive Plan, Shoreline Master Program policies, and shoreline regulations and zoning regulations.

Commented [A14]: Clear direction should be given to the County Prosecutor's Office and to Executive staff that the total package must be reviewed for internal consistency and consistency with the existing Comprehensive Plan, the Shoreline Master Program and other local and State land use and shoreline regulations. Necessary amendments to other code and plan provisions will likely be necessary to create that consistency.

5.2 Major Project Permit Review Provisions

We recommend that the County develop new Master Site Planning provisions that would be applicable to the Cherry Point Heavy Industrial District. These would include a number of elements that would be applicable under several of the options discussed above. These include:

- Require an application fee covering the County's review costs including costs for EIS preparation be paid up front or in increments as the process proceeds.
- Provide for a Development Agreement that obligates the developer to pay costs of all traffic and other environmental impact mitigation identified in the SEPA review and discretionary project review by the Planning Department, Hearing Examiner, or County Council, should a Master Site Plan or

Commented [A15]: Clear direction should be given that recovering County review costs be part of the code amendment package.

conditional use be approved. When such decisions are made, however, any mitigating conditions would need to be proportional with the impacts identified for the development in an Environmental Impact Statement or discretionary decision documents prepared by the County as the record would need to show appropriate justification for such mitigation.

- Amend the Code to give the Planning Department, the County's Hearing Examiner, or the County Council the discretion to require a bond or insurance policy (or combination of these) to ensure that all development commitments for transportation or other improvements and mitigation are followed through to completion and that any special safety hazards to the community are insured against.

5.3 SEPA Policy Revisions

We recommend the County review its current SEPA policies to be sure they provide a clear basis for mitigating environmental impacts of a major facility the County may approve, and just as importantly a clear basis for denial if the County determines key environmental impacts cannot be mitigated. The State Environmental Policy Act does provide that a project may be denied after an EIS is completed where it is decided that unacceptable adverse impacts cannot be mitigated. However, clear SEPA policies must be adopted by local ordinance to provide a basis for such a denial or even appropriate conditioning of a project. See WAC 197-11-660, attached to this report as Appendix 12.

5.4 Provisions for Change of Use or Change of Occupancy

Many jurisdictions' ordinances provide a process so that any proposed change of use or occupancy at existing facilities is reviewed for consistency with current codes and ordinances, for flagging needed discretionary land use permits, and for ensuring SEPA review where needed to address adverse environmental impacts. We recommend the County consider adopting a provision to allow a simple, ministerial planning staff approval of a change of occupancy or use where such new use remains consistent with current code provisions and is below SEPA review thresholds. This same provision should also create a clear obligation to review and properly address or mitigate impacts of change of occupancy or use that are above SEPA thresholds or otherwise require a discretionary review.

Commented [A16]: As discussed in the comments above, a Development Agreement provision creates a vehicle for ensuring conditions and requirements of any permit are in the form of an enforceable document.

Commented [A17]: As noted in earlier comments, these provisions would create financial assurance that public improvements and public safety are adequately provided for.

Commented [A18]: We recommend the County Council direct the County Prosecutor and Executive staff review existing SEPA policies and determine if they are adequate for providing SEPA conditioning and denial authority to the County.

Commented [A19]: Direction to add code provisions that require a review of changes of use and occupancy is also something we recommend. This is a common code provision in other jurisdictions but we did not find it in current County land use codes. This will ensure appropriate land use and environmental reviews occur when an existing use is significantly modified.

5.5 Consistency Provisions Regarding DNR Aquatic Reserve, the Magnuson Amendment and Tribal Treaty Rights

While the County is not charged directly with enforcing state or federal laws and treaty obligations, the County can provide in its reviews that there be evidence showing that project applicants have taken appropriate steps to address state and federal requirements. For instance, as part of a discretionary review, one element that could be required is that state leases must have been acquired and federal permitting requirements must have been met, including those that require properly addressing tribal treaty rights. For example, the Corps of Engineers recently denied an additional pier for the Gateway Pacific project because the Corps concluded that the project would violate treaty fishing rights. See Appendix 7. The County could expend substantial time and resources to go through a complete project review and approval process only to find out later that a state tideland lease or Corps permit could not be obtained. In addition, the County could make clear that a State Section 401 Water Quality Certification and a Coastal Zone Management Federal Consistency Determination must be issued by the state prior to any County action. See: https://apps.oria.wa.gov/permithandbook/permitdetail/43 and https://apps.oria.wa.gov/permithandbook/permitdetail/46 .

Accordingly, while the County would not be directly enforcing a federal or state law or obligation, the codes can be written to require a showing that necessary state and federal permits and certifications have been acquired and that there would be no adverse impact on treaty fishing rights. An alternative would be a clear provision that any County permits are issued conditionally upon acquiring all necessary state and federal permits. In addition, the County's SEPA policies should make more clear that SEPA documents are required to contain analysis of and demonstrate consistency with state and federal laws and obligations, such as consistency with tribal treaty rights.

Commented [A20]: As discussed in an earlier comment, direction to add this as part of the decision-making criteria would avoid the expenditure of County resources on projects that cannot obtain necessary federal and state approvals.

6 Appendices

Appendix 1: Additional issues in other jurisdictions

Appendix 2: Additional media reports regarding current status of fossil fuel actions in other jurisdictions

Appendix 3: *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, (E. D. Cal. 2007)

Appendix 4: *Lighthouse v. Inslee* complaint, No. 3:18-cv-05005-RJB (W.D. Wash.)

Appendix 5: LUBA Decision 2017-001, *Columbia Pacific Building Trades Council v. City of Portland*

Appendix 6: Oregon Court of Appeals Decision, 289 Ore. App. 729

Appendix 7: U.S. Corps of Engineers 2016 Memorandum for Record: Gateway Pacific Terminal Project and Lummi Nation's Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County

Appendix 8: DNR Commissioner's January 2017 Order Expanding Cherry Point Aquatic Reserve

Appendix 9: Magnuson Amendment, 33 USC 476

Appendix 10: Franchise Authority

Appendix 11: WAC 197-11-660, Substantive authority and mitigation

Appendix 12: Cascadia Law Group and the attorneys responsible for this report