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OREGON PHYSICIANS FOR SOCIAL RESPONSIBILITY**

Department of the Army
Seattle District, Corps of Engineers
P.O. Box 3755
Seattle, Washington 98124-3755

16 December 2016

Re: BP Cherry Point Dock Environmental Impact Statement

Dear Colonel Buck:

The signatories are dedicated to the protection and restoration of the Salish Sea, an internationally recognized aquatic oasis, intrinsic to the fabric of the region's ecology, economy and culture.

We would like to begin by expressing our sincere appreciation of the Corps' recent permit decisions to exercise its broad public interest obligations under the National Environmental Policy Act (NEPA). In particular, we recognize the acknowledgement of the Corps' trust obligations with tribal governments in its decisions to deny the Gateway coal terminal permit at Cherry Point and to complete an Environmental Impact Statement (EIS) to explore alternate siting of the Dakota Access pipeline.

We are writing today to urge you to exercise your public obligations under NEPA to complete the Final EIS for the construction of the North Wing to British Petroleum's (BP) crude oil tanker terminal (NWS-1992-435). By Order of August 22, 2005, the Federal District Court directed the Corps to prepare the EIS, mandated by the Ninth Circuit Court of Appeals on March 15, 2005, and to reevaluate whether the permit issued by the Corps violated the 1977 Magnuson Amendment (33 U.S.C. § 476(b); 33 C.F.R. § 325.4(a); § 325.6(b)). If the permit was found to be in violation, the Corps was to revoke the permit or place conditions on the operation of the North Wing as necessary to ensure compliance with the law.

As many of us have repeatedly stated in the past, we are not seeking the revocation of BP's permit and removal of the dock. Rather, our primary concern has been that by permitting the construction of a second dock without conditions, oil spill risks are heightened as additional oil tankers can ply the Salish Sea due to the ability for two tankers to be concurrently docked at BP's terminal.

BP operates the largest refinery in Washington with a tanker terminal built along the Cherry Point reach in Georgia Strait. This area is exposed to harsh weather conditions which increases the risk of oil spills during docking and oil transfer operations. Additionally, it is adjacent to a deep bathymetric feature that is key to the spawning behavior of the genetically unique stock of Cherry Point herring that has been in decline since the construction of the original oil terminal. These waters also support endangered salmon, rockfish and orca whales.

Our concerns about oil spills have been elevated by the recent decisions of the US Congress to lift the ban on the export of domestically produced crude oil as well as by the Canadian government's decision to approve the tripling of the Kinder Morgan Trans Mountain tar sands pipeline. Both these decisions dramatically increase the potential amount of crude oil traffic through the Salish Sea. Recent quantitative modeling analysis found that the Kinder Morgan project alone would result in a 7-fold increase in crude oil tanker traffic and a 9-fold increase in the likelihood of a 20,000 barrel or larger spill over the next ten years in Haro Strait/Boundary Pass.¹

Additionally, in December 2013, BP completed its crude oil rail terminal enabling it to receive crude oil from the Bakken formations in the US. BP also has a direct connection to the Kinder Morgan pipeline enabling it to receive vast supplies of diluted heavy crude oil (dilbit) from Alberta. The National Academy of Sciences' *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response*, documents the unique properties of Alberta oil sands (a.k.a. diluted bitumen or dilbit) as compared with other crude oils, the substantial environmental impacts from diluted bitumen if spilled, and the significant spill response challenges. Most importantly, the study concludes that traditional spill response is inadequate for dilbit because "the residues can submerge or sink to the bottom of the water body."²

The lack of a FEIS and associated mitigation measures conditioning the use of the crude oil handling capability of the BP terminal has enabled BP to have unfettered use of its crude oil dock since it is no longer encumbered by the need to handle refined product tank vessels which now are berthed at the North Wing, completed in 2001. This ability to simultaneously berth both refined product and crude oil tank vessels enables BP to take advantage of new sources of crude oil that could bypass its refinery and use its dock as a crude oil export terminal. This puts the Salish Sea at increased risk of oil spills.

Independent of the construction of the new dock, the capacity of the BP refinery has increased from 100,000 bbls/day when it was built in 1971 to 234,000 bbls/day today. While the Magnuson Amendment does not restrict refining capacity, its prohibitions on federal permits that enable increases in the number of crude oil tankers able to call on a terminal east of Port Angeles, limits how much oil can BP export based on whether it obtains its crude oil by tanker, pipeline or rail.

Both the Mayor of Burnaby and former Premier Harcourt have expressed support for the findings of the "Report from the Ministerial Panel for the Trans Mountain Expansion Project" that references routing the pipeline expansion to Cherry Point rather than the Kinder Morgan Terminal in Burnaby, BC.³

1 https://www.seas.gwu.edu/~dorpir/VTRA_2015/-PRESENTATIONS/21%20-%20COMPARISON%20VTRA%202015%20-Case%20KM%20348%20to%20VTRA-%202015%20Base%20Case.pdf

2 <http://www.nap.edu/catalog/21834/spills-of-diluted-bitumen-from-pipelines-a-comparative-study-of>

3 https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/files/pdf/16-011_TM%20Full%20Report-en_nov2-11-30am.pdf

The federal courts have been quite explicit in their direction to the Corps. On remand to the District Court, the 9th Circuit Court of Appeals directed the Corps to answer this simple question:

“Did the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude oil?” “If the answer to this question is “yes,” then the permit violates the Magnuson Amendment.”⁴

Clearly the answer is “yes.” The DEIS documents that the addition of the North Wing allows for an additional 190 crude oil tanker calls annually. In 1996, BP applied for its permit due to its dock being “at capacity,” with 125 tankers calling at its terminal. The DEIS states that 315 tankers can now call on the refinery with both docks in operation.

