

# **Appendix B**

## **BP Cherry Point EIS Scoping Report**

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**U.S. Army Corps of Engineers, Seattle District  
Scoping Report**

**Environmental Impact Statement  
BP Cherry Point Refinery North Dock**

**October 2006**

On August 16, 2006, the U.S. Army Corps of Engineers (Corps) issued a notice of its intent to prepare an Environmental Impact Statement (EIS) and to conduct scoping for the EIS. In the EIS, the Corps intends to evaluate the impacts associated with a previously authorized pier extension in the Strait of Georgia at Cherry Point, near Ferndale, Whatcom County, Washington. The pier extension identified in the Notice of Intent (NOI) is located at BP's Cherry Point refinery.

The Corps is serving as the lead agency for preparation of the EIS and the National Environmental Policy Act (NEPA) review. The U.S. Department of Homeland Security, U.S. Coast Guard (Coast Guard) is participating in preparation of the EIS as a cooperating agency.

The NOI states that the purpose of the EIS will be to evaluate continued operation of the previously permitted and constructed pier extension. The EIS will incorporate the results of a separately prepared Vessel Traffic Risk Assessment (VTRA) and an oil spill fate and effects analysis. It will also evaluate whether or not operation of the facility is in compliance with the Magnuson Amendment of the Marine Mammals Protection Act.

The NOI was distributed to interested parties throughout the area of concern, from the western Olympic Peninsula to the region near the BP Cherry Point refinery. It was distributed to municipalities, Native American Tribes, non-governmental organizations (NGOs), and appropriate federal, state, and local agencies. It was also distributed to the media and libraries, individuals who were involved in earlier litigation related to construction of the dock, and environmental ministries of the Canadian government. In the NOI, the Corps requested written comments on the scope of the EIS by September 15, 2006. The Corps also provided the public an opportunity to present verbal comments at public scoping meetings.

Scoping meetings were held at four Washington locations, including Port Angeles (September 5, 2006), Anacortes (September 7, 2006), Ferndale (September 12, 2006), and Seattle (September 13, 2006). At each scoping meeting, the Corps provided information on the NEPA review process and a summary of the VTRA study methodology. The public was then provided with the opportunity to speak about their concerns or to submit written comments regarding the scope of the EIS. A total of 11 members of the general public attended the public meetings.

The Corps also held an interagency coordination meeting at its Seattle District Office on August 23, 2006. The meeting was attended by representatives of the following agencies and organizations:

- Corps;
- Coast Guard;
- U.S. Environmental Protection Agency;
- National Oceanic and Atmospheric Administration, National Marine Fisheries Service;
- U.S. Fish and Wildlife Service;
- ENTRIX, Inc.(Corps' third-party EIS contractor); and
- BP Cherry Point, Inc.(applicant)

At both the public scoping meetings and the interagency coordination meeting, the majority of comments were directed toward the VTRA, not the EIS. Where appropriate, this scoping report lists the risk assessment questions. However, many of the questions were specific to particular aspects of the VTRA methods and not to the EIS. In these instances, the VTRA contractor responded directly to the commentor. Since they are not EIS related those comments are not included in this report.

The verbal scoping comments received at the scoping meetings and at the interagency coordination meeting are summarized below. The Corps also received scoping comment letters (attached to this report) from the following:

- Lummi Nation Tribal Historic Preservation Office;
- Skagit River System Cooperative;
- Environmental Protection Agency;
- Barry Wenger, WA Dept of Ecology;
- HellerEhrman, LLP (on behalf of BP Cherry Point Refinery);
- Ocean Advocates;
- Wise Use Movement;
- Friends of the San Juans;
- Friday Harbor Laboratories, University of Washington;
- RE Sources for Sustainable Communities (Wendy Steffensen);
- Puget Soundkeeper Alliance (Sue Joerger);
- Ecosystems First, LLC (John F. Boettner); and
- Gerald Larson

#### **COMMENTS RECEIVED AT SCOPING MEETINGS AND THE INTERAGENCY COORDINATION MEETING**

1. Provide a list of assumptions for the VTRA.
2. The VTRA should include extensive coordination with the Canadian Vessel Traffic System personnel.
3. The VTRA should document the sources of information for commercial and tribal fisheries.
4. The VTRA should address the risk factor of the language barrier that exists on some commercial vessels.
5. Address the issue of how many vessels will be in a queue waiting for berthing space at the dock.
6. The VTRA should address the “Saddlebag” route as a special area and how the Coast Guard applies regulations to the area.
7. Consider the large numbers of vessels that are on the water at different seasons, such as whale watchers, the spring fishing fleets headed north, and the gill netters in Rosario Strait.
8. Identify the location and status of the proposed Washington State Department of Natural Resources (DNR) reserve near Cherry Point in relation to the routes of the vessels to/from the refinery, particularly where the routes pass through the reserve.



9. The cumulative impacts analysis should address the issue of the dock at the proposed DNR reserve location due to the presence of bull trout, eel grass, marbled murrelet, and other sensitive species.
10. The cumulative impacts analysis should include all previous impacts and a list of all spills that have occurred in the marine waters of the state, including the cumulative impacts of all previous Corps actions in the Cherry Point area.
11. Address all flora and fauna changes that have occurred from 1970 through 2006.
12. Discuss alternative routes with DNR to minimize impacts to the reserve.
13. Address the impacts on herring, particularly in the vicinity of Cherry Point, and other species of concern. This should include development of mitigation measures regarding herring areas, particularly areas near vessel routes.
14. Address compliance of operations with the Whatcom County Critical Areas Ordinance.
15. Public issues that may need to be addressed include the demand for less vessel traffic to/from the refinery and a request for more tugs.
16. The Corps should make and document contacts with Native American Tribes.
17. There could be significant cultural and tribal issues and these should be addressed in the EIS.
18. Mitigation of use of the dock should be addressed.
19. Address impacts associated with the presence of the dock.
20. Mitigation measures included in the EIS could provide compensation for the impacts of construction of the dock.
21. Address impacts associated with ballast water discharge and intake.
22. The EIS should address the effects of noise and other disturbances on Orcas and their critical habitats.
23. Address how an increase in spill risk increases the risk to the lower end of the food chain.
24. Include a description of all regulatory compliance requirements that apply to operation of the facility.
25. Address the issue of construction of new offshore facilities related to sewage discharge by Victoria.
26. Since the Georgia Pacific terminal study included a Vessel Transit System and ballast study, this EIS should as well.
27. The requirements of the Gateway settlement agreement of 1999 should be addressed in the EIS.
28. Since an EIS was not required or prepared for the refinery when it was constructed (prior to NEPA and the State Environmental Policy Act), the EIS for operation of the BP dock could

- include the refinery and have a much broader scope than just for the change in vessel traffic associated with the dock expansion.
29. The EIS should address the Magnuson Act and all refinery dock expansions and new refinery docks constructed since the 1977 amendment. In addition, the EIS should consider mitigation for violations of the Magnuson Act.
  30. Address what influence the enhanced dock capacity has had on refinery output and what the influence will likely be in the future.
  31. The EIS should consider all shipments of product from the refinery to Washington, Oregon, and California.
  32. Address the risks and impacts of articulated tug and barges passing near the Olympic Coast National Marine Sanctuary.
  33. The scope of the EIS should include the entire coastal zone (200 feet inland).
  34. Address OPA 90 and the Waterway Safety Act, including what aspects have not been put in place as required by the act.
  35. The EIS should consider the implications of using the barrel tax refund to address spill risk and cleanup.
  36. The Corps should consider having BP renegotiate the DNR lease and to make the process more transparent than it was previously.
  37. The Corps should obtain input from other federal agencies, such as the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency.
  38. The Corps should coordinate the NEPA process with the SEPA process.
  39. The Corps should complete a Fish and Wildlife planning aid letter after scoping is completed.
  40. The Corps should set up an advisory group to address the potential alternatives, including more public input during the process than has occurred to date.
  41. One commenter requested that the Corps provide a copy of the PowerPoint presentations used at the scoping meetings on its web site. One commentor asked if the scoping comments will be entered into the docket for the project and whether or not there will be a docket that will be subject to the Freedom of Information Act.
  42. Public notification of the scoping process was not adequate and there should be more notification and meetings when the draft EIS is issued.
  43. EIS needs to assess impacts to other federal laws.
  44. EIS needs to assess impact of "Free Trade Zone" (i.e. tax free status of oil shipped north through Canadian Waters) on the Cherry Point Aquatic Reserve.
  45. EIS needs to consider revocation of the permit as a project alternative.

46. EIS needs to consider the impact to the Birch Bay Resort Community when a major oil spill occurs.
47. Homeland Security needs to be considered as an issue in the EIS and include adequate measures to address the potential for terrorist possession and control of a vessel and use as a weapon.
48. EIS needs to consider the use of dispersants to clean up oil spills and the impact these chemicals may have on the natural resources.
49. EIS needs to consider the temperature inputs related to the Refinery's NPDES permit and how this affects herring.
50. The pier extension and operation should include an effectiveness monitoring plan.
51. A "climate change" alternatives that examines the impact of zero crude oil imports to BP refinery should be included.
52. EIS should include a list of all refinery dock Section 10/404 permits granted by the Corps in Whatcom and Skagit Counties since 1970.

## **SCOPING COMMENTS SUMMARY:**

As listed in the previous section, 52 individual comments were received at a scoping meeting or by letter and can be summarized into the following 8 categories:

### EIS Purpose: Comments 28 and 30

Commenters recommended that the scope of the EIS be expanded to consider impacts of refinery operations and evaluation of dock capacity as it may effect refinery output.

### NEPA Review Process: Comments 16, 37, 38, 39, 40, 41 and 42

Commenters recommended that the Corps coordinate/communicate with various federal agencies and Native American Tribes. Formation of an advisory group to facilitate additional public input and selection of alternatives for review was also recommended, as was dissemination of the results of scoping information.

### Alternatives: Comments 6, 7, 12, 15, 45 and 51

Commenters recommended analysis of tanker routes in specific areas, vessel traffic of various types and changes to transpiration demand. Recommendations were also made to evaluate the effects of climate change and revocation of the current permit as project alternatives.

### VTRA: Comments 1, 2, 3, 4, 5, 26, 31, and 32

Commenters recommended that the VTRA should include documentation of all assumption and information sources; operations factors such as language spoken by ship personnel; queuing for berthing space; and coordination with the Canadian Vessel Traffic Control system. Recommendations were also made to include shipments of refinery product out of state and to analyze traffic past the entrance to the Strait of Juan de Fuca.

### Impacts to Resources: Comments 8, 9, 10, 11, 13, 17, 19, 21, 22, 23, 33, 46 and 49

Commenters recommended that the analysis of impacts in the EIS address Washington Department of Natural Resources (DNR) proposed Cherry Point reserve, relevant sensitive species, and food chain effects. Consideration of noise and other disturbances, impact to cultural and tribal resources and the Birch Bay Resort Community were also recommended. Commenters proposed that the EIS include impacts within the entire coastal zone including 200 feet inland and that the cumulative impact analysis include all previous spills.

Mitigation: Comments 18, 20, 35 and 48

Commenters recommended that impact mitigation include mitigation for construction and use [operation] of the dock. Recommendations were also made to consider a specific funding source for spill risk and cleanup and the use of, and impacts from dispersants as a cleanup agent.

Regulatory Compliance: Comments 14, 24, 34, 43 and 52

Commenters recommended that the EIS include an evaluation of compliance with regulatory requirements that apply to operation of the facility, including but not limited to Clean Water Act Section 10 and 404, Whatcom County Critical Areas Ordinance, OPA 90 and the Waterway Safety Act.

Other: Comments 25, 27, 29, 36, 40, 47 and 50

Commenters recommended consideration of a number of factors not classified in the previous groups. They included effects related to City of Victoria sewage outfall, conditions of the Gateway settlement agreement (adjacent facility), compliance of all refinery docks with the Magnuson Act, renegotiation of DNR leases, impacts of the Free Trade Zone on oil shipments, Homeland Security and effectiveness of [environmental] monitoring.

The Corp will consider all of the above comments during its formulation of the work scope for preparation of the EIS by the third party contractor. Consideration of individual comments will include the relationship of the comment to the intent of preparing the EIS (purpose), the EIS scope (incremental risk related to operations of the dock expansion), and area of impact.

## **COMMENT LETTERS RECEIVED BY THE CORPS**

**Perry, Randel J NWS**

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**From:** Wenger, Barry (ECY) [BWEN461@ECY.WA.GOV]  
**Sent:** Wednesday, August 23, 2006 2:06 PM  
**To:** Perry, Randel J NWS; Olivia.Romano@nws02.usace.army.mil  
**Subject:** BP dock EIS scoping comments

Here are my scant thoughts on the subject for your consideration.

The Gateway Pacific Terminal project (break bulk cargo) has been permitted on adjacent property by the state regulatory agencies subject to a number of conditions being fulfilled per our 1999 Shoreline Permit Appeal Settlement Agreement. Studies addressing the following two relevant areas of concern are required prior to construction of the project:

Vessel traffic study - to determine risk of collisions, groundings, impairment of existing docking operations, etc and to determine mitigation measures as needed. Integrate with North Puget Sound Vessel Traffic analysis that was completed in the past few years.

Ballast water sampling/monitoring - to regulate discharge of ballast water from port areas having aquatic nuisance species; require state-of-the art treatment methods to eliminate/minimize risk of invasive species.

It would appear prudent to ensure that the BP pier EIS adequately consider the cumulative impact of the two adjacent projects. Changes in incoming crude oil supply and outgoing product ships should be addressed due to recent reductions in pipeline capacity. The supply/product changes could impact the two above areas of concern, vessel traffic risk and ballast water risk, and these areas should be thoroughly discussed in the document.



# LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226 • (360) 384-1489

DEPARTMENT \_\_\_\_\_ EXT. \_\_\_\_\_

August 31, 2006

Michelle Walker, Branch Chief  
U.S. Army Corps of Engineers  
Seattle District, Regulatory Branch  
P.O. Box 3755  
Seattle, WA 98124-3755

RECEIVED  
SEP 12 2006  
REGULATORY

Re: Notice of Scoping for Environmental Impact Statement Intent to Prepare and Environmental Impact Statement (EIS) to evaluate the impacts associated with a previously authorized pier extension in Strait of Georgia at Cherry Point, near Ferndale, Whatcom County, Washington.

Dear Michelle Walker,

The Lummi Nation has received notice of the above-referenced permit dated August 16, 2006, and is responding as an affected tribe.

The electronic notice that was received notified of a public scoping meeting/open house; however, consultation with an Indian tribe must be recognized as a government-to-government relationship between the Federal Government, which should be conducted in a manner sensitive to the concerns and of the Tribe(s). Under the National Historic Preservation Act of 1966 (NHPA) Section 101 (d)(6)(b) the agency official is to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property.

The area known today as Cherry Point holds great significance to the Lummi people, we look forward to working through the consultation process with you. These comments are based on the information available at the time of the review. Should you have any questions or concerns, please do not hesitate to call me at (360) 384-2298.

Sincerely,

Lena Tso, Compliance Officer  
Lummi Nation Tribal Historic Preservation Office  
Culture Department, Lummi Nation

cc: James Hillaire, Director, Lummi *Sche'lang'en* Department  
Merle Jefferson, Director, Lummi Natural Resources Department  
Rob Whitlam, State Archaeologist, DAHP

## Romano, Olivia H NWS

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**From:** Gerald Larson [larsong@comcast.net]  
**Sent:** Tuesday, September 12, 2006 1:24 PM  
**To:** Romano, Olivia H NWS  
**Subject:** EIS Scoping for Cherry Point

The drift cells run north along Cherry point and around Point Whitehorn into to Birch Bay. As evidence, a stellar seal was found on Neptune Beach in the spring of 2006. It had been shot. The head was removed and pushed a short ways off shore. Within couple of weeks the seal had drifted to a beach in the middle of the Birch Bay Resort area.

The EIS study needs to consider the impact to Birch Bay Resort Community when a major oil spill occurs.

Gerald Larson  
5045 Alder St.  
Birch Bay, Wa. 98230  
360-371-4170



## Romano, Olivia H NWS

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**From:** DAVID E ORTMAN [deortman@msn.com]  
**Sent:** Wednesday, September 13, 2006 10:34 PM  
**To:** Romano, Olivia H NWS  
**Subject:** BP Cherry Point Dock EIS Scoping

13 September 2006

TO: Olivia Romano, Seattle, District Corps

FR: David E. Ortman  
President  
Wise Use Movement  
P.O. Box 17804  
Seattle, WA 98117

RE: BP Cherry Point Dock EIS Scoping Comments

In addition to the written comments submitted at the Corps poorly advertized EIS scoping meetings, the following comments should be included as part of our WUM scoping comments:

1. BP Free Trade Zone Cherry Point. In or around 2001, BP requested Free Trade Zone status from the Foreign-Trade Zones Board of the Department of Commerce for its Cherry Point facility at Ferndale. In its application it made several statements regarding its increased import of crude oil and export of product, which appears to be a violation of the Magnuson Act. BP's own application confirms that FTZ subzone status will increase imports of foreign crude oil (Exhibit Four, p. 24), increase imports of foreign oil due to inverted tariff relief (Exhibit Four, p. 37-38) and increase exports (Exhibit Four, p. 53). The Magnuson Amendment to the Marine Mammal Act prohibits approval of any application that "may" result in "any" increase in the amount of crude capable of being handled at the facility, other than oil to be refined for consumption in the State of Washington. Please obtain the complete docket (DOC. 7-2001) of BP's Free Trade Zone application for review as part of the scoping process. A collection of BP's statements and responses are included below.
2. Ports & Waterways Safety Act and OPA-90. The EIS should review both the Ports & Waterways Safety Act and the Oil Pollution Act of 1990 (OPA-90) and identify all legislative requirements that have yet to be implemented.
3. As stated in the Corps' Information Paper dated September 2006 on the BP Cherry Point Dock, the EIS "will assest in the Corp's decision to revoke the permit. . ." Revoking the permit issued to BP must be an alternative evaluated and analyzed in the EIS.

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Comments to Doc. 7-2001, Foreign-Trade Zones Board

1. Regarding BP's letter dated June 4, 2001:

BP states that "FTZ status does not and will not impact or alter refinery operations, and accordingly such status will not affect marine traffic. Nor, of course, will FTZ status affect the crude oil capability of any marine facility operated by the refinery."

RESPONSE: This is directly contradicted by BP's application on page 49: "Zone savings may be relatively small when compared to large capital requirements for new plants; however, such savings will offer Cherry Point a means to offset its costs of unit-by-unit upgrades which may add to refinery capacity." FTZ status is directly linked to BP's future refinery expansion plans.

BP states that its Cherry Point Refinery's application "provides ample information from which the Board can make a reasoned decision."

RESPONSE: . . . BP has offered no additional information concerning environmental impacts of the proposed FTZ Subzone application. Nor have they documented how approval of an FTZ Subzone is in "the public interest" (15 CFR § 400.31(a)) or would have a "significant public benefit." 15 CFR § 400.31(c)(3). The burden of proof is on applicants for subzones to submit "evidence establishing that the activity does or would result in a significant public benefit. . ." Id. BP has failed to do so. In addition, the FTZ examiner may request this information from BP. 15 CFR § 400.27(d)(3)(iii). Therefore, we reject BP's refusal to provide additional information as requested in our comments and request that the FTZ require BP to do so.

BP states that "[O]ther refiners on the West Coast have made use of the FTZ program, which can contribute to a refiner's ability to hold down its costs."

RESPONSE: This appears to a primary motivation for BP to submit an FTZ subzone application. However, these benefits accrue solely to BP and do not provide a "significant public benefit." In addition, BP has failed to identify any specific refiners on the West Coast currently making use of the FTZ program. Nor has BP indicated whether any of the other Puget Sound refineries (Equilon/Anacortes; Sound Refining/Tacoma; Tesoro/Anacortes; or Tosco/Ferndale) have been applied for or been granted subzone status.

