



Board of Commissioners
Thurston County
2000 Lakeridge Dr. SW # 269
Olympia, WA 98503

November 4, 2020

RE: Amendment to the Nisqually Subarea Plan, #CPA-11

Dear County Commissioners:

The Thurston County League of Women Voters (LWVTC) has been following the Thurston County planning process over the years. LWVTC's position is that the proposed amendment to the Nisqually Subarea Plan to allow for recycled asphalt plants is premature and should not be approved. It is premature because it is taken out of the context of a full subarea plan update. The record also shows that the science that was reviewed does not support the change, and that there are issues with the SEPA review that accompanied this application.

A. #CPA-11; Asphalt Recycling. Lakeside Industries applied for an amendment to the Nisqually Subarea Plan (NSAP) to allow asphalt recycling at a gravel mine site. The LWVTC supports the recycling of asphalt generally, and acknowledges that there is abundant science to support the concept. However, there is no science that shows asphalt recycling should occur in the fragile Nisqually ecosystem.

1. Reject #CPA-11 and combine it with the Nisqually Subarea Plan Update. The 2020/2021 docket lists updating the NSAP as a docket item (# CPA-6) and a "citizen initiated amendment" to change one small portion of the NSAP (#CPA-11). Lakeside's application has been severed from the update of the Nisqually Subarea Plan update process, which apparently has been deferred. Considering the Lakeside proposal separately from the NSAP runs contrary to good planning. GMA requires that "all proposals shall be considered concurrently . . . so that the cumulative effect of the various proposals shall be maintained." RCW 36.70A.130(2)(a)(v).¹

Chipping away of a plan with small amendments here and there undermines the entire planning process. Here, there is no reason to amend the Nisqually Subarea Plan other than a property owner asked for it. Granting this application would render all the work done, and defended in court, to be cast aside and ignored.

¹ While this provision pertains to annual amendments, it is still applicable here, where both the NSAP update and the RAP proposal were on the docket. Taking RAP in isolation before the update undermines the planning process.

Making amendments to a plan in a piecemeal way will result in inconsistencies and oversights. Should the update to the NSAP show there are more critical areas, including critical aquifer recharge areas (CARAs), the County may have little to no ability to stop a proposal if it an application has vested. We see no justification for considering a property owner's request outside of a major update, other than economic benefit to the property owner. This proposed amendment should be done concurrently with the NSAP update, as good planning dictates.²

2. *Science Does Not Support Amending the NSAP.* The County commissioned a literature review on the potential environmental impacts of RAP ("Herrera Report").³ The literature review examined scientific papers that evaluated the potential of metals and polycyclic aromatic hydrocarbons (PAHs) to be released into the environment when asphalt is recycled. The literature review did not evaluate the propriety of asphalt recycling at a gravel mine near critical areas and salmon habitat.

The staff report summarizes the "key takeaways" from the Herrera Report as follows:

- As a source of contaminants, RAP ***is highly variable***. Factors contributing to variability in leachate from RAP appear to include how the asphalt was originally manufactured (e.g., the sources of crude oil and aggregate or whether coal tar or bitumen was used), how the RAP was used, the duration and degree to which it has weathered and been exposed to traffic or other pollution generating sources, and how long it is stored.
- Laboratory testing indicated that there were typically some contaminants leached from RAP at concentrations that *exceeded state groundwater quality standards*. ***There were some Polycyclic Aromatic Hydrocarbons (PAHs)⁴ that leached above Washington state groundwater quality standards with some frequency.*** Some metals were also leached, 10 primarily in low pH environments.
- Testing indicated that ***there is a distinct initial flush of contaminants*** from RAP that can result in concentrations exceeding Washington State groundwater

² Moreover, since the NSAP is incorporated into the County's comprehensive plan, it should have been part of the comprehensive plan update process, which was also a fragmented review, undermining the purpose of good planning.