The Magnuson Amendment 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. (33 U.S.C. § 476(b). 33 C.F.R. § 325.4(a); § 325.6(b). (Emphasis added).

The Magnuson Amendment was written specifically to restrict the growth of crude oil tanker terminal capacity east of Port Angeles in order to protect against oil spill risk through the San Juan Islands where the Straits are much more narrow and currents are more swift.

The 9th Circuit also found that, “The permitting decision includes absolutely no discussion about the tenability or reasonableness of BP’s self-serving claims that the dock extension would not increase vessel traffic.” “Increased tanker traffic elevates the risk of oil spills—an undeniable and patently apparent risk of harm to Puget Sound.”

Despite the irrefutable fact that two docks provide more docking capacity than one, the Corps has yet to release the FEIS and ROD determining whether additional permit conditions are needed for the current and future operations of BP’s combined tanker terminal in order to be in compliance with the Magnuson Amendment.

After issuing the permit in 1996 along with ongoing dialogue and litigation, the dock was constructed in 2001 without permit conditions addressing compliance with the Magnuson Amendment. Despite the subsequent direction given by the Ninth Circuit’s 2005 decision, the Draft EIS was not published until 2014, with public hearings attended by over 400 people in July 2014. Detailed comments have been submitted to the record by the US Fish and Wildlife

⁴ *Ocean Advocates, et al. v. U.S. Army Corps of Engineers*; 402 F.3d 846 (9th Cir., 2005).

Service, the National Marine Fisheries Service, the Lummi Nation, and the Nooksack Tribe. In addition to those submitted by our organizations, over 25,000 comments were submitted to the docket seeking permit conditions to assure compliance with the Magnuson Amendment.

The Corps assured those in attendance at the July 2014 hearings and in an email to BP, obtained through a Freedom of Information Act (FOIA) request, that the FEIS would be completed by December 14, 2014. On February 24, 2016 Colonel Buck replied to a December 21, 2015 letter written by Earthjustice on the behalf of several of us, stating the Final EIS would be published in the Spring of 2016. Colonel Buck subsequently wrote on July 7, 2016 that it was not going to meet either deadline.

Over fifteen years, two lawsuits, numerous FOIA requests and eight Corps Colonels later, the FEIS is yet to be published. We are calling on the Corps to publish the FEIS and Record of Decision (ROD) prior to yet another change in federal administrations. The recent actions by the Obama and Trudeau Administrations discussed above only serve to increase the urgency of this request.

We are asking the Corps to release the long overdue FEIS, the evaluation of whether the permit for the second dock allows for future increases in crude oil tanker traffic and a determination of the necessary permit conditions restricting its use to be in compliance with the Magnuson Amendment. The determination of whether and to what extent, the new dock “will or may result in any increase in the volume of crude oil capable of being handled at any such facility” can easily be made if the Corps’ accepts the findings in the DEIS that BP has already exceeded the maximum number of tankers that called on the refinery when only one dock was in operation. Even without the existing documentation, there is clearly the potential for it to be used for that purpose in the future.

The Corps’ NEPA process has dragged on for far too long. There is ample evidence in the docket, including the Draft EIS, for the Corps to make a ROD regarding its permits compliance with the Magnuson Amendment prior to completion of the FEIS. Given the importance of the Corps’ determination and its failure to issue final environmental review documents, we may be forced to consider filing litigation in 2017 challenging the Corps’ unreasonable delay. We hope such a step will be unnecessary.

We ask that that the Corps uphold its obligations for due process and transparency by publishing the FEIS and ROD with appropriate permit conditions to assure that BP’s lease enables it to continue to conduct business without putting the Salish Sea at risk of oil spills or violating the Magnuson Amendment.

Thank you for agreeing to meet with representatives of our groups on January 4th. We hope that you can reply to this letter beforehand to maximize the productivity of that conversation.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Felleman", with a long horizontal line extending to the right.

Fred Felleman, NW Consultant, Friends of the Earth

Crina Hoyer, Executive Director, RE Sources for Sustainable Communities

Matt Krogh, Director, Extreme Oil Campaign, STAND.earth

Chris Wilke, Executive Director and Puget Soundkeeper, Puget Soundkeeper Alliance

Rebecca Ponzio, Oil Campaign Director, Washington Environmental Council

Stephanie Buffum, Executive Director, Friends of the San Juans

San Olson, Officer, San Juans Alliance

Tom Glade, President, Evergreen Islands

Jayne Freudenberger, Co-President, League of Women Voters of Bellingham/Whatcom County

Terry Wechsler, Esq., Co-founder, Protect Whatcom

Chris Wierzbiki, Interim Director, Futurewise

Laura Ackerman, Oil Policy Director, The Lands Council

Emily Johnston, President, 350 Seattle

Arthur (R.D.) Grunbaum, President, Friends of Grays Harbor (FOGH)

Arnie Martin, Chapter President, Grays Harbor Audubon Society

Alona and Don Steinke, Community Organizers, Vancouver, Washington

Regna Merritt, Director, Healthy Climate Program, Oregon Physicians for Social Responsibility

Cc: Brigadier General Scott A. Spellmon
United States Senator Patty Murray
United States Senator Maria Cantwell
Congresswoman Susan Delbene
Governor Jay Inslee
Lummi Nation Tribal Chairman Tim Ballew
State Senator Kevin Ranker
Whatcom County Councilmember Carl Weimer