## 2. BP's Response to Perceived Increase in Marine Vessel Traffic:

BP states that physical modifications to the refinery, which may increase the capacity of the refinery, are subject to permitting by regulatory agencies.

RESPONSE: Increase in marine vessel traffic, both in terms of increased imports and increased exports can take place without any physical modification to the refinery.

BP states that the total volume of crude receipts (and thus marine traffic) will remain the same regardless of where the crude originates.

RESPONSE: Foreign tanker fleets are older and suffer more collisions and spills than the U.S. tanker fleet. Therefore marine vessel traffic is not the same "regardless of where the crude originates."

BP states that operational requirements is also a variable in marine traffic at Cherry Point.

RESPONSE: . . . One factor making up operational requirements is Cherry Point's status as a FTZ subzone. If an FTZ subzone had no impact on refinery operations or decision making, there would be little reason to apply for one.

BP states that should FTZB issue a grant of authority it is acknowledging that the current operations fall within the guidelines of the FTZ Program and that the site is eligible for inverted tariff relief.

RESPONSE: This is correct. However, BP has submitted an incomplete application. BP has refused to provide additional information as requested by commenters. BP's application has not demonstrated that approval of an FTZ Subzone for BP is in "the public interest" or would have a "significant public benefit."

BP admits that "there is some general language in the application stating the FTZ status may contribute to increased exports."

RESPONSE: This is evidence enough that the granting of an FTZ Subzone would be a violation of the Magnuson Amendment to the Marine Mammal Act. . .

BP refers to FTZ annual reports and to general EIA data showing the United States as a net importer of finished petroleum.

RESPONSE: This has no bearing on BP's Cherry Point refinery or its application. In fact, BP admits that one goal of the FTZ program is to promote manufacturing and exportation. Thus, unless BP intends to amend its applications, its position that FTZ subzone status will "improve the U.S."

refinery margin for export activity" (p. 53) is evidence that BP intends to use the FTZ subzone status to increase exports.

3. BP's Response to Foreign Trade Zone Subzone Application Process:

BP refers to the FTZB website for subzone/manufacturing application guidelines.

RESPONSE: . . . While the guidelines are helpful for applicants they do not substitute for compliance with the FTZB regulations. When information requested by the regulations is lacking, an application is incomplete.

a. Exhibit Two Comments

BP indicates that additional information can be supplied for Exhibit Two.

RESPONSE: The FTZ examiner should request this information, particularly specific details of the dock expansion. Such information is critical to a full review of the application. BP's decision to withhold this information from the FTZB raises questions about what else it is withholding.

BP states that the fact that it has federal, state and local permits is "sufficient evidence to satisfy the environmental statement of the application."

RESPONSE: The mere existence of permits does not satisfy the environmental statement of the application. The FTZ examiner should request a list of all environmental permits and all notices of violations, fines and penalties that have been assessed, along with any other lawsuits brought against the issuance of permits to BP's Cherry Point facilities over the past decade.

BP states that it does not have to provide historical data to the FTZB.

RESPONSE: As set out in § 400.25 (a)(6), the Board or the Executive Secretary may request "any additional information.". Therefore, when it is appropriate to provide historical data, the applicant must provide it.

b. Exhibit Four Comments

BP states that they do not need to address incomplete application comments submitted by the Puget Sound Gillnetters Association regarding § 400.24 because it pertains to zones in general.

RESPONSE: 15 CFR § 400.25 (Application for subzone) states that "An application to establish a subzone as part of a proposed or existing zone shall be submitted in accordance with the format in § 400.24, except that the focus of the information provided in Exhibit Four shall be on the specific activity involved and its net economic effect." Therefore, BP is required to submit the information requested under § 400.24. Failure to do so, renders the application incomplete as documented in the Puget Sound Gillnetters comments to the FTZB.

BP claims that granting FTZ status could in no way result in violation of the Magnuson Act (sic).

RESPONSE: BP's own application confirms that FTZ subzone status will increase imports of foreign crude oil (Exhibit Four, p. 24), increase imports of foreign oil due to inverted tariff relief (Exhibit Four, p. 37-38) and increase exports (Exhibit Four, p. 53). The Magnuson Amendment to the Marine Mammal Act prohibits approval of any application that "may" result in "any" increase in the amount of crude capable of being handled at the facility, other than oil to be refined for consumption in the State of Washington. This is an extremely low threshold and BP has certainly crossed it.

BP states that the physical capacity of the refinery to handle crude oil at its dock will remain unchanged.

RESPONSE: This is not correct. BP is in the process of modifying its Cherry Point dock to take advantage of the increased imports of foreign crude oil (Exhibit Four, p. 24), increased imports of foreign oil due to inverted tariff relief (Exhibit Four, p. 37-38) and increased exports (Exhibit Four, p. 53) resulting from FTZ subzone status.

BP states that the FTZB does not need to comply with the National Environmental Policy Act.

RESPONSE: Notwithstanding any categorical exclusions allowed under the CEQ NEPA regs, "An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so." 40 CFR § 1508.4. Therefore, given the fragile and unique environment and importance of Cherry Point to Puget Sound fish and wildlife, the FTZB can and should prepare an environmental assessment.

In conclusion, BP has exhibited no willingness to address the specific information gaps in its application or to supplement its inadequate four sentence statement as to environmental impact (Application, p. 60).



*Naturam Expellas Furca*

*Tamen Usque Recurret*

# WISE USE MOVEMENT

*P.O. Box 17804, Seattle, WA 98127*

13 September 2006

Mrs. Olivia Romano  
Corps of Engineers, Seattle District  
P.O. Box 3755  
Seattle, WA 98124-3755 RE: EIS Scoping comments on BP's Cherry Point Marine Pier

Dear Seattle District Corps:

The following are the comments of the Wise Use Movement on preparation of an environmental impact statement (EIS) on BP's Cherry Point marine pier extension.

The draft EIS should include the following:

- \* Risk assessment of oil spills from increased tanker/barge traffic and increased cargo container and Navy vessel movements in Puget Sound, the Strait of Juan de Fuca, Canadian waters, and the outer Olympic coast.
- \* A procedure for determining how much of BP's Cherry Point marine pier extension is related to increased crude oil imports for refinery production of products for Washington State (as set out in the Magnuson Amendment).
- \* A procedure for determining how much of BP's Cherry Point marine pier extension project is related to export of refined product outside the state of Washington, including exports to Oregon, California, Alaska, Asia and elsewhere.
- \* Alternatives to increased crude oil refinery and marine pier capacity given that fossil fuels are a non-renewable resource and contribute to climate change. Alternatives including a no-action alternative (no marine pier extension) and a "climate change" alternative that examines the impacts of zero crude oil imports to the BP refinery should be included.
- \* A cumulative impact analysis of all oil spills at the BP Cherry Point dock and all oil spills along the coastal zone of Whatcom County and Skagit County since 1970.

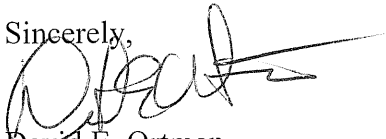
\* An analysis and assessment of flora and fauna populations changes between 1970 and 2006 with the coastal zone of Whatcom County and Skagit County.

\* A list of all refinery dock Section 10/404 permits granted by the Corps of Engineers in Whatcom and Skagit County since 1970.

In addition, the DEIS should contain an explanation of the refusal of the Corps of Engineers to prepare a DEIS prior to the construction of the BP Cherry Point Pier expansion project.

Please send me a copy of the DEIS when it becomes available.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Ortman', with a long horizontal stroke extending to the right.

David E. Ortman  
President



## **Ocean Advocates**

3004 NW 93<sup>rd</sup> St.  
Seattle, WA 98117  
206.783.6676

### **Scoping Comments for BP Cherry Point Dock Expansion EIS September 13, 2006**

The need for a thorough environmental impact statement to be completed at this time is underscored by the fact this refinery was completed prior to the passage of NEPA and therefore never had an EIS. The recent listing of the killer whale, marbled murrelet, chinook salmon and bull trout under the ESA and the continued depressed state of the Cherry Point herring run underscores the need for precautionary measures to be taken to aid in their recovery. Finally, the rapid growth in vessel traffic to ports in Washington and British Columbia, including a major bulk port to be built within a mile of the BP refinery underscores the need for a thorough vessel traffic risk assessment and cumulative impact analysis.

While the Ocean Advocates' court challenge focused on the need for a thorough review and mitigation of oil spill risk as well as compliance with the Magnuson Amendment to the MMPA, the EIS needs to include a far broader analysis to include air and water quality, noise, lighting, temperature, invasive species, long shore transport, and eelgrass shading. Particular attention needs to be paid to the impacts to listed species and to Cherry Point herring as prey for those species as well as to migratory birds who have traditionally timed their stopover at Cherry Point corresponding with the herring spawn.

#### **D) Magnuson**

The 9th Circuit's March 4<sup>th</sup> 2005 Amended Decision asks, "Did the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude oil?" It then goes on to state, "If the answer to this question is 'yes', then the permit violates the Magnuson Amendment (p. 2536)."

In his May 29, 1992 cover memo submitting the final Environmental Report for the Cherry Point Dock Completion Project to the Corps, Senior Project Manager for ENSR Engineering, Jim Thorton, states, "The existing dock currently operates at 74% utilization. When the time required for scheduled and unscheduled maintenance and inspections is taken into account, the dock is essentially operating at full capacity. At the current high utilization rate, it has become increasingly necessary for incoming crude tankers to anchor offshore in anchorage zones waiting for available berthing space. To alleviate this bottleneck, ARCO is proposing to complete the dock as it was originally permitted by the Corps of Engineers in June 1970."

In 1992 ARCO was refining 174,500 barrels per calendar day, up from 96,000 barrels per day in 1977, but far less than their current capacity of in excess of 235,000 barrels per day. According to the 31 March 2000 BE produced for ARCO by Berger/ABAM the number of

vessels calling on ARCO terminal increased from 102 in 1977 to 234 in 1992 when the permit was applied for. It was estimated that 330 vessels would call on the dock in 2002. Clearly if there was a bottleneck in 1992 when 234 tanker ships were calling at the dock when the refinery was producing 174,500 barrels per day, that situation could have only gotten worse as the refinery increased throughput by 61,000 barrels per day and tank vessel traffic was expected to increase by approximately 100 vessels a year.

While it would be instructive to update these numbers, including the amount of traffic at the dock during the four months of the herring spawning season (March-June) which averaged around 20 between 1994 and 1999, it appears irrefutable that the new dock increased the potential berthing capacity of the terminal for tankers carrying crude oil by freeing up the dock which was encumbered by refined product vessels. Therefore, the Corps will need to establish a mechanism by which they can condition this permit and monitor BP's compliance with the condition in a manner far better than was used to confirm their practice of pre-booming tankers at the new dock.

It is also important to recognize that BP's NPDES permit is due to be renewed in November. The release of the draft permit has been delayed by Ecology who is in negotiations with BP over how high a level of discharge the second tier of their permit will allow. It is imperative that the Corps incorporate the findings of the new permit in this analysis. The reason this is important is because their discharge permit is tied to their throughput. Purvin and Gertz Inc. May 27, 2005 report for BP entitled, "US West Coast Refined Product Supply-Demand Overview" anticipates a 30,000 barrel per day increase at BP by 2008 and a 225,000 barrel per day increase on the west coast within a decade. BP has been exploring the possibility of meeting some of this increased demand with oil from Alberta's tar sands that may enable them to increase refinery output without a proportional increase in crude tanker traffic. While this may help them avoid further infraction of the Magnuson Amendment, it will certainly increase the amount of refined product movements and associated risk of oil spills and disturbance to herring that will need to be modeled in either case.

The 2004 Marine Cargo Forecast Technical Report prepared for the WPPA and Washington DOT attempts to forecast marine trade through Washington through 2025. It predicts the amount of waterborne cargo moving through Washington ports to increase by 2/3 over the next two decades and the amount of containers moving through the Puget Sound is likely to triple. The report notes that from 1992 to 2002 inbound receipts of crude oil remained flat, but domestic receipts declined an average of 0.6% while foreign imports grew at an average rate of 11.6%. Foreign imports are expected to exceed domestic by 2025 statewide, but declarations made by BP already suggest that Alaskan oil currently accounts for only half of the crude refined at Cherry Point. The report alludes to the fact that the oil industry will try to bring foreign oil into Washington on bigger, "more efficiently sized," foreign tankers. The Marine Cargo forecast mistakenly predicts refining capacity to slow in contrast BP's consultant report forecasting a 30,000 barrel per day increase at the Cherry Point refinery, an 8,000 barrel per day increase at Conoco Philips and a 25,000 barrel per day increase at the Anacortes refineries.



According to Ecology in 2005 209 tankers made 716 entering transits through Washington waters. In addition, there were 3,913 barge transits in Puget Sound and 1,542 on the Columbia River. In total tank vessels comprised 49% of the traffic. It is imperative that the EIS also evaluate the cumulative impacts of the Corps' permitting activities in relation to the Magnuson Amendment. It is our belief that the Corps has failed to enforce the Magnuson Amendment on numerous occasions resulting in Washington State waters being exposed to the risk of an oil spill far greater than that posed by our own energy needs as was envisioned by the late Senator. The attached list includes permits issued to oil facilities east of Port Angeles between 1977 and 1983. The EIS should include a description of each of these permits and all permits involving dredging at oil terminals to determine the extent to which the Corps has upheld Magnuson. It is known for example that BP dredged the Ferndale refinery when they purchased it from Mobil and US Oil dredged their terminal in Tacoma. Both of these actions clearly enabled deeper draft vessels to come to the terminal thereby increasing the volume of crude oil capable of being handled.

Several specific examples and a list of permits needing description follow. The Corps has likely issued additional permits since this time that should be included in the EIS.

OYB-1-004111	ARCO	12.1.77
OYB-1-009091	ARCO	9.28.83
OYB-1-009275	ARCO	5.10.84
OYB-1-014082	ARCO	10.31.90
OYB-4-014469	ARCO	
OYB-4-013252	BP	
OYB-1-009997	BP	9.4.85
OYB-2-013470	BP	10.26.90
OYB-4-014393	BP	
OYB-2-007624	CHEVRON	
OYB-2-009133	CHEVRON	2.1.84
OYB-2-010621	CHEVRON	10.22.86
OYB-2-013076	CHEVRON	10.5.90
OYB-2-004692	NORTHERN TIER	3.2.82
OYB-2-004693	NORTHERN TIER	3.2.82
OYB-1-004580	SHELL	4.21.78
OYB-2-006079	SHELL	1.21.80
OYB-1-007740	SHELL	1.28.82
OYB-1-013522	SHELL	5.14.90
OYB-1-008414	TEXACO	1.5.83
OYB-4-013604	TEXACO	7.18.90
OYB-4-014359	TEXACO	
OYB-4-014359	TRANSMOUNTAIN	4.20.81
OYB-2-006532	TRANSMOUNTAIN	4.20.81
OYB-2-008437	UNION OIL OF CA	12.10.82
OYB-1-009975	UNION OIL OF CA	4.10.85
OYB-1-014107	UNION OIL OF CA	1.28.91
OYB-2-013226	US OIL	2.26.91

Permit 3915 Mobil Oil Corp. Individual issued 27 May 1977 pier/pile Cherry Point. The work included the installation of breasting dolphins, mooring dolphins including capstans and quick release hooks, marine loading arms and platform, control house, current direction and velocity meter, berthing monitoring equipment, new walkways between dolphins, and various fire equipment. The size of the pier was not altered from that originally constructed with a Department of the Army permit issued on 18 May 1953. Mobil stated the need for the work was because the cut-off of Canadian crude oil via pipeline made it necessary for the refinery to receive its crude supply solely by tanker. While they also stated that there will be no increase in the number and/or size of the vessels unloading and loading oil at the facility, how has the Corps. monitored this assertion? Furthermore, the addition of marine loading arms clearly, "will or may result in any increase in the volume of crude oil capable of being handled at any such facility."

Permit 4580 Shell Oil Co Individual 21 Apr 1978 pier/pile Fidalgo Bay. The modifications included the replacement and strengthening of several mooring and breasting dolphins, installing a marine unloading arm system, additional navigation and fire protection equipment, and a new gangway. The work involved only a minor change in the wharf area from that originally constructed with a Department of the Army permit issued on 16 August 1954. There is a letter from USFWS saying "the permit applicant has assured us that this proposal will in no way increase the capability of their facility to off-load petroleum products, and consequently would not be in conflict with the Magnuson Amendment."

Of particular interest, a special condition was added to the permit that states "the permittee agrees that any increased volume of crude oil handled at this facility (as measured against the volume the facility was capable of handling on 20 October 1977), which could not have been handled without the modifications to the facility authorized by this permit, will be refined solely for consumption in the State of Washington."

Again, it is hard to understand how the Corps could have concluded that installing a marine unloading arm system on a dock that previously received its oil by pipeline from Canada could not have resulted in, "any increase in the volume of crude oil capable of being handled at any such facility." Furthermore, it would be instructive to learn how the Corps has enforced the special condition put on the permit so that it could be in compliance with Magnuson. This would provide an indication of the ability of the Corps to appropriately condition a permit for this purpose.

Permit 8414 Texaco, Inc. Individual 5 Jan 1983 pier/pile Fidalgo Bay. The permit was for the maintenance and renovation of the existing facility originally constructed in 1958. The work included replacing dolphins, constructing 2 loading platforms and articulated arms, constructing 2 gangway towers, and installing building and fire protection systems. Their application states "present loading and unloading rates will not be increased by the new marine loading arms and piping." How the Corps evaluated this questionable assertion needs to be described.

## II ) Oil Spill Risk Assessment:

BP, whose credibility has come under increasing scrutiny since the disclosure of their lack of pipeline maintenance on the North Slope has been uncovered, convinced the Corps that the new dock would reduce the risk and impact of oil spills by reducing the amount of docking maneuvers and increasing protection by pre-booming all transfers. Unfortunately, the Corps did not analyze whether the reduction of docking maneuvers will be offset by an increase in the number of tank vessels the dock is able to accommodate when considered in combination with the planned expansion of the refinery. Furthermore, the Corps failed to monitor their pre-booming activities. In fact BP removed the mooring devices that enabled them to pre-boom and it is unclear as to whether BP ever pre-boomed at all. In our settlement BP only agreed to pre-boom around the transfer area, not the whole vessel and then chose not to include diesel or jet fuel as products needing to be pre-boomed. This is wholly unacceptable and in need of further investigation for the original application called for pre-booming all transfers at both terminals. While low flash point products could be exempted, BP has taken a much less protective posture. Finally, within a year after constructing this new “safe” dock arrangement the Overseas Washington pulled away from the crude dock breaking some loading arms (see DOE Pub #03-08-001) and it is our recollection that there was some special handling needed for the vessel at the new dock as well, but it was not written up by DOE. This incident needs to be included in the EIS.

Now that the Corps is required to conduct a thorough oil spill risk assessment it is imperative that it be appropriately scoped. To begin with an accurate account of all incidents and oil spills at the terminal needs to be compiled. For example, there was a 21,000-gallon spill reported at the ARCO refinery on 6.4.72 when herring larvae would have been present in large numbers. However, this incident is rarely included in summaries. In addition 22,400 gallons of “oily water” were discharged at ARCO on 8.29.01. A complete list describing all the incidents that occurred at Cherry Point and the cumulative impacts associated with spills at the Ferndale refinery need to be included in the EIS.

The Vessel Traffic Appendix to the Ocean Advocates et al/BP/Corps settlement states:

“The study will include identification and evaluation of potential vessel traffic management protocols that would reduce the risk of an accident and that can be instituted consistent with existing law. At a minimum, the vessel traffic management protocols studied will include: (1) use of Rosario Strait and Guemes Channel instead of the Huckleberry-Saddlebag traverse; (2) stationing a year-round prevention and response tug (of the kind currently stationed in Prince William Sound) in Neah Bay, Washington; (3) a single tug escort requirement for the Western reaches of Juan de Fuca Strait with hand-off between prevention and response tugs stationed in Neah Bay and Port Angeles; and (4) any additional vessel traffic management protocols or other mitigation measures selected for analysis during the scoping stage of the EIS.