³ The County contracted with Herrera Consultants to prepare the report. Lakeside Industries paid for the report. One might question the objectivity of the report, particularly when Herrera frequently cites "Lakeside Industries" as a source for distinguishing conclusions. See, e.g., Literature Review: Contaminant Leaching from Recycled Asphalt Pavement at 17, Herrera Environmental Consultants, May 2019.

⁴ PAHs (carcinogenic)" or "cPAHs" means those polycyclic aromatic hydrocarbons substances, PAHs, identified as A (known human) or B (probable human) carcinogens by the United States Environmental Protection Agency. These include benzo(a)anthracene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, chrysene, dibenzo(a,h)anthracene, and indeno(1,2,3-cd)pyrene. WAC 173-340-200.

quality standards, but that these peak concentrations decrease quickly to below detection limits.

- Although this literature review specifically did not include an assessment of potential environmental impact from fate and transport of these contaminants, a number of the researchers suggested that the impact to the environment would be negligible if dilution and assimilation were considered.
- Batch and column laboratory tests, while informative, are not necessarily representative of what can be expected under field conditions.

These “takeaways,” on their face, question the wisdom of changing one provision of the NSAP in isolation of a holistic update and without additional environmental review. Bullet 2 explicitly states that “typically” contaminants leached from RAP at concentrations exceeding groundwater standards, and PAHs leached at high levels “with some frequency.” This takeaway alone should give the Commissioners pause about proceeding. Bullet 3 refers to a “distinct initial flush” of contaminants, but implies that those contaminants are diluted. But the RAP process is continuous, so each time RAP is processed there will be an “initial flush.” This summary conclusion brushes over logic in minimizing concerns. Bullet 4 implies, without basis, that there would be negligible impact if dilution and assimilation is considered. Dilution is *not* the solution to pollution.

Thurston County has received a number of comments, several from distinguished individuals, stating that the science supports the proposed amendment. Please read those comments carefully. The “science” they are referring to is that science supports asphalt recycling, which we agree is a good concept. There is no science in the record supporting the change to the NSAP, and in fact, the Herrera Report concludes that there is a potential for pollution. No comments, other than applicant representatives, say science supports asphalt recycling in the Nisqually Subarea. We do not believe there is science supporting this change.

The Board should reject the adoption of #CPA-11, or, at the very least, defer it until science shows that it will not cause environmental impacts.

3. *Reject # CPA-11 because there are Critical Aquifer Recharge Areas and Fragile Ecosystems that will be impacted.* One of the major themes voiced by the applicant and staff is that the proposed amendment deals solely with the NSAP plan and not to a specific site. However, given the history and the applicant, it is abundantly clear that the amendment will open the door for Lakeside to operate a RAP at its site on Durgin Road. In 2004, Lakeside applied for a special use permit to recycle asphalt, despite the prohibition in NSAP. This permit was denied and litigated. The Court of Appeals decision upholding the denial contains abundant evidence regarding the purpose of the prohibition:

The proposed asphalt facility would be approximately two miles upwind and upriver from the Nisqually National Wildlife Refuge, home to numerous wildlife species and endangered salmon. The groundwater around the mine site is between four and fifteen feet below the extremely

porous surface. The site is also located in the County's aquifer protection district. The County has spent approximately \$2.4 million to purchase development rights in the immediate area adjacent to the proposed facility to prevent environmental damage.

Lakeside Industries v. Thurston County, 83 P.3d 433 (2004).

The Court also noted that the NSAP is "a plan the County adopted to preserve the agricultural and pastoral character of the valley." *Id.* The Lakeside site is bordered by long term agricultural lands. The NSAP not only sets goals and policies to enhance agricultural uses, it also seeks to limit large-scale commercial development. The NSAP, and the site, is blanketed with Critical Aquifer Recharge Areas (CARAs), which by definition, are susceptible to pollution. These factors should all be taken into consideration before amending the NSAP.

