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September 27, 2016

Karen Frakes  
Civil Deputy  
Whatcom County Prosecutor's Office  
311 Grand Avenue, Suite 201  
Bellingham, WA 98225

**Re: Moratorium Ordinance; Comprehensive Plan Revision Proposal**

Dear Ms. Frakes:

I write on behalf of the Whatcom Business Alliance, a local membership organization comprising businesses and public entities across all business sectors that promotes a positive business climate that facilitates business success and community prosperity. These comments are offered in regard to the moratorium ordinance on the Whatcom County Council's September 27, 2016 agenda. This ordinance, if passed, would establish an interim moratorium on the acceptance and processing by the County of applications and permits for new or expanded facilities related to unrefined fossil fuel transport in the Cherry Point Urban Growth Area. The comments below are also salient to the underlying action - development of comprehensive plan language prohibiting transshipment of unrefined fossil fuels through Whatcom County - that is to be protected against now by enactment of the moratorium ordinance. As such, I ask that a copy of this letter be placed in Whatcom County's administrative record being maintained regarding this comprehensive planning effort.

The ordinance to be developed by the Whatcom County Planning Commission may be unconstitutional due to discrimination against interstate or foreign commerce. The U.S. Constitution's Article 2, commonly referred to as the Commerce Clause, grants to the United States *Congress* and not the states or its political subdivisions such as counties, the power to regulate commerce among foreign nations and domestic states. The county's intended action may be an unconstitutional attempt to regulate foreign commerce by attempting to control commercial activity beyond the county's borders. The ordinance may also result in differential treatment of in-state and out-of-state economic interests in violation of the Commerce Clause.

The last 'WHEREAS' in tonight's moratorium ordinance acknowledges limits to the county's authority over 'transportation of certain goods' imposed by federal law yet <sup>256 2</sup> summarily <sup>256 A</sup> concludes the county is within its rights. No findings support this conclusion, although <sup>9.27.16</sup>

RECEIVED BY: Erin Anderson  
SUBMITTED BY: Tony Larson

COUNCIL MEETING  
COMMITTEE  
EXHIBIT: H

reference to the propriety of the action in the first instance suggests that the appropriate research and evaluation have been performed. Indeed, Washington's Growth Management Act ("GMA"), Ch. 36.70A RCW, requires counties to evaluate their comprehensive plans to ensure that they do not conflict with state or federal constitutional standards. Before Whatcom County proceeds further down the path of potentially usurping Congress's retained powers over commerce, I ask that the County Council provide the public with its analysis supporting the conclusion that selective banning of certain commodity-related economic activities is constitutional and lawful. Absent that showing, tonight's moratorium ordinance, offered in pursuit of potentially unconstitutional and unlawful objectives, should be rejected.

This ordinance also may be in conflict with various Washington state laws. One of these is the state's Energy Facility Site Location Act ("EFSLA"), Ch. 80.50 RCW. EFSLA requires county comprehensive plans and development regulations adopted under the GMA to accommodate the state's reserved right to site certain types of energy facilities. The ordinance that the planning commission has been instructed to prepare would potentially prohibit energy-related siting activity over which a state agency - the Energy Facility Site Evaluation Council or EFSEC - may have sole authority.

Another state law that may be violated by the ordinance Whatcom County seeks to pass is the Shoreline Management Act ("SMA"), Ch. 90.58 RCW. The GMA expressly includes, as one of its 14 goals, the goals and policies of the SMA. The SMA, in turn, establishes three goals that local Shoreline Master Programs must address: shoreline use, environmental protection, and shoreline access. Terminals, docks, and piers used to ship any commodity over the water are shoreline uses. Those facilities are necessarily water-dependent. Under the SMA, water-dependent shoreline uses must be *prioritized*, not banned, lest uses that are not water-dependent be favored in the shoreline.

The concerns raised herein are not new to the county council: they echo some of the many issues presented in comment letters to the county during this summer's comprehensive planning update process. Before it proceeds further, I ask that Whatcom County produce the analysis intimated in the moratorium ordinance and required by the GMA regarding the constitutionality and lawfulness of its intended acts under various statutory regimes, including but not limited to EFSLA and the SMA. Until that work is done and the constitutionality and lawfulness are definitively established, there should be no moratorium on lawful commerce in Whatcom County related to unrefined fossil fuels.

Karen Frakes  
September 27, 2016  
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Very truly yours,

A handwritten signature in black ink, appearing to read "Erin L. Anderson". The signature is fluid and cursive, with a large loop at the end.

Erin L. Anderson

ELA:sdl

cc: Jack Louws, Whatcom County Executive  
Todd Donovan, Whatcom County Councilmember  
Carl Weimer, Whatcom County Councilmember  
Rud Browne, Whatcom County Councilmember  
Barbara Brenner, Whatcom County Councilmember  
Ken Mann, Whatcom County Councilmember  
Satpal Sidhu, Whatcom County Councilmember  
Barry Buchanan, Whatcom County Councilmember  
Client