Given the limited space allotted to describing these scenarios in the settlement we will elaborate here:

1) Comparing the use of Rosario Strait and Guemes Channel to the Huckelberry-Saddlebag traverse needs to consider not just the width of the channels, traffic and current velocity, but also bottom composition and proximity to particularly oil sensitive habitats such as the extensive eelgrass beds associated with Padilla Bay Estuarine Research Reserve. Furthermore, the relative merits of teathering the tug to the tanker through both passages needs to be considered as does the relative challenges associated with transitting oil barges vs tankers. In light of the development of BP's Preferred Procedures for transit between Cherry Point and March Point as a result of our settlement agreement, modelers should evaluate the relative merits of waiting at the dock for favorable current velocities in Guemas Channel vs transitting through Saddlebags.

2) Stationing a year round PRT class tug in Neah Bay is not to be considered the status quo for the current Neah Bay rescue tug is not year round or of the multi-mission capabilities of the PRTs nor is it's funding secured passed 2008. In the course of evaluating this scenario the modelers should become familiarized with the 29 responses the various tugs have been involved with since the seasonal service started in 1999 as well as the incidents that have occurred in the vicinity between Port Angeles and the Columbia River when the tug was not on duty. In addition to considering the benefits to the various vessels that have been rendered assistance the overall impact on the coverage of the Tug of Opportunity System needs to be considered in this analysis.

3) The idea of having two PRT class tugs, one stationed in Port Angeles, the other in Neah Bay, was an attempt to assure that neither tug would be more than 30 miles from its homeport at any time and that the distance between the tugs at the handoff mid Strait is minimized. The human factors benefits as well as the relative impact on the Tug of Opportunity System needs to be compared with having a single tug on station at Neah Bay. Whether this service could be provided with just two tugs also needs to be considered in light of the growth in tanker traffic projected for this region.

4) Additional measures. Beyond just describing the incidents, oil spills and mitigations that have occurred or are proposed along the Cherry Point reach and Strait of Juan de Fuca, the EIS needs to include the entire path taken by crude and refined product carriers throughout Washington State, not just between Cape Flattery and the refinery as the settlement suggested. The reason for this proposed expansion into Puget Sound and along the Olympic Coast is particularly important for refined products. The Federal District Court restricted the use of the new dock to the handling of refined products. However, the 9<sup>th</sup> Circuit Court of Appeals asks whether the new dock could handle crude oil. It is our understanding that the new dock has piping for crude that needs to be verified by the Corps for it speaks to the physical possibility of being able to handle crude oil. In either case the new permit needs to explicitly state that the new dock is for refined product exclusively.

However, assuming the use of the dock is limited to refined products, it is imperative that the Corps and the Coast Guard as a cooperating agency understand the ramifications of having a dedicated refined product terminal on the vessel traffic in Washington. We believe that Senator Magnuson's interest in limiting Washington State's exposure to an oil spill proportional to our oil needs justifies this expanded view in the EIS. Specifically the oil spill risk assessment should model the movements of crude and refined oil along the Olympic Coast where the Olympic Coast National Marine Sanctuary has found 6 oil and chemical tankers and 109 tugs with oil and chemical barges passed within the ATBA. This represented 57% of the ATBA violations in 1995. Furthermore, the establishment of the towboat lanes by the Coast Guard near shore of the inbound traffic lanes puts this hazardous cargo unnecessarily close to shore and heading into oncoming traffic. It also appears to set this traffic up to cut the corner tightly at Cape Flattery resulting in the ATBA infractions. Similarly since some of the oil is destined for Puget Sound that traffic should be modeled as well.

Another vessel traffic management practice authorized by the Coast Guard that needs attention if we are going to safely accommodate the burgeoning growth of traffic through our waters is the process by which pilots disembark from outbound vessels. The Coast Guard has long recognized the Port Angeles rotary as one of the more challenging parts of the waterway to manage. One of the sources of this challenge is associated with the fact that outbound vessels, rather than staying in the outbound lanes on the north side of the Strait of Juan de Fuca where they could drop the pilot off at the Victoria pilot station and take a launch across the Strait, cross over the lanes to drop the pilot off at Port Angeles. In the course of doing this maneuver the deep draft vessel is putting itself into meeting situations with inbound traffic. The relative merits of beginning pilotage at Neah Bay should also be considered as a way to mitigate the language challenges associated with an increasing foreign flagged tanker fleet.

A mitigation measure negotiated with the Gateway PIT project adjacent to the BP refinery that could benefit from modeling calls for berthing activity to be prohibited from one hour after the beginning of flood tide to one hour after the beginning of the ebb tide during the herring spawning period (April 10 through May 20). It would be valuable to determine the effects this measure, designed to minimize disturbance on spawning herring, would have on vessel traffic management.

The failure of the Coast Guard to implement the Salvage and Firefighting rule required by OPA'90 as well as the State Department of Ecology's failure to establish an Emergency Response System for the Entrance to the Strait of Juan de Fuca as called for by the legislature in 1991 needs to be considered in light of our region's ability to accommodate the projected growth in vessel traffic. Finally, the Washington State Department of Natural Resources failure to finalize rules, if not to drop entirely, their plans to establish the Cherry Point Ecological Reserve needs to be evaluated.

The adequacy of BP's oil spill response equipment to respond to oil spills during the various wind speeds and seas states that occur during transfers needs to be evaluated. It is our understanding that despite being located in an exposed environment the boom and skimmers they have for deployment are meant for more sheltered waters. Furthermore,

their contingency plan filed with the Department of Ecology envisions the use of dispersants despite the proximity to shore that a likely spill might occur. The overall efficacy of their oil spill response plan, from pre-booming to skimming, storage of collected oil, and dispersant use needs to be thoroughly evaluated in light of the operating environment. A final vessel traffic model should consider the impact on traffic if fuel transfers were stopped when wind speeds and sea state eclipsed the ability of the response equipment they have staged to respond.

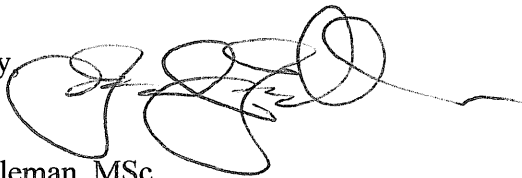
**Other Issues:**

In addition to the risk of oil spills, the risk of the complete extirpation of Cherry Point herring is of utmost concern. This spawning stock, once numbering greater than 15,000 tons when the Cherry Point refinery was built was equal to all the other spawning populations of herring in Washington State combined. When the Corps granted the dock expansion permit the stock was at an all time low of 808 tons. It now hovers around 2000 tons. This stock of herring has been shown to have unique genetic characteristics not shared by herring stocks in Washington or British Columbia and spawn later in the season than all other stocks in Washington. The herrings' unique run timing have historically been exploited by migratory seabirds such as surf scoters whose numbers have collapsed coinciding with the decline in the herring. Similarly, endangered and protected species such as marbled murrelets, Puget Sound Chinook salmon, Stellar's sea lions, Southern Resident killer whales, minke whales, Dall's and harbor porpoise rely on this once abundant, nutrient-rich species for their own survival.

Consequently, the EIS needs to consider the impacts of expanded berthing capacity on the ability of the refinery to increase their throughput and related dock activities and discharges, including but not limited to:

1. Management of invasive species in ballast water from expanded oil tanker and barge traffic. Special consideration should be given to the expanded use of ATB's and their current ballast water management practices. Furthermore, repeated efforts have been made to test biocides for treating ballast water at Cherry Point, the potential impact on herring needs to be considered.
2. Impacts of noise, lights and other disturbance to Cherry Point herring stocks from expanded oil tanker and barge traffic at Cherry Point during the spawning season.
3. Evaluation of proposed refinery expansion on air and water quality.

Sincerely,

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

Fred Felleman, MSc.  
NW Director  
Ocean Advocates

# Magnuson's legacy is intact

GUEST COLUMNIST

FRED FELLEMAN

On May 30, 5½ years after successfully challenging the Army Corps of Engineers' permit allowing construction of a new oil tanker dock at BP's Cherry Point refinery, Ocean Advocates et al., BP and the Corps signed a settlement that was approved by U.S. District Judge Robert Lasnik.

No sooner was I breathing a long-awaited sigh of relief before my phone started to ring with calls from concerned citizens and elected officials alike, inquiring how we could have "settled," implying we did not uphold the late Sen. Warren Magnuson's legacy of protecting Washington waters from oil spills ("Ending of BP lawsuit cheered," P-I, May 19). They could not have been more wrong; here's why.

In a 1977 Senate speech, Magnuson said: "The waters of Puget Sound, and the attendant resources, are indeed a major national environmental treasure. Puget Sound ought to be strictly protected; its resources ought not to be threatened. Since tanker accidents are directly related to the amount of tanker traffic, there should not be an expansion of traffic over what now presently exists."

Congress listened to Magnuson, amending the Marine Mammal Protection Act by prohibiting federal permits that would expand refinery dock capacities to handle crude oil beyond that required for Washington state needs. His amendment stopped a proposed supertanker port at Cherry Point and pipeline to Rocky Mountain markets.

However, in the intervening years, federal agencies failed to enforce the law, resulting in state refin-

eries producing twice as much oil products as we consume. This failure has increased our risk and was successfully challenged in 2005 when the Corps and BP lost our lawsuit challenging the refinery dock construction near Bellingham without preparing an environmental impact statement or considering the amendment's implications.

This is particularly important now that the National Marine Fisheries Service has found that oil spills pose a significant threat of extinction to our endangered orcas and have proposed the waters surrounding the dock as critical habitat for their recovery.

Big oil has previously asserted their investment in new tankers addresses the problem. However, oil is arriving increasingly on foreign vessels and far more is still done to prevent and respond to oil spills in Prince William Sound than in Washington waters, where refinery expansion plans abound amidst increasing freight traffic.

Our settlement does not affect the court's ruling, only what BP is obligated to do during the time it takes the Corps to complete the EIS and issue a Magnuson-compliant permit. Not knowing what the court might grant us after another costly hearing, we waived our claim to temporarily restrict the number of tankers coming to the dock in exchange for substantial oil spill protections, including placement of booms around tankers before they transfer oil, the purchase of additional skimmers, designated anchorages for oil barges, avoidance of the narrowest tanker passage with additional safeguards required if they use it, and a \$1 million state of the art vessel traffic study to be incorporated into the Army Corps' EIS and future regulatory reviews.

As a result of this settlement, BP's

claims to Congress that environmentalists are causing them to cut back on their production when supplies are tight should be muted, and meaningful safeguards are put in place beyond state or federal requirements.

Our settlement assures that the Corps' EIS will thoroughly address oil spill risks but it does not limit our right to challenge its overall adequacy or their interpretation of Magnuson's restrictions on the new dock.

Following the court's direction, the Corps may conclude some future restrictions will be needed on the use of the new dock. Any such suggestion will likely renew BP's efforts to amend Magnuson as they have tried twice before. Rather than closed door lobbying efforts, an open discussion is required to address the measures needed in response to the risk from previous refinery dock expansions before more are sought. Alternatively, BP is considering piping the most greenhouse-gas-intensive oil derived from Alberta tar sands to avoid Magnuson's potential dock restrictions, making a mockery of their global warming PR campaign.

We appreciate Congress' continued defense of Magnuson so that the tradeoffs as to where our oil comes from, how it is transported and whether Oregon needs to build its own refinery can be discussed. By instituting new safety measures and raising these issues, our lawsuit upholds Magnuson's historic oil spill prevention legacy while leading the way for new efforts.

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**Fred Felleman of Seattle** (felleman@comcast.net) is Northwest director of Ocean Advocates, which filed the lawsuit over BP's expansion of the Cherry Point refinery dock, along with ReSources, North Cascades Audubon and Bellingham commercial fisherman Dan Crawford.



cial certificates issued under this subparagraph."

#### AGRICULTURAL HAND HARVEST LABORERS

Sec. 7. Section 13 (29 U.S.C. 213) is amended by adding at the end thereof the following new subsection:

"(1) (i) The minimum wage and overtime exemption provided by subsection (a) (6) of this section shall apply according to its terms to hand harvest laborers described in this subsection but an employer or group of employers may also apply to the Secretary for a waiver of the application of section 12 to the employment of individuals, who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece basis in the region in which such individuals would be employed for a period not to exceed eight weeks in any one calendar year. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

"(A) the crop to be harvested is one with a particularly short harvesting season and the application of section 12 would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

"(B) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

"(C) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

"(D) individuals age twelve and above are not available for such employment; and

"(E) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

"(2) Any waiver granted by the Secretary under paragraph (1) shall require that—

"(A) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

"(B) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

"(C) such individuals be employed under such waiver (i) for not more than thirteen weeks between June 1 and October 15 of any calendar year, and (ii) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection."

#### STUDENTS

Sec. 8. (a) Section 14(b) (4) (B) (29 U.S.C. 214(b) (4) (B)) is amended by striking "four" each time it appears and substituting "six".

(b) Section 14(b) is amended by adding at the end thereof the following new paragraph:

"(5) The Secretary may by regulation or order provide for an exemption from the limitations imposed under subsection (b) (4) (B) upon a showing by the employer that such an exemption would not have an adverse effect upon full-time employment."

#### HOTEL, MOTEL, AND RESTAURANT EMPLOYEES

Sec. 9. (a) Effective January 1, 1978, section 15(b) (8) (29 U.S.C. 215(b) (8)) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours".

(b) Effective January 1, 1979, such section is repealed.

#### DATA COLLECTION ON MINIMUM WAGE EARNERS

Sec. 10. (a) Section 11(a) (29 U.S.C. 211(a)) is amended by adding the following: "The Secretary of Labor shall conduct, or make arrangements to conduct, a study to

determine (i) the nature and extent of non-compliance with the provisions of this Act, and (ii) the social and economic characteristics of workers affected by the minimum wage and modifications thereto, to include, but not limited to, age, sex, race, family status, duration of employment with the same employer, and, to the extent practicable, information concerning the proportions of such workers who are heads of households, principal or secondary wage earners, and the family size and total family income of such workers."

#### RETAIL AND SERVICE ESTABLISHMENT COVERAGE

Sec. 11. (a) Section 3(a) (29 U.S.C. 203(a)) is amended by renumbering paragraphs (2), (3), (4), and (5) as (3), (4), (5), and (6), respectively, and inserting after paragraph (1) the following:

"(2) is comprised exclusively of one or more retail or service establishments, as defined in section 13(a) (3), and whose annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated) and beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than \$275,000 (exclusive of excise taxes at the retail level which are separately stated) and beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than \$325,000 (exclusive of excise taxes at the retail level which are separately stated), except that an employer who is required to pay the minimum wage on the day before the date of enactment of the Fair Labor Standards Amendments of 1977 and who would not be so required subsequent to enactment of the Fair Labor Standards Amendments of 1977 may not decrease the wages or increase the maximum hours required by this Act of any employee who received the minimum wage applicable during the time at which the employer was required to pay the minimum wage."

(b) Paragraph (1) of section 3(a) is amended by adding after the phrase "and beginning February 1, 1969, is an enterprise" the following: "other than a retail or service establishment described in paragraph (2)".

#### EFFECTIVE DATE

Sec. 12. (a) The amendment made by section 2 of this Act shall take effect on the first day of January 1978, except that on and after the date of enactment of this Act the Secretary of Labor shall take such administrative action as may be necessary.

(b) The amendments made by sections 4, 5, and 6 shall take effect on January 1, 1978.

Mr. JAVITS. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. CRANSTON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WILLIAMS. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of the Senate amendments to H.R. 3744.

The PRESIDING OFFICER (Mr. MATSUNAGA). Without objection, it is so ordered.

Mr. WILLIAMS. Mr. President, I move to indefinitely postpone consideration of S. 1871.

The PRESIDING OFFICER. Without objection, the motion is agreed to.

Mr. JAVITS. Mr. President, I will just take 30 seconds to compliment Senator WILLIAMS and to express my appreciation of the fine work on this matter.

Mr. RANDOLPH. May we have order, Mr. President?

The PRESIDING OFFICER. The Senate will be in order and the Senator will cease. The Senator will suspend for a moment. The Senate will be in order.

The Senator from New York.

Mr. JAVITS. To those on Senator WILLIAMS' staff and of my staff, John Rother and Don Zimmerman, the two top men on Labor.

I am grateful also for the patience of our colleagues who bore with us on some pretty hard things.

Mr. WILLIAMS. Mr. President, it is too late to fully express the feelings I have on this matter.

Certainly, the Senator from New York and I have had, again, a happy relationship. His staff has been helpful. My staff people, Steve Paradise and Darryl Anderson, have been invaluable.

The Senator from West Virginia (Mr. RANDOLPH) has been a trooper in all respects, in all regards, on this bill.

Finally, the majority leader is to be thanked by all of us.

Mr. JAVITS. May I say that for both the majority and minority leaders who held up their hands when we needed it most.

I thank the members of the minority.

Mr. BAKER. Mr. President, only 15 seconds to say that I wish to extend my congratulations and appreciation to both Senator JAVITS, the manager on this side, and Senator WILLIAMS, the manager on the majority side, for a job well done.

Mr. ROBERT C. BYRD. Mr. President, I believe the Senate—indeed, the working people of this country—owes a large measure of appreciation to the dedicated managers of S. 1871, the minimum wage legislation, Senator WILLIAMS for the majority, and Senator JAVITS, the minority manager. They have exhibited the depth of their commitment to the working people of the Nation through their knowledge of complex issues in guiding this measure to its passage. I must also take a moment in praising the outstanding work in this field of my distinguished senior colleague from West Virginia, Senator RANDOLPH, who greatly assisted the managers of this bill.

I wish to express my appreciation also to Steve Paradise, Darryl Anderson, John Rother, and Don Zimmerman of the professional staff of the Human Resources Committee for their distinguished work on the bill.

#### THE MARINE MAMMAL PROTECTION AUTHORIZATION ACT

Mr. PACKWOOD. For the record, I would like to discuss with my distinguished colleague from the State of Washington the amendment he offered to S. 1522, the Marine Mammal Protection Authorization Act, which concerns a limitation on the expansion of crude oil terminals in Puget Sound and northern Washington State waters. My understanding is that the amendment was not intended to reduce the ability of the State of Oregon to receive petroleum products from Washington State refineries, either now or in the future, as Oregon's petroleum demands increase.

Mr. MAGNUSON. Exactly, and let me clarify the intent of that amendment for the Senator from Oregon. As you know,



be intent of the amendment is to restrict increased tanker traffic in the Puget Sound area. When the amendment was drafted, I took care to be sure that it did not unduly affect the State of Oregon. In fact, the amendment only applies to construction or alteration of dock facilities in the Puget Sound region, not to refineries as such. We both know that Oregon receives most of its supplies of refined petroleum from Washington refineries. This oil is transportation primarily via the Olympic pipeline through Portland. As Oregon's needs increase, there are several ways that Oregon would receive additional supplies from Washington, despite this amendment.

First, much of the oil refined in the State of Washington is shipped out of State for sale. In fact, none of the refineries are actually the top marketer in the State. Therefore, refined product, that is now exported from my State at the current level of crude oil imports at Washington refineries could be diverted to the Oregon market via the Olympic Pipeline, necessary.

Second, a new oil port at Kitimat, British Columbia, could be connected into Washington State to handle expanded refinery capacity or expanded needs in Oregon.

And finally, if Oregon wanted to receive increased supplies, it could also be accomplished by increasing tanker shipments as long as no alteration of dock facilities in Puget Sound is involved.

Mr. PACKWOOD. Thank you for that explanation. I would hope that if necessary you would assist my State in every way should problems arise as a result of this amendment.

Mr. MAGNUSON. I do not foresee any serious problems arising but will do whatever I can to help my distinguished colleague from Oregon and his State.

Mr. PACKWOOD. I thank the Senator for his remarks and pledge of support.

# DEPARTMENT OF DEFENSE SUPPLEMENTAL APPROPRIATION AUTHORIZATION ACT, 1978

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of S. 1863, which the clerk will state by title.