B. #CPA-11: SEPA Process. We have significant concerns with the County's SEPA process for planning in general as well as the Determination of Nonsignificance (DNS) issued for this proposal. We did not appeal the DNS issued solely due to the high fee required (close to \$2,000).

SEPA, the State Environmental Policy Act, Chapter 43.21C RCW, requires that all governmental agencies consider the environmental effects of a proposed action – "A Full Disclosure Law." It is as applicable to plan amendments as it is to specific project proposals. Thurston County does not conduct a SEPA analysis until *after* the planning commission has reviewed, held public hearings, and made a recommendation on a proposal. That means neither the planning commission nor the public has the benefit of an environmental analysis until it reaches the commissioners. This violates SEPA.

WAC 197-11-055, adopted by reference in Thurston County Code 17.09.020, requires that SEPA this consideration be done at the *earliest* possible point in the planning process

(1) Integrating SEPA and agency activities. **The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.**

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, **at the earliest possible point in the planning and decision-making process**, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) **A proposal exists when an agency is presented with an application** or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.

(i) **The fact that proposals may require future agency approvals or environmental review shall not preclude**

current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

WAC 197-11-055.

(2) The responsible official of the lead agency shall make the threshold determination, **which shall be made as close as possible to the time an agency has developed or is presented with a proposal** (WAC 197-11-784). If the lead agency is a GMA county/city, that agency must meet the timing requirements in subsection (6) of this section.

WAC 197-11-310.

Further, Thurston County Code 17.09.050 specifically states that the SEPA analysis should accompany the staff recommendation to the planning commission. The SEPA review should have happened when the proposals were first submitted

In May of this year, the Central Puget Sound Growth Management Hearings Board found a King County ordinance noncompliant with GMA because the SEPA review was done too late in the process (*FOSV v. King County*, CPSPGMHB Case no. 20-3-0004c, Order on Dispositive motions, 5/26/20).⁵ *FOSV* (Friends of Sammamish Valley) involved King County's development regulation regarding the wine and beverage industry in the Sammamish Valley.

In *FOSV*, the County knew there were issues arising from a "burgeoning wine industry" in 2012. In 2016, the County issued a consultant study on the issues, which included a series of policy recommendations. From that, the County executive issued a series of policy changes, which included proposed regulations that went to the County Council for consideration in April 2018. Public comments were considered during this process, but the SEPA determination was not issued until June 2019. The Growth Board found that this violated SEPA. A Board would find the same in Thurston County's process,

In terms of issuing a DNS, the County also made a critical error, concluding it could not determine impacts until a site-specific proposal was submitted. The Growth Management Hearings Boards have rejected this approach:

Non-project actions are not exempt from adequate SEPA review. In fact, jurisdictions may not evade SEPA review by deferring analysis until later stages of actual development. This Board has often considered SEPA requirements in regards to nonproject actions. Thus, when a city amends its comprehensive plan or changes zoning, a detailed and comprehensive SEPA environmental review is required. SEPA is to function "as an environmental full disclosure law," and the City must demonstrate environmental impacts were

⁵ <https://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=6904>

considered in a manner sufficient to show “compliance with the procedural requirements of SEPA.”

Olympians for Smart Development & Livable Neighborhoods, et al., v. City of Olympia, Case No. 19-2-0002c, Order Denying Motion to Dismiss, Allowing Supplementation of the Record, Granting Summary Judgment at 6, March 29, 2019. (citing WAC 197-11-055(2)(a)(i), *Alpine Lakes Protection Society v. DNR*, 102 Wn. App 1, 16 (1999); quoting *Association of Citizens Concerned about Chambers Lake Basin et al., v. City of Olympia*, GMHB No. 13-2-0014 (Final Decision and Order, August 7, 2013) at 5 (footnotes omitted).

In sum, for all the reasons set forth above, we urge the Board of Commissioners to defer the proposed amendment #CPA-11 for consideration at least until it can be considered concurrently with the NSAP update. At that time, SEPA should be done early in the process, and most certainly before the planning commission considers it.

Sincerely,

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