The legislative clerk read as follows: A bill (S. 1863) to authorize appropriations during the fiscal year 1978 for procurement of aircraft and missiles, and research, development, test, and evaluation for the Armed Forces, and for other purposes.

The Senate proceeded to consider the bill which had been reported from the committee on Armed Services with amendments as follows:

On page 1, beginning with line 3, insert the following:

That this Act may be cited as the "Department of Defense Supplemental Appropriation Authorization Act, 1978".

On page 2, at the beginning of line 15, insert "Sec. 201.":

On page 2, line 22, strike "\$333,000,000" and insert "\$263,470,000";

On page 2, line 23, strike "\$15,000,000" and insert "\$14,000,000";

On page 2, beginning with line 24, strike

So as to make the bill read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Department of Defense Supplemental Appropriation Authorization Act, 1978".

## TITLE I—PROCUREMENT

Sec. 101. In addition to the funds authorized to be appropriated under the "Department of Defense Appropriation Authorization Act, 1978" there are hereby authorized to be appropriated during fiscal year 1978, for the use of the Armed Forces of the United States for procurement of aircraft and missiles, and other weapons, as authorized by law, in amounts as follows:

### Aircraft

For Aircraft: for the Air Force, \$33,000,000.

### Missiles

For Missiles: for the Air Force, \$64,000,000.

## TITLE II—RESEARCH, DEVELOPMENT, AND EVALUATION

Sec. 201. In addition to the funds authorized to be appropriated under the "Department of Defense Appropriations Authorization Act, 1978" there are hereby authorized to be appropriated during the fiscal year 1978 for the use of the Armed Forces of the United States for research, development, test, and evaluation, as authorized by law, in amounts as follows:

For the Air Force, \$263,470,000.

For the Defense agencies, \$14,000,000.

Mr. STENNIS. Mr. President, this bill will be presented primarily by the Senator from New Hampshire (Mr. McIntyre) who has asked me to assist him in controlling the time.

Mr. President, I will yield briefly, but I would like to make a brief statement on the way the bill looks from here.

This is the followup authorization bill regarding prospective aircraft and missiles that come into the picture because of the B-1 matter and the action of President Carter in canceling it out. The B-1 itself is not in the bill. There is no direct vote on any money here concerning the B-1.

This has been very carefully gone over, worked over by the committee, and all the major wrinkles except one, I believe have been straightened out.

There could be a rollcall vote on that, but I still have hope we can straighten it out; and, of course, for final passage.

I will be very brief, just 2 or 3 minutes. Mr. President, may we have quiet to my right front, please?

The PRESIDING OFFICER. The Senate will be in order.

Several Senators addressed the Chair.

Mr. STENNIS. The Senator from Iowa asked me to yield to him for a unanimous-consent request.

Mr. CULVER. I thank the Senator for yielding.

Mr. President, I ask unanimous consent that Mr. Stevenson and Mr. Asplund of my staff be granted privilege of the floor during consideration of this bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STENNIS. Mr. President, I ask unanimous consent for Mr. Sullivan, Mr. Riedel, and Mr. Cohen.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STENNIS. Mr. President, I want to accommodate Senators. It will have to be brief, there are people waiting.

The PRESIDING OFFICER. May I inquire of the Senator from Mississippi to whom he is yielding now?

Mr. STENNIS. I yield to the Senator from Arizona.

Mr. GOLDWATER. Mr. President, I ask unanimous consent that Robert Old, Rhett Dawson, and Will Ball, be granted privilege of the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BARTLETT. Mr. President, I ask unanimous consent that Ron Lehman of my staff be granted privilege of the floor during this matter.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STENNIS. Mr. President, I will just take 2 or 3 minutes to refer to this bill. It is a highly important measure, Mr. President, because it relates directly to what we all know as the Triad, the third leg of our strategic forces. It has been affected, of course, by the decision of the President concerning the B-1. This additional authorization was submitted to us just before the August recess. Hearings were held partly during the recess by our subcommittee and have been completed since, of course.

We have very fine recommendations here that cover all the items. There is some disagreement about one item. There are some other colloquies here about some amendment.

But the Senator from New Hampshire, with his usual skill and completeness and very fine work, together with his fellow members of that subcommittee, have done their usual excellent job. I am going to ask him, for the committee, to make the opening presentation on this matter.

The prospect is that I think it will not be extended. We could finish this bill within an hour, but it might take more.

Mr. President, I yield to the Senator from New Hampshire.

Mr. McIntyre. I thank the Senator.

Mr. President, what is the time limitation on this particular bill?

The PRESIDING OFFICER. Three hours, equally divided.

Mr. McIntyre. And on the amendments?

The PRESIDING OFFICER. Thirty minutes on amendments.

Mr. STENNIS. I yield the Senator from New Hampshire 15 minutes.

The PRESIDING OFFICER. The Senator from New Hampshire is recognized for 15 minutes.

Mr. McIntyre. Mr. President, I certainly regret the lateness of the hour and the time of the week when we bring up this very important matter. I certainly will bear it in mind as we try to get through a brief explanation and try to deal with such amendments as may be offered or such colloquies as may be in order.

Mr. McIntyre. Mr. President, when the President decided to cancel the B-1, it had the following effects:

He asked Congress to delete \$1.434 billion in fiscal year 1978 B-1 procure-



**ENSR Consulting  
and Engineering**

14715 N. E. 95th St.  
Suite 200  
Redmond, WA 98052  
(206) 881-7700  
(206) 883-4473 (FAX)

May 29, 1992

Mr. Dick Berg  
Regulatory Functions, Corps of Engineers  
P. O. Box C-3755  
Seattle, WA 98124

Re: Corps of Engineers PN# 92-1-00435

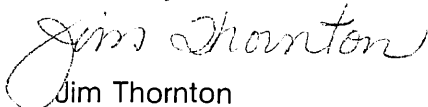
Dear Mr. Berg:

Enclosed is the final Environmental Report for the ARCO Products Company, Cherry Point Refinery, Dock Completion Project. This proposed project is in response to increased need for marine terminal space for outgoing petroleum products and future vapor recovery systems. The existing dock currently operates at 74 percent utilization. When the time required for scheduled and unscheduled maintenance and inspections is taken into account, the dock is essentially operating at full capacity. At the current high utilization rate, it has become increasingly necessary for incoming crude tankers to anchor offshore in anchorage zones waiting for available berthing space.

To alleviate this bottleneck, ARCO is proposing to complete the dock as it was originally permitted by the Corps of Engineers in June 1970. The original design was an 1800 foot pier with two docks connected to the pier by trestles. However, in 1970/71 only one dock and trestle was built.

ARCO has applied to the Corps of Engineers for a Section 10 permit (OYB 92-1-0435) to complete the originally proposed dock and trestle. The dock will be constructed in 70-90 feet of water so there is no dredging or filling associated with the construction. Public Notice (OYB92-1-00435) for this Section 10 permit should be reaching your desk soon. If you have any questions regarding the project, please call me at (206) 881-7700.

Sincerely,

  
Jim Thornton  
Senior Project Manager

JT/jb (JT2/L-COE.2)

Distribution: Joanne Stellini, U.S. Fish and Wildlife  
Russ McMillian, Department of Ecology  
John Malek, U.S. EPA  
Val Elliott, National Marine Fisheries Service  
Dave Jamison, Department of Natural Resources  
Brian Williams, Department of Fisheries

cc: Dennis Bays, ARCO

Load, Transport, and Erect Loading Arms and Mechanical Items	12
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Complete Piping and Electrical Tie-Ins (concurrent activity, no floating equipment required)	60
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## Operation

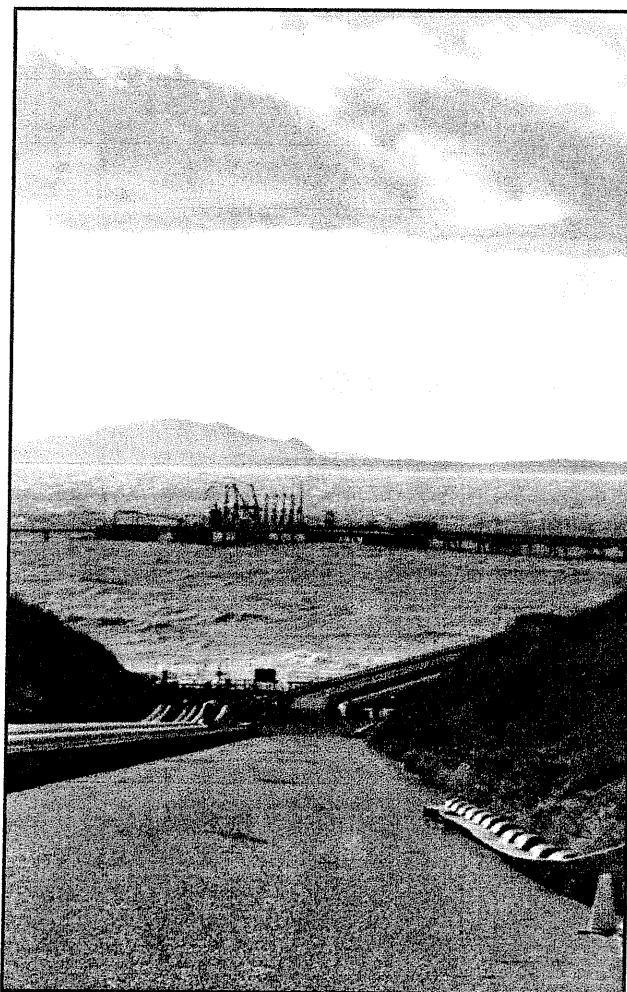
Upon completion of the pier in 2001, it will be used to transship petroleum products, as described previously. Table 1 provides information on the total number of vessels that visited the ARCO Marine Terminal in each year since 1973 and gives a projected total for the year 2002 (Payne 2000). It should be noted that traffic levels are temporarily at projected 2002 levels because of the recent Olympic Pipeline shutdown. Further, under normal operating conditions, the increase in vessel traffic (to 330 vessels per year) is expected to occur regardless of the Marine Terminal addition. In addition, Table 2 provides the number of vessels (ships and barges) that have visited the terminal in the herring spawning season (March, April, May, and June) for each year since 1994 and projects the numbers of vessels for 2002 (Payne 2000). These ships will be accompanied by tugs to assist in mooring and to escort the vessels where required by the State of Washington.

**Table 1. ARCO Cherry Point Vessel Traffic**

Year	Number of Vessels
1973	170
1974	137
1975	119
1976	109
1977	102
1978	114
1979	121
1980	116
1981	130
1982	165
1983	180
1984	233
1985	221
1986	252
1987	248
1988	239
1989	243
1990	220
1991	218
1992	234
1993	222
1994	237
1995	220
1996	274
1997	271
1998	249
1999	291
2002	330 estimated

# The OVERSEAS WASHINGTON

## PREVENTION BULLETIN 03-01



*View of dock showing Strait of Georgia.*

### OVERVIEW

On Friday, December 14, 2001, the T/V OVERSEAS WASHINGTON was discharging cargo at the south wing of the dock at a facility at Cherry Point, Washington. At about 0718, a combination of wind and wave action parted the two after-spring lines and the OVERSEAS WASHINGTON moved aft, damaging three loading arms. Because the vessel crew and the terminal operator recognized the deterioration of the weather, the loading arms had been drained and no significant amount of oil was spilled.

All times are approximate Pacific Standard time.

### PROBABLE CAUSE

The immediate cause of the breakaway incident was the failure of the after-spring mooring lines. Factors that likely contributed to the incident include:

- The wind and sea-state experienced at the dock caused the vessel to roll and surge putting additional stress on the mooring lines.
- Inadequate preparation aboard the ship for heavy weather conditions at the berth.
- Lack of adequate policies and procedures aboard the ship regarding monitoring weather conditions while at berth and actions to take in preparation for heavy weather.
- Loading arm disconnect procedures that did not account for the combined effect of winds and seas.

### VESSEL INFORMATION

The OVERSEAS WASHINGTON was a 90,515 deadweight ton, steam-powered tank ship built in 1978. The tanker was registered under the United States flag. Length overall was 272 meters.



# Vessel Transits through the Olympic Coast National Marine Sanctuary and Area to be Avoided (ATBA)

see map on reverse side  
During Calendar Year 2005

The International Maritime Organization (IMO), a specialized agency of the United Nations, has designated the Area to be Avoided (ATBA) off the coast of Washington to reduce the risk of marine casualties including oil spills, and the resulting environmental damage in the Olympic Coast National Marine Sanctuary (Sanctuary). Vessels advised to stay clear of this ATBA include all ships and barges carrying cargoes of oil or hazardous materials and all ships 1,600 gross tons and larger. The Olympic Coast National Marine Sanctuary, in cooperation with the U.S. and Canadian Coast Guards, monitors vessel compliance under this voluntary program. The Cooperative Vessel Traffic System (CVTS) collects data on all vessels entering and leaving the Strait of Juan de Fuca.

Vessel Type	Transits in and out of the Strait of Juan de Fuca recorded by the CVTS <sup>1</sup>	Transits passing through the Sanctuary <sup>2</sup>	Transits passing through the ATBA within the Sanctuary <sup>3</sup>	Estimated ATBA Compliance Rate <sup>4</sup>
	1	2	3	4
Container Ship	2,989	1,959	10	99.5%
Bulk Carriers	2,925	1,980	24	98.8%
Oil Tankers	898	636	5	99.2%
General Cargo ships	595	477	1	99.8%
Tugs with Oil Barges	582	570	100	82.5%
Vehicle Carriers	467	367	6	98.4%
Chemical Tankers	375	261	1	99.6%
Roll-on Roll-off Vessels(RORO)	362	222	3	98.6%
Cruise Ships	326	209	4	98.1%
Articulated Tank Barges	283	283	0	100.0%
Fishing vessels	194	114	26	77.2%
Heavy Load Carriers	33	28	0	100.0%
Refrigerated Ships	27	15	1	93.3%
Liquefied Petroleum Gas Carriers (LPG) and Liquified Natural Gas (LNG) Carriers	18	6	0	100.0%
Non-oil Tankers	16	10	0	100.0%
Cable Layers	14	11	0	100.0%
Ore-Bulk-Oil Vessels (OBO)	14	8	0	100.0%
Tugs with Chemical Barges	14	14	9	35.7%
<b>TOTALS</b>	<b>10,132</b>	<b>7,170</b>	<b>191</b>	<b>97.3%</b>

## (Footnotes)

<sup>1</sup> The vessel transits in this column were provided by the Cooperative Vessel Traffic System (CVTS) and include commercial vessels greater than 1600 gross tons, or tugs with oil or chemical barges.

<sup>2</sup> This column includes a subset of the CVTS vessel transits through the Sanctuary.

<sup>3</sup> This column includes a subset of the Sanctuary vessel transits that also go through the ATBA. These are vessels potentially not complying with the provisions of the ATBA. This is not known with certainty. For example, in some cases fishing processors do not transit the ATBA, but are engaged in operations within the ATBA and are therefore not subject to ATBA provisions. In other cases tank barges may be transiting while in ballast and not carrying petroleum products or chemicals.

<sup>4</sup> This column shows the percentage of vessels transiting through the Sanctuary that stayed out of the ATBA {Column 4 = 1 - (Column3/Column2)}. This is used as an estimate of compliance with ATBA provisions.

# 2004

# Marine Cargo Forecast

## Technical Report

## Final

*Prepared for*

Washington Public Ports Association  
and  
Washington State  
Department of Transportation

*Prepared by*

BST Associates  
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Bothell, WA 98011  
(425) 486-7722  
bstassoc@seanet.com

*In Conjunction With*

Paul Chilcote  
and  
Global Insight

May 19, 2004



## Skagit River System Cooperative

11426 Moorage Way • P.O. Box 368 LaConner, WA 98257-0368

Phone: 360-466-7228 • Fax: 360-466-4047 • [www.skagitcoop.org](http://www.skagitcoop.org)

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September 14, 2006

Randal Perry  
U.S. Army Corps of Engineers  
Regulatory Branch, Seattle District

### Electronic Comment Submission

Reference: Intent to Prepare an Environmental Impact Statement (EIS) to evaluate the impacts associated with a previously authorized pier extension in Strait of Georgia at Cherry Point, near Ferndale, Whatcom County, Washington.

Dear Mr. Perry:

Skagit River System Cooperative (SRSC) makes the following comments on behalf of the Swinomish Indian Tribal Community.

SRSC is responding to public notice of intent to prepare an Environmental Impact Statement (EIS) to evaluate the impacts associated with a previously authorized pier extension in Strait of Georgia at Cherry Point, near Ferndale, Whatcom County, Washington dated August 15, 2006 with comments due September 13, 2006. SRSC makes these comments to assist the U.S. Army Corps of Engineers (ACOE) in the development of an Environmental Assessments (EA) or Environmental Impact Statements (EIS) for the project. We may have additional comments when the EA or EIS is issued. As this is anticipated to be a long process SRSC may wish to be involved throughout the process including review and comment on study plans and preliminary reports as they are developed. Additionally the Swinomish Indian Tribal Community may wish to have a government to government consultation with the ACOE on this project.

The SRSC is concerned with increased vessel traffic associated with continued operation of the pier extension at Cherry Point. We are aware that the ACOE plans to analyze increased risk of oil spills due to increased vessel traffic. This analysis should include both vessel grounding with catastrophic oil spill and smaller spills associated with off-loading crude oil and fueling vessels. There should also be an analysis of effects of increased vessel traffic on wave patterns and drifts cells in the nearshore area. Impacts to forage fish spawning and incubation should be included in that analysis. Additionally increased vessel traffic is likely to conflict with tribal fisheries. An analysis of the impact on tribal fishermen and shellfishers ability to access traditional fishing grounds should be included in the EIS.

SRSC appreciates the cooperative relationship we have with the ACOE and would be happy to meet with you to discuss our concerns related to this project. We appreciate the opportunity to provide comments on this public notice.

If you have any questions feel free to email or call me at [swalsh@skagitcoop.org](mailto:swalsh@skagitcoop.org) or (360) 466-1512.

Sincerely,

Stan Walsh  
Fisheries Biologist  
Skagit River System Cooperative



September 14, 2006

Matthew Cohen  
[matthew.cohen@hellerehrman.com](mailto:matthew.cohen@hellerehrman.com)  
Direct +1.206.389.6024  
Direct Fax +1.206.515.8966

Ms. Olivia Romano  
U.S. Army Corps of Engineers  
Seattle Regulatory Branch  
P.O. Box 3755  
Seattle, WA 98124-3755

Re: Cherry Point Dock EIS

Dear Ms. Romano:

I am writing on behalf of the BP Cherry Point Refinery, to comment on the scope of the NEPA EIS that the Corps will prepare in response to the U.S. District Court remand order in *Ocean Advocates v. U.S. Corps of Engineers*. The Corps and BP share a commitment that the EIS must objectively analyze the environmental impacts of the “reasonably foreseeable increases in vessel traffic” resulting from the addition of the North Wing to the Cherry Point dock. In one key respect, however, this EIS differs from most that the Corps develops. BP currently holds a Section 10 permit for the North Wing. The Court of Appeals in *Ocean Advocates* did not vacate the permit, nor did it direct the Corps to do so. Instead, the Ninth Circuit ordered the district court to remand to the Corps to perform two tasks: “(1) prepare a full EIS considering the impact of reasonably foreseeable increases in vessel traffic, and (2) reevaluate the dock extension’s potential violation of the Magnuson Amendment.”<sup>1</sup>

In discussing the remedy for the Corps’ failure to evaluate the impacts of increased vessel traffic, the Ninth Circuit suggested that “the Corps may impose conditions on the operation of permitted terminals at any time ‘to satisfy legal requirements or otherwise to satisfy the public interest.’ 33 C.F.R. § 325.4(a); *see also id.* § 325.6(b).”<sup>2</sup> At the end of the opinion the Court of Appeals declared: “The district court should direct the Corps to revoke the permit or place conditions on the operation of the dock extension *if necessary to ensure compliance with the law.* 33 C.F.R. § 325.4(a); *see also id.* § 325.6(b).”<sup>3</sup>

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<sup>1</sup> 402 F.3d at 875.

<sup>2</sup> 402 F.3d at 871.

<sup>3</sup> 402 F.3d at 875 (emphasis added).

## **A. Project Purpose**

The Corps now faces the challenge of implementing the Ninth Circuit mandate within the existing matrix of NEPA procedures. A typical EIS in support of an application for a Corps permit begins with a “Purpose and Need” section, in which the Corps specifies the applicant’s purpose in applying for the permit.<sup>4</sup> In this case, the “proposed action” is NOT the issuance of a Section 10 permit to authorize construction of the North Wing. BP already holds a Section 10 permit. The purpose of the EIS, directed by the Ninth Circuit, is to determine whether conditions must be added, or the permit must be revoked, to satisfy the “public interest” standard. BP proposes to preserve the existing permit without additional restrictions. Alternatives analyzed in the EIS should consist of operating restrictions and mitigation measures, including “reasonable alternatives not within the jurisdiction of the lead agency.”<sup>5</sup> The Settlement Agreement between BP, Ocean Advocates and the Corps identifies three specific mitigation measures that should be evaluated in the oil spill risk section of the EIS: (1) use of Rosario Strait rather than the Huckleberry-Saddlebag traverse; (2) stationing a year-round rescue tug at Neah Bay; and (3) imposing a tug escort requirement for the western reaches of the Strait of Juan de Fuca.<sup>6</sup>

BP asks the Corps to avoid confusing the “purpose” of the EIS with BP’s purpose in constructing the North Wing. *BP does not seek a permit to build or modify the North Wing, nor does BP seek to amend the existing Section 10 permit.* The purpose of the EIS is to evaluate whether the permit must be reopened or revoked to satisfy the “public interest” standard in 33 CFR 320.4.<sup>7</sup> The “proposed action” should be defined as operation of the existing dock pursuant to the conditions in the existing Section 10 permit. Alternatives studied should include the three summarized in the preceding paragraph, and any other options identified through the scoping process.

## **B. NEPA and the Magnuson Amendment**

The Ninth Circuit remanded the Cherry Point Section 10 permit on two independent grounds: that the Corps should have prepared an EIS and that the Corps misconstrued the Magnuson Amendment. Both inquiries could result in amendments to, or even revocation of, the permit. For administrative efficiency reasons, the Corps may decide to issue a single decision, following completion of the EIS, that resolves the NEPA and Magnuson challenges to the permit. It is important to recognize, however, that there is little overlap between the factual issues

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<sup>4</sup> 40 CFR 1502.13.

<sup>5</sup> 40 CFR 1502.14.

<sup>6</sup> Settlement Agreement § II.I.

<sup>7</sup> The Ninth Circuit repeatedly cited § 325.4(a) as the source of the Corps’ authority to condition a Section 10 permit to protect the environment. That subsection authorizes District engineers to add conditions to permits to satisfy “the public interest requirement.” Subsection 320.4 defines the criteria the Corps considers in conducting a public interest review.

relevant to a Magnuson determination and the vessel traffic impacts that the Corps will study in the EIS.

The Magnuson Amendment is a flat prohibition on issuance by any federal agency of a permit to construct a dock or marine terminal 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.”<sup>8</sup>

The first task the Corps must perform in applying Magnuson to the North Wing project is to determine whether the North Wing increased “the volume of crude oil capable of being handled” at the Cherry Point Dock on October 18, 1977. If the answer to that question is “yes” the Corps would need to determine whether any increase in crude transfer capability was needed to handle oil to be refined for consumption in Washington.

BP believes that the Corps will not need to reach the second question. BP will show that the North Wing had zero impact on the crude transfer capability of the Cherry Point Dock.<sup>9</sup> BP will provide any data the Corps requires to document that fact. The Corps will not need to analyze whether any increase in crude delivery capability was needed to meet Washington demand growth.

We preview these points now only to show that the administrative record the Corps will assemble to resolve the Magnuson challenge will have no factual issues in common with the NEPA analysis of projected increases in vessel traffic. Whereas the Magnuson determination will compare the dock’s crude oil transfer capability before and after the North Wing, the NEPA analysis will examine projected increases in crude *and* product vessel traffic against a baseline of crude *and* product vessel traffic.<sup>10</sup> Whereas the baseline date for Magnuson is October 18, 1977, the NEPA review will measure projected increases against the capability of the dock immediately preceding the North Wing. The data the Corps will use to apply the Magnuson test will have little relevance to the NEPA analysis.

The Magnuson Amendment vests the Corps with no discretion to impose or waive vessel traffic limits in a Section 10 permit. Congress set a hard limit on the authority of any federal agency to permit a new or modified crude oil transfer marine terminal east of Port Angeles. Magnuson Amendment crude transfer limits are not a NEPA alternative or a mitigation measure.

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<sup>8</sup> 33 U.S.C. § 476(b).

<sup>9</sup> The Ninth Circuit spent pages agonizing over whether the Section 10 permit actually prevents BP from using the North Wing to deliver crude oil. On remand BP intends to simplify the Magnuson review by proposing that any permit revision include the stipulation that Judge Lasnik approved, prohibiting use of the North Wing to ship or deliver crude oil without a new or amended Section 10 permit from the Corps.

<sup>10</sup> The pre-North Wing dock handled both crude and product vessels.

Any limits imposed by the Magnuson Amendment apply regardless of their environmental impact. There are no alternatives to study, and no policy choices to make.

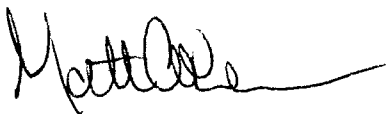
For this reason, and because projected vessel traffic increases are very different from increases in the crude transfer capability of the dock, BP believes that it would be improper for the Corps to analyze the applicability of the Magnuson Amendment in the EIS. The analysis would have no bearing on the Corps' decision. Instead, it would muddle the vessel traffic impact study in the EIS by forcing the document to analyze two different changes: increases in total vessel traffic over the pre-North Wing baseline, and increases in crude transfer capability over a 1977 baseline.

With one caveat, the Ninth Circuit treated the Magnuson and NEPA issues as entirely separate. The caveat is that the Court of Appeals directed the Corps to consider both Magnuson and the environmental impact of the vessel traffic increase in deciding whether to add conditions to the Section 10 permit.<sup>11</sup> The Corps should follow this approach. BP recommends that the Corps follow the procedures in 33 CFR 325.7 (modification, suspension or revocation of permits) to reevaluate the application of the Magnuson Amendment to the North Wing project.<sup>12</sup> For administrative efficiency the Corps should complete the EIS before evaluating the need to reopen the permit. If the Corps decides that the existing permit requires revision, it should include any new conditions the Corps deems necessary to satisfy the "public interest" standard, and any limits imposed to comply with the Magnuson Amendment.

### C. Conclusion

BP appreciates the Corps' consideration of these comments as you undertake a project that does not neatly fit the Seattle District's routine permit processing procedures. BP looks forward to supplying any information the Corps and its contractors require to analyze the vessel traffic impacts of the North Wing project.

Very truly yours,



Matthew Cohen

cc: Sue Leong  
Scott McCreery

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<sup>11</sup> 402 F.3d at 875.

<sup>12</sup> Although § 325.7 does not require any opportunity for public comment, BP recommends that the Corps solicit public comment on its proposed Magnuson determination as part of a proposal to reaffirm or revise the existing Section 10 permit.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, Washington 98101

RECEIVED  
SEP 20 2006  
REGULATORY

September 15, 2006

Reply To  
Attn Of: ETPA-088

Ref: 06-050-COE

Olivia Romano  
US Army Corps of Engineers  
Seattle Regulatory Branch  
Seattle, WA 98124-3755

Dear Ms. Romano:

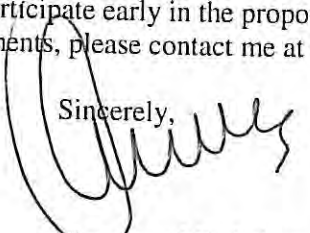
The U.S. Environmental Protection Agency (EPA) has reviewed the Army Corps of Engineers (the Corps) Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) to evaluate the impacts associated with a previously authorized pier extension in the **Strait of Georgia at Cherry Point, Whatcom County, WA**. Our review was conducted in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act. Section 309, independent of NEPA, specifically directs EPA to review and comment in writing on the environmental impacts associated with all major federal actions.

The NOI states that the Corps will complete an EIS on the impacts of a permitted pier extension, including vessel traffic study and risk of oil spills from potential increase in oil tanker traffic in Puget Sound and reevaluate the pier extension's potential violation of the Magnuson Amendment of the Marine Mammals Protection Act. The NOI also indicates that the EIS will analyze oil spill impacts on aquatic resources, fish and wildlife habitat functions, threatened and endangered species impacts, surface water quality, and cumulative impacts. After the EIS analysis, the Corps, in cooperation with the Coast Guard, will decide whether the issued permit that authorized the pier extension and operation will be revoked or if conditions will be imposed on the operation of the permitted pier extension to comply with the law and public interest.

EPA supports the Corps' efforts to take a hard look at the environmental consequences of the pier extension and operation. Our review of the EIS will consider not only the environmental effects, but also the adequacy of the proposed EIS in meeting the public disclosure requirements of NEPA. In the mean time, please find below our scoping comments concerning issues that we believe are significant and that should be considered in the proposed EIS analysis.

Thank you for the opportunity to participate early in the proposed EIS analysis. If you have questions or would like to discuss our comments, please contact me at (206) 553-6322.

Sincerely,

  
Theogene Mbabaliye  
NEPA Review Unit



## **EPA Scoping Comments On BP Cherry Point Pier Extension Project**

### **Range of Alternatives and Purpose and Need**

The EIS should include a clear statement of the underlying purpose and need for the pier extension and operation, including the broader public interest and need.

The EIS should also include a range of reasonable alternatives that would meet the stated purpose and need for the pier extension and that are responsive to the issues identified during the scoping process. This will ensure that the EIS provides the public and the decision-makers with information that sharply defines the issues and identifies a clear basis for choice among available options i.e., alternatives as required by NEPA. The Council on Environmental Quality recommends that all reasonable alternatives should be considered, even if some of them could be outside the capability of the applicant or the jurisdiction of the agency preparing the EIS for the proposed action. EPA supports actions that minimize environmental degradation.

### **Environmental effects**

Construction and operation of a pier extension for the purpose of facilitating transportation, production, and consumption oil and gas products may result in a variety of environmental effects, including potential oil spills, air and water pollution, degradation of marine life, alteration of natural habitats and food, and threats to public health and safety. As a result, the proposed EIS analysis should disclose what such effects would be at Cherry Point and list their mitigation measures. This would involve delineation and description of the affected environment, resources at risk, impacts to resources, and mitigation measures for the impacts.

### ***Marine habitat***

The NOI indicates that the proposed project could have impacts on marine resources and habitat. The EIS should therefore describe the current quality and capacity of habitat, its use by organisms, especially fish and other marine mammals, and attempt to identify their known migration routes. If marine habitats will be impacted as a result of the pier extension, operation, and marine traffic, then the EIS should disclose the impacts to marine habitat and mitigation measures that would be taken to minimize such impacts. As an example, oil spills in sensitive coastal environments such as the Strait of Georgia can result in oil-covered shores and wildlife, requiring significant resources for containment of oil plumes and complete cleanup and restoration of impacted resources and sites. Since impacts may not be limited to marine habitat, the EIS analysis should also consider offshore habitats. For example, marbled murrelets (small seabirds) use old-growth forests for nesting and depend on coastal marine areas for feeding.

Under the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA), as reauthorized and amended by the National Invasive Species Act of 1996 (NISA), the U.S. Coast Guard (USCG) and the State of Washington must prevent the introduction of aquatic non-indigenous species from ballast water. Because the uptake and discharge of ballast water is one of the largest pathways for the introduction and spread of aquatic invasive species, we recommend that the EIS analysis include information about current aquatic invasive species

infestations and measures to be taken to prevent introduction and spread of non-indigenous species in the Cherry Point marine habitat via ballast water.

### ***Water quality***

Preventing water quality degradation is one of EPA's primary concerns. Section 303(d) of the Clean Water Act (CWA) requires the state of Washington to identify impaired water bodies that currently or would potentially fail to meet state water quality standards, and to develop a Total Maximum Daily Load (TMDL) for each waterbody and pollutant on the 303(d) list of impaired waters. The EIS must disclose which waterbodies may be impacted by the pier extension and operation, the nature of the potential impacts, and the specific pollutants likely to impact those waters. It should also report those water bodies potentially affected by the pier extension that are listed on the State's current 303(d) list. As an example, the pier extension and associated activities' influence on water quality in the Strait of Georgia and adjacent streams should be assessed.

If Washington State Department of Ecology has developed a water quality restoration plan or Total Maximum Daily Load (TMDL) for 303(d) listed waters, EPA recommends that the Corps coordinate with Ecology as the TMDL is implemented. If a TMDL has not yet been established for a 303(d) waterbody, then the EIS should demonstrate that there will be no net degradation of water quality to the 303(3) listed waters. Antidegradation provisions of the Clean Water Act apply to those waterbodies where water quality standards are currently being met. This provision prohibits degrading water quality unless an analysis shows that important economic and social development necessitates degrading water quality. The EIS should indicate how the antidegradation provisions would be met.

If the pier extension and operation would impact wetland and riparian areas, the EIS should identify their locations, and demonstrate that any operations associated with the pier will not impact wetlands and riparian areas.

### **Endangered Species and Marine Mammal Protection Acts**

The pier extension and associated activities may impact endangered, threatened or candidate species listed under the Endangered Species Act (ESA), their habitats, as well as state sensitive species. The EIS analysis should therefore identify the endangered, threatened, and candidate species under ESA, and other sensitive species within the project and surrounding areas. The EIS should describe the critical habitat for the species; identify any impacts the pier and associated operational activities may have on the species and their critical habitats; and how the pier and its operations would be conducted consistent with the ESA requirements, including consultation with the U.S. Fish and Wildlife Service (FWS) and National Oceanographic Atmospheric Administration (NOAA). The Corps actions should promote the recovery of declining populations of species, such as the Puget Sound Chinook salmon and bull trout, orca whales, marbled murrelets, and herrings.

The Magnuson's Amendment to the Marine Mammal Protection Act (MMPA) of October 18, 1977 prohibits any activity that would result in any increase in the volume of crude oil capable of being handled at any facility within waters of Puget Sound beyond that to be refined for consumption in the state of Washington. We recognize that the Corps and the USCG

will analyze potential increases in marine traffic and supply of crude oil consistency with the Magnuson Amendment. EPA recommends that the Corps and the USCG work closely with the FWS and the National Marine Fisheries Service (NMFS) to ensure that the pier extension and operation comply with ESA and MMPA.

### **Cumulative and Indirect Impacts**

The proposed EIS analysis should assess impacts of the pier extension and operation over the entire area of impact. The analysis should consider the effects of the pier and associated operational activities when added to other past, present and reasonably foreseeable future projects in and outside the project area, including those by entities not affiliated with the Corps. Only by considering all actions together can one conclude what the impacts on environmental resources are likely to be.

Because the project area may be intertwined with a mix of other private, state, and federally owned areas, the EIS should assess cumulative impacts across jurisdictions to disclose the sum of individual effects of all projects on local environment. Cumulative effects analysis should also consider appropriate mitigation strategies to minimize adverse and to enhance beneficial cumulative effects. Monitoring and evaluation of the mitigation strategies' effectiveness would also be an important component of the proposed action, especially if data obtained from such monitoring can be used to modify, for example, vessel traffic management and to reduce risks of oil spills and associated impacts to Cherry Point marine ecosystem.

EPA has issued guidance on how we are to provide comments on the assessment of cumulative impacts, *Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, which can be found on EPA web site at: [www.epa.gov/compliance/resources/nepa.html](http://www.epa.gov/compliance/resources/nepa.html). The guidance states that in order to assess the adequacy of the cumulative impacts assessment, five key areas should be considered. EPA tries to assess whether the cumulative effects' analysis:

1. Identifies resources if any, that are being cumulatively impacted;
2. Determines the appropriate geographic (within natural ecological boundaries) area and the time period over which the effects have occurred and will occur;
3. Looks at all past, present, and reasonably foreseeable future actions that have affected, are affecting, or would affect resources of concern;
4. Describes a benchmark or baseline;
5. Includes scientifically defensible threshold levels.

### **Public Participation and Environmental Justice**

The proposed EIS analysis should include potential impacts on low income or people of color communities. The project evaluation should consider how to meet environmental justice requirements consistent with Executive Order (EO) 12898 (*Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*). The EIS process should also be used as an opportunity to engage with the public in dialogue about management of oil and gas production facilities and their impact on local environment. Community acceptance for such projects may be easier if there are shared opportunities, such as local employment, education, economic, and other benefits.



## Consultation with Tribes

If the pier extension and operation would have impact on historical or traditional cultural places of importance to tribes in the area, then the EIS should include identification of historic resources, and assurance that the tribes' treaty rights and privileges have been addressed appropriately. Consultation with all affected tribal governments is stipulated in the Executive Order (EO) 13175 (*Consultation and Coordination with Indian Tribal Governments*). This order states that the U.S. Government will continue "to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights."

Consistent with the July 28, 1999 memorandum from the Council on Environmental Quality (CEQ) to Heads of Federal Agencies, EPA urges the Corps to involve affected tribes in the pier extension and operation project implementation. The EIS document should include the process used to consult with tribes and outcomes of such consultations.

## Monitoring

We support project strategies that include monitoring, which is a necessary and crucial element in identifying and understanding the consequences of actions. The pier extension and operation should include an effectiveness monitoring plan. This plan is important because it would generate more data on vessel traffic, risks of accidental collision and oil spills in the Strait of Georgia waterway, and subsequent environmental effects.

## Additional resources:

Canter, L. W., and Kamath, J. (1995). Questionnaire checklist for cumulative impacts. *Environmental Impact Assessment Review*, 15(4): 311-339. Online: <http://www.sciencedirect.com/science/journal/01959255>

Council on Environmental Quality (CEQ). (1997). Considering cumulative effects under NEPA. Online: <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm>.

National Research Council (2003). Cumulative effects of oil and gas activities on Alaska's North Slope. Online: <http://darwin.nap.edu/books/0309087376/html/R1.html>

**Romano, Olivia H NWS**

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**From:** Wendy Steffensen [waters@re-sources.org]  
**Sent:** Friday, September 15, 2006 2:48 PM  
**To:** Romano, Olivia H NWS; Sue Joerger  
**Subject:** comments on BP Cherry Point marine pier extension  
**Attachments:** letter\_BP case\_scoping\_091506.doc

Comments on the BP Cherry Point marine pier extension are attached and pasted in.  
Thank you for your consideration of these.

Wendy Steffensen  
North Sound Baykeeper  
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Wendy. Steffensen, North Sound Baykeeper  
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suejoerger@pugetsoundkeeper.org

Olivia Romano  
U.S. Army Corps of Engineers (USACOE)  
Seattle District Regulatory Branch  
P.O. Box 3755  
Seattle, WA 98124-3755

Submitted by e-mail to:  
[Olivia.h.romano@usace.army.mil](mailto:Olivia.h.romano@usace.army.mil)

RE: BP Cherry Point Marine Pier Extension Project EIS

September 15, 2006

Dear Ms. Romano:

As the North Sound Baykeeper with RE Sources for Sustainable Communities and the Puget Soundkeeper of Puget Soundkeeper Alliance, the subject of the Cherry Point dock and its potential

9/28/2006

impacts to the environment is a subject of great import. Indeed, RE Sources was one of the litigants to join with Ocean Advocates in the lawsuit responsible for bringing about this EIS.

As Keepers in the Puget Sound region, our job is to advocate for and to maintain clean water in Puget Sound. Please accept these comments on the scope of the upcoming EIS, in that spirit. We hope that our comments will be incorporated as fully as possible. It is our understanding that you will evaluate the substantive issues in the lawsuit and the settlement, including making a determination on compliance with the Magnuson Amendment, as a matter of duty; thus, we have not commented specifically on items already outlined in the settlement. Should you have any questions, please do not hesitate to call.

Wendy S. Steffensen, North Sound Baykeeper  
RE Sources for Sustainable Communities

Sue Joerger, Puget Soundkeeper  
Puget Soundkeeper Alliance

1) Restatement of items discussed at the hearing in Anacortes on September 7, 2006.

In addition to the items outlined on the Powerpoint slide show presented by the USACOE for inclusion in the EIS, several other items were also discussed. I include them here to reiterate their importance and to ensure that they are included as part of the scope of the EIS.

a) Determination of the impacts of the pier extension, additional traffic, and increased risk of an oil spill on endangered and threatened animals, as well as species of concern such as herring and eelgrass. Mitigation for the above impacts should also be proposed. Whatcom County species of concern can be found in the latest version of the Critical Areas Ordinance and Shoreline Management Program.

b) Determination of the impact and risk of increased ballast water brought into the Cherry Point area. This should include a mitigation plan for management of species and a requirement for monitoring ballast water discharged at the BP Cherry Point dock to verify that there has or has not been an open-water ballast exchange.

c) Evaluation of the risk of a collision, grounding, etc, when tankers preferentially use Guemes Channel, instead of the Huckleberry- Saddlebag Traverse. The sensitivity of the location of the oil spill and the fact that the Huckleberry-Saddlebag Traverse hosts a crabbing ground off of Vendovi Island, should be taken into account in this analysis. Additionally, there should be an evaluation of formally designating the Huckleberry- Saddlebag Traverse a Special Navigational Area, as is Guemes Channel.

d) Evaluation of the impact of human error and negligence on the risk of a collision, grounding, etc. Human errors should include, but not be limited to the following: language deficiency, inattentiveness, sleep deprivation, drug and alcohol use, and lack of knowledge. The possible upward or downward rate of human error occurrence should also be evaluated, in light of our knowledge of socioeconomic pressures.

2) Incorporation of relevant items from the 1997 settlement agreement between Pacific International Terminals (PIT) and Washington Environmental Council regarding the appeal of Whatcom County major development permit (MDP 92-2003) and shoreline substantial development permit (92-0020), as heard before the Washington State Shorelines Hearings Board (SHB 97-22 and 97-23). These include, but are not limited to the following:

a) Determine the shading impacts from the dock expansion. Propose a mitigation plan to replace the eelgrass/ or macroalgae that may have been displaced, as well as any functions that have been lost.

b) Evaluate the new trestle/ wharf structure and operation of the dock on Cherry Point herring nearshore movement, schooling and spawning behavior. Propose a mitigation plan to account for any disruption in the behavior of the Cherry Point herring.

c) Evaluate the contribution of the dock extension to any interference on littoral drift or wave dampening on the Cherry Point reach. This work should be combined with work already done on this subject, much of it done by PIT. Propose a mitigation plan to account for any interference on littoral

drift and wave dampening caused by the new dock extension.

3) The impact of increased vessel traffic should be evaluated in terms of increased impacts to air and water quality, and to the health of biologic organisms in the Cherry Point area, as well as other areas where traffic will be significantly increased and/or the ecosystem is sensitive. Mitigation measures for the increased vessel traffic should be proposed.

**Romano, Olivia H NWS**

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**From:** johnb@ecosystemsfirst.com  
**Sent:** Friday, September 15, 2006 11:12 AM  
**To:** Romano, Olivia H NWS  
**Importance:** High  
**Attachments:** bp\_scoping\_draft.doc; Cherry Pt Herring Population.pdf; ecofirstcard copy.jpg

Dear Mrs. Romano,

Please include the enclosed attachments for the Scoping Notice that applies the the BP Pier wing extension.

Thank you for taking these comments.

John F. Boettner  
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website: [www.ecosystemsfirst.com](http://www.ecosystemsfirst.com)  
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John Boettner  
Ecosystems First LLC  
9039 Fremont Ave N.  
Seattle, WA 98103

Sept 13, 2006

Mrs. Olivia Romano  
U.S. Army Corps of Engineers  
Seattle Regulatory Branch  
4735 E. Marginal Way South  
Seattle, Washington 98134

**Re: Scoping Notice - Environmental Impact Statement To Evaluate the Impacts Associated With a Previously Authorized Pier Extension in Strait of Georgia at Cherry Point, Near Ferndale, Whatcom County, Washington**

Thank you for the allowing the opportunity to comment on the Scoping Notice for the BP Refinery pier extension.

Since Ocean Advocates has generously agreed to dismiss suggestions to demolish the facility and allow uninterrupted facility operation, we assume these concessions were granted in exchange for equitable compensation at a later time.

#### **New Developments in Interim Period**

It is assumed the EIS will still be conducted according to the rules of mitigation sequencing (with the above noted exception) attempting to adhere to efforts to avoid, minimize, and mitigate this project as though it were a new project application. As a DNR Environmental Specialist involved with the original negotiations for this project, I hope we will be able to address environmental issues more comprehensively than before, especially since major developments that have occurred.

In order to avoid, minimize, or mitigate impacts to the Cherry Pt aquatic ecosystem, environmental sequencing should dictate that we consider the prolonged chronically depressed condition of the Cherry Pt herring stock, especially by adhering to monitoring the more sensitive phases of the herring life cycle, and responding proactively to contribute to ecosystem and resource recovery. It is one thing to maintain criteria that will pass standards conforming to a Corps permit, but another to address details that are potentially affecting conditions essential to ecosystem function, not to mention herring behavior, migration, spawning habitat utilization, etc.

Given we are conducting this EIS process under a new set of environmental circumstances (i.e., the ESA listings of salmon, bull trout, orca whale, a decade of herring returns that demonstrate lack of improvement in the depressed Cherry Pt herring population, etc.), adaptive management is required. In addition, recent BP facility environmental incidents have disclosed a dismal record of environmental stewardship, indicating that some accountability has to be included in the overall process, and compensate for a complete lack of foresight with regard to facility maintenance. This disregard for proactive policy pertinent to incident prevention needs to be comprehensively addressed, otherwise we will have yet another ticking environmental time bomb.

#### **Historic Record**

As a participant in the SLERA, an evaluation of the literature was performed that did not adequately address baseline habitat conditions prior to construction of the BP Refinery facilities, this effort needs to be performed in earnest; specifically we need to know the characteristics of the unmodified shoreline prior to construction, and to the greatest extent achievable the geographic range of marine vegetation types prior to



development. We also need to superimpose a timeline with a schedule of construction events over time (i.e., dredging activity, pier modifications, outfall construction, out discharge incremental adjustments, etc.)

### **Homeland Security**

In this post 9/11 era, we hope that adequate measures have been put in place to address the potential for terrorists taking command of one of these vessels and weaponizing it.

### **The Cherry Pt Ecosystem**

Cherry Pt is a landscape asset of intrinsic value on several scales, with deepwater access it has utility for industry, and as one of the more complex and unique aquatic environments of Puget Sound; not only does Cherry Pt provide benefits to citizens of the state in natural aesthetic qualities, but as an extension of the Frazer River delta it offers value added multi-species fishery opportunities, and passive consumption opportunities for interacting with a spectrum of wildlife from waterfowl to whales.

### **Cherry Pt Herring**

Cherry Pt Pacific herring are unique for two reasons; they are a marine forage fish that elicit a distinctly geo-specific homing instinct, and they have a reproductive cycle that occurs later than any other Puget Sound herring stock. A decline in Cherry Pt herring alarmed managers because at one time it was heralded as the largest herring population inside Washington State waters, but in recent years has experienced some minimal recovery, but the overall population remains so low that other chronic effects have to be considered. Where Cherry Pt herring population once tallied 15,000 short tons, in 2006 this population struggled to recover to a reach a decade long peak of slightly over 2200 tons.

Since the discovery of the Cherry Pt herring population, the range of documented spawning grounds for Cherry Pt herring has diminished considerably EVS Environment Consultants, Inc. (1999). Historically, Cherry Pt herring utilized nearshore marine vegetation starting beyond Pt Roberts at the Canadian border, then spawn activity extended south as far as Lummi Island in Hale Passage and Pt Francis into Bellingham Bay; in recent years, spawning has been limited mostly to Birch Pt, into Birch Bay, and the geographic vicinity of industry.

In addition, since the crash of the Cherry Pt herring population, there has been unprecedented scientific investigation of this herring resource; however, we scarcely understand the physical and chemical dynamics taking place in this aquatic ecosystem, much less the ability of the carrying capacity of this aquatic landscape to accommodate industry and sustainable resources together.

### **Cherry Pt Studies**

Due to the intense development interest, and bio/ecological importance of this herring stock/site, Cherry Pt herring have been the subject of some of the most intense research of any herring population in Washington State if not the nation. The Cherry Pt research provides detailed scientific information; however, past inconsistencies in this work have resulted in scientific products that provide very little usefulness to managers or regulators, and even less protections for habitat or resources. Never the less, continuing development and creative employment of environmental protections test natural thresholds that support resources, and usually with no regard for uncertainty. It is vital to the Cherry Pt ecosystem that some continuity is built into scientific monitoring efforts, a system that provides a solid foundation that can gradually be built upon, but with an overlapping system to provide some element of comparison.

In past years, a number of studies have been conducted using *in situ* herring egg bioassay, and *in situ* caged mussels; these studies attempted to assess the uptake of polyaromatic hydrocarbons (PAHs) in tandem with measuring biological effects to herring embryos from anthropogenic sources. While the studies only represent a pilot effort from 1998 to 2000 Applied Biomonitoring and Boettner, J.F. (2000), they addressed (both natural and anthropogenic) cumulative impacts on an aquatic landscape scale, and showed usefulness as monitoring tools; in addition, these scientific methods provided a more realistic reflection of carrying capacity. These studies offered a scientific system of checks and balances, not to mention a means of evaluation for characterizing and monitoring ambient water quality conditions onsite. However, the temporal limitations of this scientific effort, and lack of consistency between different methodologies have limited the rendered these efforts largely inconsequential.



An example of monitoring studies that could be applied to Cherry Pt herring would be to continue the herring spawn collection performed during 2000. The 2000 studies involved collecting herring spawn and incubating them in a laboratory until hatching, then weight measurements found that not only did Cherry Pt population have a smaller weight at hatch compared to years prior to 2000, but they were also smaller than neighboring populations of Puget Sound herring Boettner (2001); this method seemed a possible means for monitoring the further decline (or recovery) of Cherry Pt herring. Other studies performed for WDNB by Applied Biomonitoring and Boettner, J.F. (2000) were conducted during the deployment of the caged mussels included up to two temperature probes per cage, the probes provided an analysis of *in situ* temperature that reflected natural and anthropogenic factors affecting herring embryos on the spawning grounds. In 1998, Applied Biomonitoring and Boettner, J.F. 2000 observed peak temperatures of 12.8°C during the Kocan, R. M., P. Hershberger, and T. Mehl. (1998) herring embryo cassette deployment; this high temperature could have contributed to a prevalence of herring embryo mortality and abnormalities observed that year (as opposed to other systemic population problems suggested in Hose, J.E. Phd. (1999)). In the past, monitoring arrays of temperature probes placed near outfalls and on the spawning grounds have been discussed by stakeholders but never implemented.

#### **Monitoring Light and Noise Pollution**

Even though light and noise pollution were considered factors that could adversely affect natural migratory behavior of herring and other migratory aquatic species, no project monitoring (or implementation of BMPs) has been conducted on either light or noise as it applies to Cherry Pt resources.

#### **Dispersants**

After having attended a meeting at the Dept of Ecology several months ago on the subject of dispersants to clean up oil spills, it was evident that there was a real desire on the part of regulatory entities to employ the use of dispersants to control oil spills. It is becoming obvious that regulatory agencies are being influenced by the oil industry who advocates for the use of dispersants, partly because it helps to reduce the amount of oil that hits nearshore habitat (reducing the natural resources damages from a more complicated clean up method), and further reducing resources damages with an: "out of sight out of mind" approach with the "appearance" of an enhanced recovery. The truth is the use of dispersants invites another realm of uncertainty for the lack of information that applies to the fate and toxicity of the oil (plus dispersant material), especially in colder water environments (such as Washington State). There is enough concern about the "potential" use of dispersants that it should dictate a separate settlement agreement.

#### **Photo-toxicity and Micro-Surfacelayer Contamination**

Photo-activated PAHs can be a major source of mortality to herring, especially critical during their gestation period (when they are exposed to open water effluent mix as herring embryos on marine vegetation). In addition, no emphasis has been placed on microlayer contamination that also potentially affects herring eggs on vegetation exposed during tidal inundation. Photo-toxicity and microlayer contamination work in tandem. Monitoring photo-toxicity represents a potential risk of complete mortality to herring embryos.

Carls, M. G., S. D. Rice, and J. E. Hose. (1999) found that after the Exxon-Valdez Oil Spill that polyaromatic hydrocarbon (PAH) levels as low as 1 ppb have been found to elicit effects in hatch rates and abnormalities in herring embryos. These concerns should be addressed in spill prevention that should not only emphasize best management practices, but also be reflected in day-to-day operations.

#### **Temperature Inputs**

Although this is not an application for an NPDES Permit, since this Scoping Notice and being conducted under extenuating (after-the-fact) circumstances, it is not unrealistic to ask for data comparing the output of the effluent outfall discharge after the wing extension was installed (and actively used), compared to before its use.

By its physical nature alone, discharge effluent is generally warmer than ambient temperature, and most likely relatively fresh compared to a more saline (and more dense) marine environment; the more buoyant plume will rise towards surface where it intermingles with the Frazer River plume, then moves towards shore ENZR (1999) where it collects along the shoreline (coming in contact with herring offspring on

marine vegetation). Additionally, this plume flow has the potential to affect herring parent biomass migrating from deeper water offshore towards the nearshore to spawn. Further offshore, the vertical curtain of warmer freshwater has the potential to intercept Cherry Pt herring as they approach from deeper marine water; this exposure to changing freshwater and temperature gradients by sexually maturing herring could affect herring spawning behavior.

Mote (2005) tracked historical surface temperature at Race Rocks, B.C., in the Strait of Juan de Fuca as far back as the 1920s. Mote (2005) plotted average temperature over time, the temperature averaged 9°Celsius until 1970 before it started to rise to its current average of 10°Celsius (and the projection is still trending higher); this upward temperature trend coincides with declines that have been observed with Cherry Pt herring.

The additive nature of temperature inputs is an environmental concern, especially during periods of naturally occurring of high temperatures. The cumulative nature of permitted and unpermitted temperature inputs alone have never been fully characterized or understood, nor are there sufficient efforts to try to mitigate for these types of impacts.

It is also important to consider other potential sources of temperature input sources such as cooling water exchanged and discharged from vessels accessing the pier facilities.

## **Conclusion**

I am an individual with vested interest in this process for the following reasons:

- 30 years of service as an environmental scientist for Washington State, and participation in numerous activities to monitoring Cherry Pt herring spawning activity, hydroacoustic population monitoring, shoreline management, etc.
- Participation as an Environmental Specialist working for DNR in the Screening Level Ecological Risk Assessment (SLERA) conducted to debate the numerous environmental issues surrounding the BP wing extension project, and project manager for several DNR sponsored studies in 1998, 99, and 2000.
- My family has shoreline property at 11281 Blue Heron Beach Rd, in Bow, WA on Samish Bay. Our Samish Island property is one of many at risk to devastation from oil spills, either from oil refinery facilities at both Cherry Pt and Fidalgo Bay or the increasing number of vessels seeking access to these facilities. In addition, the Samish and Bellingham Bay area has been used as (what we assumed was emergency temporary moorings as an interim measure) subsequent to the Whatcom Creek Olympic Pipeline oil spill, but vessels continue to moor there even though the Olympic Pipeline is back in service.



This is a sunset viewed from our Samish Island residence (Lummi Island is to the right). Ever since the Olympic Pipeline disaster, this scene is now obstructed by one (or more) moored oil tankers about 85% of the time. This mooring activity is a concern to residents due to the increased potential for hazardous spill incidents, and the demonstrated methods for compensating parties who are victims to these incidents.

It is important to be comprehensive in our approach to permitting future industrial activity to take place in the Cherry Pt aquatic ecosystem, it is essential chronically affected resources such as Cherry Pt herring are given consideration prior to every decision made by stakeholders and managers in control of effluent and facilities management.

As we speak, regulators continue the process of reviewing additional requests for aquatic development at Cherry Pt without considering the implications of cumulative effects and resource consequences. Scientists and managers working on the aquatic ecosystem at Cherry Pt continue to struggle; they remain incapable of characterizing what scale of adverse impacts can be accommodated, and what parameters are essential to sustain an area that represents a remnant of Puget Sound pristine environments.

As a scientist who dedicated a significant portion of his 30-year career to observing Puget Sound herring through hydroacoustic surveys, spawning ground surveys, midwater and surface trawl effort, etc., I have become concerned about what I consider atypical schooling and spawning (i.e., spawning in south Birch Bay) behavior, primarily because I cannot agree with the assumption that herring will spawn anywhere.

## **Monitoring**

This EIS process is an opportunity to address monitoring issues comprehensive basis, adapting the monitoring effort to protect the chronically stressed herring resource, including species of salmon, trout,

and whales listed under the Endangered Species Act (ESA), this effort is being conducted to request the following action be taken:

1. Initiate plans to address water quality on a landscape scale to address receiving water health, including monitoring of collective endpoints of water quality impacts.
2. Continue *in situ* studies as described including new developments in technology, if new technology is implemented, to minimize data inconsistencies and confusing endpoints, a process of seamless integration of the studies needs to be integrated.
3. Increase scrutiny of input of temperature, including retrofitting enhancements/improvements in water quality treatment, avoid, minimize, and mitigate where appropriate, etc.

The Cherry Pt herring resource is so important to me that I am willing to make myself available to help provide scientific advice to construct a comprehensive monitoring plan along with contingencies. Please see my enclosed business card and contact information to help with future monitoring endeavors. I've also included a pdf file of a chart I designed from Cherry Pt population data provided by WDFW. The chart includes total population each year broken down by year class contribution per year.

Thanks again for offering this opportunity to comment.

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10





Tons at Age										
	2	3	4	5	6	7	8	GE 9	SUM	SPAWNER
1973	15	765	5864	4649	2880	645	90	0	14908	14998
1974	42	1690	2430	4761	3261	1466	251	28	13949	13963
1975	10	1954	1003	1923	3039	1819	538	52	10337	10337
1976	379	794	2854	1587	2132	2653	1137	308	11844	11844
1976	995	2653	900	1504	1137	1717	1777	1161	11844	11844
1978	77	4521	1920	878	944	636	834	1174	10984	10973
1979	269	976	3983	1872	747	996	438	687	9967	9957
1980	3209	690	793	1847	1549	494	345	308	9236	9329
1981	448	2631	740	647	1188	348	87	131	6220	6219
1982	1261	1122	1747	614	299	230	64	0	5337	5342
1983	1846	1580	1451	2185	597	161	202	40	8063	8063
1984	1664	779	926	1151	985	242	71	77	5895	5901
1985	1659	2385	1020	271	207	150	40	29	5760	5760
1986	2393	1718	754	414	250	74	51	11	5665	5671
1987	814	1287	522	199	90	37	22	37	3108	3108
1988	1089	1793	1014	385	111	35	0	4	4432	4428
1989	2086	809	745	348	12	8	0	0	4007	4003
1990	1864	1769	450	605	265	25	20	0	4998	4998
1991	754	1766	1151	499	398	46	14	0	4629	4624
1992	1527	850	1119	349	88	60	8	0	4001	4009
1993	3475	626	299	240	171	69	10	0	4889	4894
1994	4876	873	304	133	114	19	6	0	6324	6324
1995	1519	1942	320	99	189	33	4	0	4105	4105
1996	573	1111	1083	204	53	68	6	0	3098	3095
1997	236	630	595	82	33	0	0	0	1576	1574
1998	841	205	196	59	21	0	0	0	1322	1322
1999	267	884	82	29	4	0	0	0	1265	1266
2000	370	249	185	5	0	0	0	0	807	808
2001	374	565	247	56	0	0	0	0	1241	1241
2002	646	430	174	37	43	0	0	0	1330	1330
2003	836	596	122	42	13	0	0	0	1611	1611
2004	23	389	740	405	101	54	23	0	1734	1734
2005	267	1522	169	36	16	0	0	0	2010	2010





October 13, 2006

Ms. Olivia Romano  
U.S Army Corps of Engineers  
Seattle District Regulatory Branch  
P.O. Box 3755  
Seattle, WA 98124-3755

Re: EIS Scoping Comments for BP Dock Expansion at Cherry Point

Dear Ms. Romano:

Pursuant to my email request on September 15, 2006 for an extension of time to submit written comments, Friends of the San Juans (Friends) submits the following comments for inclusion in the EIS scoping process for the British Petroleum (BP) North Wing Dock Expansion at Cherry Point (the "Expansion"). The mission of Friends is to protect the land, water, sea, and livability of the San Juan Islands through science, education, law, and citizen action. For over 25 years, Friends has been the citizen-based organization applying science to improved stewardship of public and private lands through comprehensive land use planning and citizen involvement in the San Juan Islands.

**I. Friends' Interest in the BP Dock Expansion**

Friends has a direct interest in the Expansion for multiple reasons.

**A. Tanker traffic through Rosario and Haro Straits.** All tanker traffic traveling to and from BP's Cherry Point refinery passes through or near the waters of San Juan County, which include Rosario Strait and Haro Strait. Any increase in tanker traffic and its corresponding increased risk of oil spills and incidents directly impacts the waters, wildlife and shorelines that Friends has worked to protect, preserve and enhance for over 25 years.

**B. Pristine nature of the San Juan Islands ecosystem.** The San Juan Islands currently contribute a high degree of functioning and intact nearshore habitat to all types of marine mammals, seabirds, shorebirds, and other wildlife in the northern Puget Sound region. In order to maintain this critical food web, Friends is working to protect the priority nearshore habitats that benefit forage fish and the species who consume forage fish (salmon, rockfish, marine birds, and marine mammals). The Islands are a Marine Protected Area and are "shorelines of statewide significance." See RCW 90.58.030(e)(iii) (Shoreline Management Act of 1971).

C. Friends' Science-based Protection Work. Friends is using its nearshore assessment results to identify restoration and protection priorities and implement improvement projects, including marine riparian plantings, development of a soft shore restoration blueprint and identification of priority properties for acquisition or conservation easement. Concurrently, Friends has provided best available science on San Juan County's nearshore habitat to over 175 local, state, federal, tribal and non-governmental organization scientists and land managers. Friends has hosted nearshore science and policy workshops for staff and managers, and participated in numerous public planning processes to improve the management and protection of the County's shorelines. Friends played a key role in the development and review of the San Juan chapter of the Puget Sound Salmonid Recovery Plan (Shared Strategies 2005) as well as the County's Marine Stewardship Area.

In sum, Friends' science, law and policy work to protect, preserve and enhance the marine-rich environment of the San Juan Islands is second to none. Oil tanker traffic to and from the BP Cherry Point refinery passes through this marine-rich environment that increasingly shows signs of ecological decline and which Friends works to protect everyday. Any increase in oil tanker traffic and its resulting increased risk of oil spills is of great concern to Friends.<sup>1</sup> Accordingly, Friends' goal in submitting the following comments is to ensure adequate safeguards are considered, evaluated, and implemented throughout the EIS process to protect the precious resources on which we all depend for our livelihood, recreation, and well-being.

## II. Corps' Purpose for the EIS pursuant to the 9<sup>th</sup> Circuit Ruling

A. 9<sup>th</sup> Circuit Ruling that Corps Failed to take requisite "hard look." The 9<sup>th</sup> Circuit decision held that the Corps' 1995 permit decision finding no significant impact from the then-proposed Expansion failed "to provide any reason, let alone a convincing one, why the Corps refrained from preparing an EIS." See *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (C.A. W.A., amd. 2005). In addressing the Fish & Wildlife Service's concerns about tanker traffic raising the risk of an oil spill, the court found that the Corps' justification "cannot possibly qualify as a fully informed and well-reasoned basis for failing to give more careful attention to the potential for increased traffic. . . . A patently inaccurate factual contention can never support an agency's determination that a project will have "no significant impact" on the environment." 402 F.3d 866 The court further held that the "permit extension granted in 2000 proves equally deficient" because, again, "the Corps failed to provide *any* reason why an EIS was unnecessary." *Id.*

B. Corps' Purpose for the Expansion EIS. Friends is concerned that because the Expansion has already occurred, the EIS might turn into a *post hoc* rationalization to justify the Corps' 1995 permitting decision and subsequent 2000 permit renewal allowing the Expansion rather than taking the requisite "hard look" at the environmental consequences of the Expansion.<sup>2</sup> In remanding the case to the district court, the 9<sup>th</sup> Circuit ordered a "full EIS

<sup>1</sup> See Seattle Post-Intelligencer series, "The Sound of Broken Promises - Part 5," October 12, 2006 ([www.seattlepi.nwsource.com](http://www.seattlepi.nwsource.com)).

<sup>2</sup> The Corps' NEPA review, in addition to the CEQ regulations in 40 C.F.R. 1500, utilizes the "public interest review" under 33 C.F.R. 320.4 for permit decisions and all substantive criteria therein, as well as NEPA EIS Scoping Comments for  
BP Dock Expansion at Cherry Point

considering the impact of the reasonably foreseeable increase in tanker traffic.” 402 F.3d at 876.

Because the 9<sup>th</sup> Circuit held that the Corps failed in its original duty to assess environmental consequences of the types of impacts and actions proposed by the Expansion to discern the actual, probable and reasonably foreseeable environmental harms that should have been avoided, minimized or mitigated prior to issuing the permits, the Corps must now fulfill that duty. That is, the Corps must perform a full environmental impact statement as if BP were applying for its Section 10 permit that includes a “public interest review” because this is precisely what the Corps failed to do before issuing the 1995 permit and its renewal.

The Corps’ regulatory “public interest review” “requires a careful weighing of all those factors which become relevant in each particular case.” 33 C.F.R. 320.4 (a)(1). The decision to authorize a proposal and conditions under which it may be allowed must balance and “reflect the national concern for both protection and utilization of important resources.” *See Id.*

*Safety* is a public interest review factor expressly listed for which individual and cumulative effects must be considered. *Id.* Human error and technology failures will continue to create risks to our common waters, and mandatory safety measures must be continually updated to reflect new information and technology.<sup>3</sup> The safety issues pertinent to the Corps’ consideration of BP’s operations at Cherry Point include whether BP has taken appropriate measures to ensure that the best available science and best management practices are fully incorporated into BP’s daily operational practices at Cherry Point. **Quite simply, is the way in which BP brings crude oil to its dock and transfers that oil and refined product to and from its oil tankers as safe as it can be?** The Corps has the burden, along with BP, to show that the public’s interest in the waters of Northern Puget Sound, which continue to show signs of ecological demise, are protected to the maximum extent possible.

The Corps’ regulations require that, in addition to the public interest review required in Section 320.4 (a), the Corps must have “considered and followed” other Federal, state and local requirements including NEPA, the Endangered Species Act, the Coastal Zone Management Act, as well as others.” 33 C.F.R. 320.4 (j)(4).<sup>4</sup> Thus, public interest review must be considered *in addition to* the Corps engaging in a full and fair discussion of the litany of probable environmental consequences and violations under all other applicable laws of the 1995 permit and 2000 permit renewal.

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Implementation Procedures for the Department of the Army found in 33 C.F.R. 325, Appendix B, and 33 C.F.R. 230, Appendix B.

<sup>3</sup> See Prince William Sound Citizens Regional Advisory Council, “An Assessment of the Role of Human Factors in Oil Spills from Vessels,” August, 2006 ([www.pwscrac.org](http://www.pwscrac.org)).

<sup>4</sup> Corps regulations Section 325.2 (a)(4), “Processing of applications,” states that the district engineer “will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation” required by NEPA. 33 C.F.R. 325.2 (a)(4). That section, however, supplements NEPA Implementation Procedures for the Regulatory Program found in 33 C.F.R. 325, Appendix B, which are more explicit. *See* 33 C.F.R. 325, Appendix B, Section 2.



The 9<sup>th</sup> Circuit ruling supports a broadly scoped EIS for the Cherry Point dock operations. The court noted that if, “for example, the Corps determined on remand that the operation of the dock may result in significant degradation of the environment, the Corps could impose restrictions on the operation of the dock or require other mitigating measures.” 402 F.3d at 871. It is of no significance that BP does not currently seek a permit to build or modify the North Wing or its existing Section 10 permit. The Corps, in complying with the 9<sup>th</sup> Circuit order to “revoke the permit or place conditions on the operation of the dock extension if necessary to ensure compliance with the law,” must start from the beginning and completely assess the extent to which the Expansion and all operations arising therefrom caused or may cause environmental degradation. If the Corps has the authority to completely revoke BP’s Section 10 permit, it follows then that the Corps must consider and evaluate the full spectrum of environmental consequences directly, indirectly and cumulatively caused by the issuance of the permit, its renewal and all of BP’s operations enabled under it.

### **III. NEPA standards applicable to the Expansion EIS**

A. NEPA’s Declaration of Policy & Purpose. Effective January 1, 1970, Congress declared a national policy “which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” See 42 U.S.C. 4321 (§101). Based on that declaration of purpose, Congress authorized and directed that, to the “fullest extent possible” the “policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.” See 42 U.S.C. 4332<sup>5</sup> (1) (§102). The provisions of the Act and of these regulations [Council on Environmental Quality regulations] must be read together as a whole in order to comply with the spirit and letter of the law. 40 C.F.R. 1500.3.<sup>5</sup>

B. EIS Components. In mandating that all agencies of the Federal Government prepare an environmental impact statement for major Federal actions significantly affecting the quality of the human environment, Congress required the EIS to consider the (i) the environmental impact of the proposed action, (ii) unavoidable adverse effects, (iii) alternatives, (iv) local short-term use versus long-term productivity, and (v) any irreversible and irretrievable commitment or resources involved in the proposed action should it be implemented. See 42 U.S.C. 4332 (2)(C).

Friends raises several factors that must be considered in this EIS given the sensitivity of this area to increased pollution. While this list is not exhaustive, these factors, their inter-relations and cumulative impacts must be part of the Corps’ analysis in deciding appropriate operational mitigation measures to ensure that the public interest and safety are properly prioritized. The following preliminary list of factors should be incorporated into the Corps’

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<sup>5</sup> Parts 1500 through 1508 of this title [40] provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969. 40 C.F.R. 1500.3.

discussion of the types of actions and impacts, with consideration to past, present and all reasonably foreseeable relationships between:

- 1) Causes of Impacts: tankers, other vessels, spilled oil, spilled gas, ballast water, air effluent from tankers, polluted runoff from increased refinery capacity, noise and light pollution, impact of dock construction on nearshore habitat and its ecosystem functions;
- 2) Recipients of Impacts: marine mammals, forage fish, eelgrass and kelp, endangered species, sea and shore birds, seawater, shore/nearshore, upland, groundwater, air;
- 3) Types of Vessels [multiple number of each at any given time]: oil tankers, large cargo vessels, military, ferries, recreational, fishing;
- 4) Safety Response Capabilities: tankers without any rescue tug within 30, 60, or 90 miles; tankers with a tug available within 30, 60, or 90 miles; tankers tethered to a tug;
- 5) Ecological Protection Layers: Endangered Species Act critical habitat for the Bald Eagle, Chinook salmon, Marbled Murrelet and Orca whale [proposed], Federal and State threatened species, WDFW priority species, WDFW priority habitats, State candidate species of concern, State species of concern, and local species of concern for Whatcom County, WDNR's Natural Areas Program, WDNR's Aquatic Reserve Program, Cherry Point Aquatic Reserve status, Pacific herring spawning grounds and holding area, Makah Indian Nation U&A fishing area and cultural resources, Lummi Indian Nation U&A fishing area and cultural resources, as well as other native tribal rights; and
- 6) Locations Impacted: Cherry Point, Boundary Pass, Haro Strait, Rosario Strait, Guemes Channel, Strait of Juan de Fuca east of Port Angeles, Strait of Juan de Fuca west of Port Angeles, Cape Flattery, outer Olympic Coast.

C. EIS Considerations: Actions, Impacts & Alternatives. The scope of an environmental impact statement "consists of the range of actions, alternatives, and impacts to be considered." 40 C.F.R. 1508.25.

1. Types of Actions. An "action" may be a "connected action," a "cumulative action," or a "similar action." See 40 C.F.R. 1508.25 (a)(1)(2) and (3), respectively.<sup>6</sup>

a. "Connected actions" are closely related and automatically trigger other actions which may require environmental impact statements; cannot or will not proceed unless other actions are taken previously or simultaneously; or are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. 1508.25 (a)(1)(i)(ii) and (iii).

- What specific actions does the Corps consider to be "connected actions" under this definition?

The connected actions to be assessed here include the BP refinery expansion, the pier addition and any other past, present or future actions that BP may take with regard to use or

<sup>6</sup> 33 C.F.R. 230.4, "Definitions" references 40 C.F.R. 1508. Thus Title 33, Chapter II – Corps of Engineers, Department of Army, Department of Defense – Part 230, Procedures for Implementing NEPA expressly defers to the CEQ definitions which are used herein.

expansion of this facility. If the Expansion allows BP to handle more crude, then more oil can be refined which discharges more effluent to the air, sea, land, groundwater.

- To what extent does the North Wing's sole handling of refined product facilitate the South Wing's handling of more crude oil, more frequent crude oil shipments or larger crude oil carrying tankers?
- How does this allow the refinery to expand production?
- Will the Corps review all NPDES permits issued to BP or its predecessor in interest for the Cherry Point facility since 1977 to determine the increase in refinery capacity due to increased tanker traffic?
- On what facts and information will the Corps rely to decide whether the North Wing will allow the South Wing to indirectly increase refinery capacity, and what environmental impact that increase could have on the area?

b. "Cumulative actions" are ones "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. 1508.25 (a)(2). What specific actions does the Corps consider to be "cumulative actions" under this definition?

The cumulative actions to be assessed here include all tanker traffic along the outer Coast, through the Strait of Juan de Fuca, through Haro and Rosario Straits in the San Juans Islands, and into the waters surrounding Cherry Point, as well as loading and unloading activities at the Cherry Point dock, and any increase thereof.

- Will the Corps evaluate the cumulative impact of the Corps' other permitting decisions with respect to other crude oil refining docks east of Port Angeles since 1977 to determine their cumulative impact?
- How will the Corps evaluate whether its past permitting decisions have exposed Cherry Point, the San Juan Islands, and other waters of the state to a greater than necessary risk to an oil spill?
- Will the Corps attempt to quantify the extent to which its 1995 permitting decision for Cherry Point was magnified by all other Corps permitting decisions allowing a) dredging of other refinery docks to allow larger vessels, b) additions to or expansions of existing docks, or c) increased tanker traffic?

c. "Similar actions" are ones which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluation their environmental consequences together, such as common timing or geography." 40 C.F.R. 1508.25 (a)(3). An agency should analyze these actions in the same impact statement when it is the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions. 40 C.F.R. 1508.25 (a)(3).

- What specific actions does the Corps consider to be "similar actions" under this definition?

The similar actions here include all permits and permit renewals issued with or without an EIS that are similar in nature to the BP permit and permit renewal.



2. Types of Impacts. The “impacts” to be considered may be “direct,” “indirect,” or “cumulative.” See 40 C.F.R. 1508.25 (c)(1)(2) and (3), respectively. The effects or impacts<sup>7</sup> of an action “includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. 40 C.F.R. 1508.8. *Any direct, indirect or cumulative impacts that are mentioned as part of the scoping process should be addressed in the EIS and if an impact is considered to be non-significant the reasoning and underlying methodology for that determination should be provided.*

- What are the direct, indirect and cumulative impacts from the connected, cumulative and similar actions?
- What does the Corps consider to be the direct, indirect and cumulative impacts to the ecological, aesthetic, historic, cultural, economic, social and public health that the Corps acknowledges as necessary to evaluate as part of a full and fair EIS?
- What are the direct, indirect and cumulative impacts to Pacific herring spawn populations and the multiple endangered species on their behavior and what mutations have been or could be caused from exposure to increased noise, light, traffic, effluent, ballast water, and from the disruption of two large oil tankers moored at each wing of the Cherry Point dock at the same time?

a. “Direct effects” are “caused by the action and occur at the same time and place.” 40 C.F.R. 1508.8(a).

b. “Indirect effects” are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. 1508.8(b).

c. “Cumulative impacts” on the environment are the “impacts which result from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. 1508.7.

- What are the spatial and temporal boundaries that the Corps will evaluate for cumulative impacts, and specifically for each resource impacted, under the EIS?
- Did other Corps permit decisions consider the Magnuson Amendment to the Marine Mammal Protection Act?
- How will the EIS assess and provide minimization or mitigation measures to ensure the safety and preservation of marine resources, as well as the quality of the air, seawater, groundwater, the shoreline and the nearshore?

<sup>7</sup> “Effects and impacts as used in these regulations are synonymous.” 40 C.F.R. 1508.8



All of the questions posed above should be specifically addressed in the EIS.

3. Alternatives and Environmental Consequences Considered. The primary purpose of the EIS is to “serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the on-going programs and actions of the Federal Government.” 40 C.F.R. 1502.1. To achieve this purpose, agencies shall prepare an EIS which shall, among other things, “state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.” 40 C.F.R. 1502.2.

Section 1502.14, “Alternatives including the proposed action,” forms “the heart” of the environmental impact statement. 40 C.F.R. 1502.14. The information and analysis presented in Section 1502.16, “Environmental consequences,” “forms the scientific and analytic basis for the comparisons under Section 1502.14” for the alternatives considered in the EIS. 40 C.F.R. 1502.16.<sup>8</sup> Pursuant to this Section, the Corps must evaluate possible conflicts between the proposed action and the objectives of Federal, regional, State, local and Indian tribe land use plans, policies and controls for the area concerned, the energy requirements and conservation potential of various alternatives and mitigation measures, the natural or depletable resource requirements and conservation potential of alternatives and mitigation measures, the historic and cultural resources, and the means to mitigate adverse environmental impacts.

The Expansion EIS should provide a detailed evaluation of how the Expansion utilizes local short-term uses of the Cherry Point area aquatic environment in relationship to how the Expansion maintains and enhances the long-term productivity of the marine-rich aquatic environment that has witnessed significant decline in health and production that past several years. This is particularly applicable to the Cherry Point herring stocks and the areas use as forage and feeding grounds for at least four (4) known Federally listed endangered species. The scope of the EIS should include a detailed analysis of all marine, biological, environmental [including pollution to air, water, land and from noise and increased tanker traffic], cultural, and historical resources which would be irreversibly or irretrievably committed by any of the proposed actions or alternatives. *See generally* 40 C.F.R. 1502.16 and 33 C.F.R. 325, Appendix B.

#### 4. Mitigation Measures

As noted above, the waters on which BP relies for shipping its crude oil and refined product are in dire straits. The Corps, in partnership with the Coast Guard, should evaluate whether BP's current transport and transfer protocols throughout Washington waters are adequate to ensure that BP does not contribute to the further decline of Puget Sound's health. Accordingly, it is incumbent upon the Corps and Coast Guard to seek voluntary implementation of mitigation measures for BP's practices now, and certainly prior to the final EIS implementation, which could be 3-4 years away.

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<sup>8</sup> See 33 C.F.R. 325, Appendix B, Subection 9.b.6., which expressly references 40 C.F.R. 1502.16.

Voluntary mitigation measures for the dual-dock operation could include:

- Tethering tankers to tugs through the San Juan Islands;
- Restricting transfers of crude and refined product to daylight hours only during herring spawn season;
- Hiring SCUBA divers to dive from shore to locate herring spawn holding area and to place temporary buoys delineating area of spawn holding area so that tanker traffic can avoid the area during spawn season;
- Utilizing non-dispersant technologies and clean-up methods for any level of oil or gasoline spill; and
- Pre-booming all transfers during spawning season.

Additionally, given the large scope of the EIS and its serious implications for the health of the marine environment at Cherry Point and beyond, it would be appropriate for the Corps' district engineer to require BP to post a bond in an amount sufficient to cover the large expense of potential mitigation measures. *See* 33 C.F.R. 325.4 (a)(3)(d).

### **III. Magnuson Amendment Compliance**

The full text of the Magnuson Amendment to the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) reads as follows:

#### **33 USC § 476. Restrictions on tanker traffic in Puget Sound and adjacent waters.**

(a) The Congress finds that—

- (1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;
- (2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and
- (3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

(b) 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.

The purpose of the Magnuson Amendment was to significantly lower the risk of an oil spill in the northern reaches of the Puget Sound and the San Juan Islands by limiting the amount of tanker traffic. The 9<sup>th</sup> Circuit holding acknowledged the oil spill risk, that “[i]ncreased tanker traffic elevates the risk of oil spills – an undeniable and patently apparent risk of harm to Puget Sound. An oil spill could destroy and disrupt ecosystems and kill or injure critical

numbers of threatened and endangered species that live, and thrive, in the Cherry Point Region.” 402 F.3d at 868.

Tanker traffic limits can be imposed through limits on berthing capacity at existing docks. The court again acknowledged this point by stating that “[i]f the alterations to the terminal authorized by the permit increased the potential berthing capacity for purposes of unloading crude oil, then the permit violated the Magnuson Amendment.” 402 F.3d at 874.

By definition, the use of the North Wing increases berthing capacity. Whereas the South Wing was previously receiving crude oil and loading refined product, the North Wing frees up the South Wing to potentially receive double the number of crude oil shipments. The Corps must assess the degree to which the Expansion violates the Magnuson Amendment as part of the EIS, and must specifically address the court’s question of “did the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude oil?” 402 F.3d at 875.

The Corps has distinct questions to answer in the EIS, in addition to those posed by the 9<sup>th</sup> Circuit, including:

- What was the state of the Cherry Point ecosystem at the time the Magnuson Amendment became effective on October 18, 1977?<sup>9</sup>
- What was the state of the ecosystem at all times the Corps has issued renewal permits for the BP Terminal and other refinery processing facilities?
- To what extent will (or has) the North Wing affect berthing capacity?
- By restricting the North Wing to loading refined product only, to what extent does that increase the crude handling capability of the South Wing (by freeing up the South Wing from loading refined product for transport/export and allowing the South Wing to increase the number of ships capable of off-loading crude, the berthing capacity at the South Wing is increased, as is the volume of crude oil capable of being handled at BP’s Cherry Point Terminal)?
- Will the Corps perform an annual review of BP’s safety record via the Marine Safety Information Service available to public with safety record, age of vessel, incidents, etc.?

It is worth noting that BP’s operations failure – the failure to abide by simple maintenance and upkeep duties on the Alaskan pipeline - has earned it a total lack of public trust in its company. Trust in BP is so lacking that its own shareholders filed a lawsuit against the company claiming negligent oversight of pipelines in the Prudhoe Bay oil field.<sup>10</sup> BP’s broken promises and failed duties resulted in Prudhoe pipeline leaks and the largest oil spill ever last winter – an estimated 201,000 gallons of oil spilled - onto the frozen tundra. The public and the Corps can no longer rely on BP’s promises and assurances – BP’s gross negligence has cost it any deference or trust that it previously may have enjoyed.

<sup>9</sup> See “2004 Washington State Herring Stock Status Report,” WDFW, p.45, May, 2005; The Washington Department of Fish & Wildlife began taking Cherry Point herring stock inventories in 1973.

<sup>10</sup> See “BP Operations Negligent, Shareholders’ Suit Claims,” Mary Pemberton, Anchorage Daily News, October 4, 2006 ([www.adn.com](http://www.adn.com) – search for “BP”).



If BP claims that no Magnuson Amendment violation is present then it has the heavy burden of proof to bring forth sufficient evidence to substantiate that claim. The Corps' original reliance on BP's specious claims and undocumented statements about the capabilities and purpose of the North Wing cost it a scathing ruling from the 9<sup>th</sup> Circuit about its permitting process. Thus, the Corps may not, throughout the EIS process, defer to any statement presented by BP that does not have solid supporting documentation, including all underlying assumptions, formulas, facts, data and methodologies.

#### **IV. Forage Fish Spawning Area**

Critical marine species and habitats in the region include pacific herring [plus spawning grounds], surf smelt [plus spawning grounds], salmonids [nursery, migratory, feeding habitats], bald eagles, peregrine falcon, orca whales and other marine mammals. See attached 2006 Whatcom County Critical Areas Ordinance map. Puget Sound marine ecosystem is "wasp-waisted" meaning that there are a small number of species that play a large role in converting energy and moving it up the food chain between plankton and larger species. Pacific herring and surf smelt play that role and utilize Cherry Point for spawning and feeding grounds. See also, attached NOAA's proposed critical habitat map for Orca whales (Cherry Point is part of "Summer Core" area for Orcas).

Pacific herring has played an historically important role in commercial fishing, recreational fishing, cultural and tribal traditions, and for a plethora of ecological species. The Cherry Point area serves as "core" area of spawn deposition for largest single herring spawning stock in Washington.

- i. Herring serves as 42% Pacific Cod diet;
- ii. 53% Halibut; 58% Chinook salmon [endangered] [area is part of critical habitat for Chinook – see attached NOAA Fisheries map]
- iii. 32% harbor seals; important to seabirds – especially juveniles

The Cherry Point Region is a feeding area for wide variety of migratory birds as herring spawn later than other stocks and provide unique feeding opportunity for many birds and marine mammals. There is currently no known way to rebuild a herring spawning ground. Spawning grounds are most vulnerable to human impacts – not fisheries in this case – because they rely on nearshore environments [lower intertidal and shallow subtidal on eelgrass and other submerged aquatic vegetation] – so it is essential to protect remaining spawning grounds.

Surf Smelt is susceptible to loss of shoreline vegetation because changes in beach microclimate reduce incubating egg survival rate. Shoreline armoring or modification on any kind beach structures can alter the accretion, erosion and transport of sediment through a system, and over time this changes the character of the beach, reducing quality and quantity of habitat available for spawn. On-beach structures such as ramps and driveways, directly cover and eliminate intertidal spawning habitat, and can also impact transport of sediment and change beach profile and substrate over time.

Friends has played an integral part in San Juan County Marine Resources Committee's marine stewardship area conservation planning process where University of Washington scientists and numerous marine and nearshore habitat biologists evaluated threats to the marine environment and determined that the most severe potential impacts to nearshore

sand, mud and gravel habitats, seabirds and marine mammals include a major oil spill as a top threat. Thus, any increase in tanker traffic and resulting oil spills will have an exponential effect on marine life, from herring spawn up the food chain to endangered marine mammals.

Friends' recommendations to ensure the continued survival and growth of critical forage fish and their habitat includes performing surveys of pacific herring species at all life stages [eggs, larvae, and adults] plus habitat and surveys of surf smelt egg success. Since both species spawn on kelp and eelgrass, must monitor impacts to both of these as well. Two weeks prior to spawning adult herring reside offshore in a holding area between Birch Bay and Sandy Point. See attached Whatcom County MRC maps. Post-EIS monitoring of the holding area; study limiting tanker traffic through highest density portions of holding area each year or in general

#### **V. Cherry Point State Aquatic Reserve**

The 2003 State Aquatic Reserve Technical Advisory Committee (TAC) unanimously voted to manage the Cherry Point marine environment as an Environmental Aquatic Reserve. The Cherry Point Aquatic Reserve extends from the southern edge of Birch Bay State Park on the north, to the northern border of the Lummi Indian Nation Reservation on the south. The TAC recognized Cherry Point "as an extraordinary stretch of shoreline with excellent potential to maintain the relatively undeveloped character of the area." See 2003 Aquatic Reserve Technical Advisory Committee Recommendation, Cherry Point. Department of Natural Resources Commissioner Doug Sutherland accepted the TAC's report and directed DNR staff to prepare proposals for establishing the reserves and associated management plans.

The Cherry Point Aquatic Reserve Site Proposal recognized that Cherry Point is "one of the most important Pacific herring areas in Washington State. Cherry Point serves as the "core" area of spawn deposition for the largest single herring spawning stock in Washington waters, a stock that historically supported more than 10,000 tons of estimated spawning escapement biomass annually." See Cherry Point Aquatic Reserve Site Proposal Application, p. 7. The Proposal also acknowledges that "[p]rotection of this stock would help conserve a feeding area that is used extensively by a wide variety of migratory birds that winter in Puget Sound," but that the Pacific herring stock has been downgraded to "critical" because permanent damage is likely to or has already occurred. The Cherry Point Proposal states that historic oil spills were due to technical equipment failure or human error, thus are likely to continue in the future with the threat of a major oil spill incident continues.

Friends recommends that the EIS process that the Corps is conducting for the Expansion should coordinate with the SEPA process, including completion by BP of a SEPA Checklist, which will begin for the Cherry Point Aquatic Reserve this winter. Friends recommends that the Corps examine the Geographic Response Plan that the Department Of Ecology issued in 2003 and revise as necessary to consider and include impacts to all marine environmental factors and species known to frequent the area. Finally, Friends recommends incorporating the reporting requirements of OPA 90 and the DOE Best Achievable Practices requirements of annual equipment deployment exercises and tabletop exercise.

#### **VI. Cultural and Tribal Issues**

All tanker traffic passes through numerous Usual & Accustomed fishing rights areas between Cape Flattery and the Strait of Juan de Fuca until arrival at Cherry Point. In many cases the native tribes traded substantial amounts of land in their treaties with the United States Government to retain their U&A fishing areas. The value of that trade was premised upon the continued health and abundance of historic levels of salmon stocks. Salmon fishing not only provided subsistence and livelihood to Washington tribes, but was deeply embedded in their cultural practices and spiritual observances.

Tanker traffic and all levels of oil spills have been cited as major causes of salmon declines in the Puget Sound and for the listing of Chinook salmon on the Endangered Species List. Thus, before the Corps may permit an activity that will directly impact tribal fishing and cultural rights, it has an implied, if not express, duty to make sure that any direct, indirect and cumulative impacts to the various U&A's are mitigated to ensure the health and continual thriving of salmon stocks, salmon spawning areas, forage fish habitat and forage fish spawning areas.

While the State has done much to improve quality of salmon spawning and migratory channels in fresh water to ensure vitality of native salmon runs, Puget Sound waters still at risk from oil spill pollution and resulting detriment to salmon stocks.

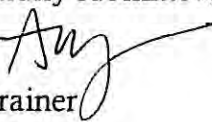
The Corps' EIS process must monitor impacts to salmon from vessel traffic, including:

- What were historic salmon stocks in relation to BP's operations?
- What impacts have resulted from increased tanker traffic?
- How will the Corps coordinate with all tribes, non-profits, governments and concerned citizens to ensure that all tribal fisheries and cultural concerns are adequately addressed?

## **VII. Conclusion**

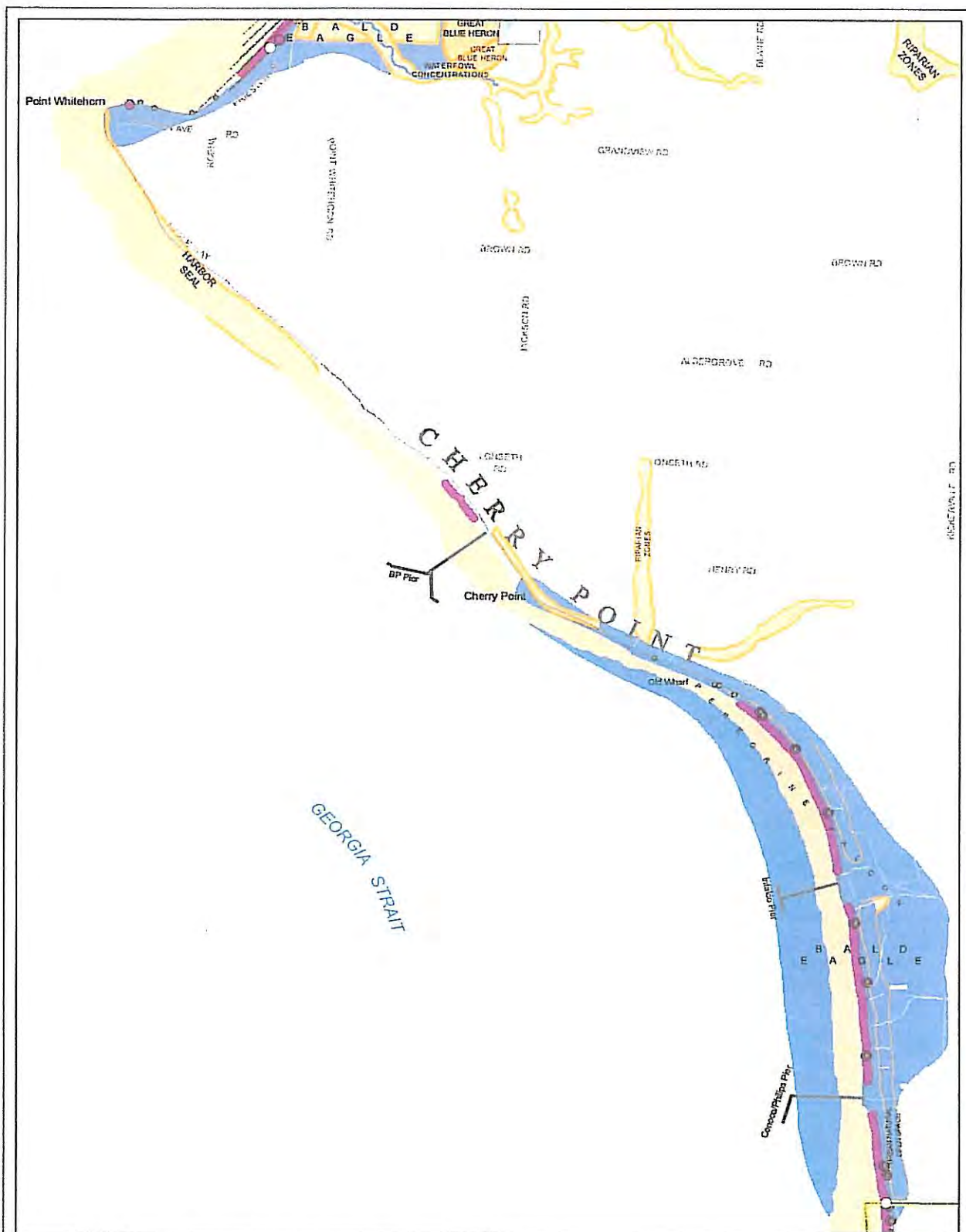
The Corps has a complex evaluation to perform to fully protect the precious resources within Washington's waters from oil spill contamination. Friends looks forward to working with the Corps throughout the EIS process to ensure that the concerns of Friends and the multiple stakeholders involved are adequately addressed. Thank you for your consideration of our comments.

Respectfully submitted,

  
Amy Trainer  
Staff Attorney

Cc: County Administrator Pete Rose  
Councilman Kevin Ranker  
Councilman Alan Lichter  
Councilman Bob Myhr





# Critical Saltwater Wildlife & Habitat: Cherry Point

Habitats & Species (DFW PHS 3,2005)

- Areas with listed species
- Habitats and areas with priority species
- Habitats and species of local importance
- Current Rare Plant and Ecosystems
- Rare Nonvascular
- Rare Plant
- Quality Ecosystem
- Preserves & Resource Conservation Areas
- Marine Habitats and Species
- Commercial and recreational shellfish areas

Spawning Survey (MRC '01 - '03)

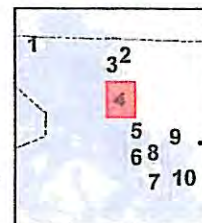
- Sand lance present
- Smelt present
- Herring present
- Winter Rock Sole
- Spawning Areas (DFW)
- Herring Spawning
- Sand lance Spawning
- Smelt Spawning
- Cilios (Transparency 40%)
- SHORELINE REACH BREAKS



0 0.15 0.3 0.6 Miles

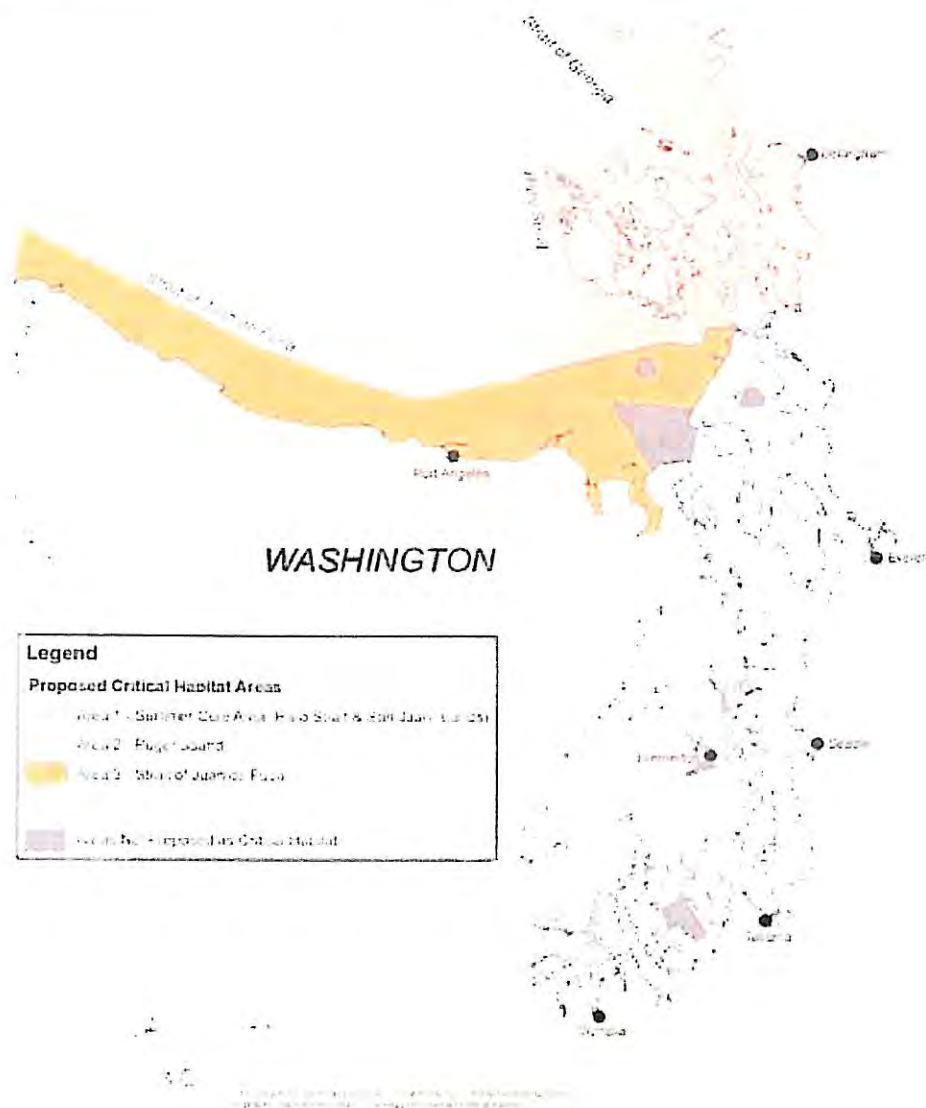
Scale 1: 28000

Wildlife: Species and habitats - WDFWPHS database (3,2005) Forage Fish Spawning Survey- Marine Resources Committee (2003)  
Shellfish - Anchor Environmental (1999)  
Legend items may not appear on every map.  
Jul 24, 2006



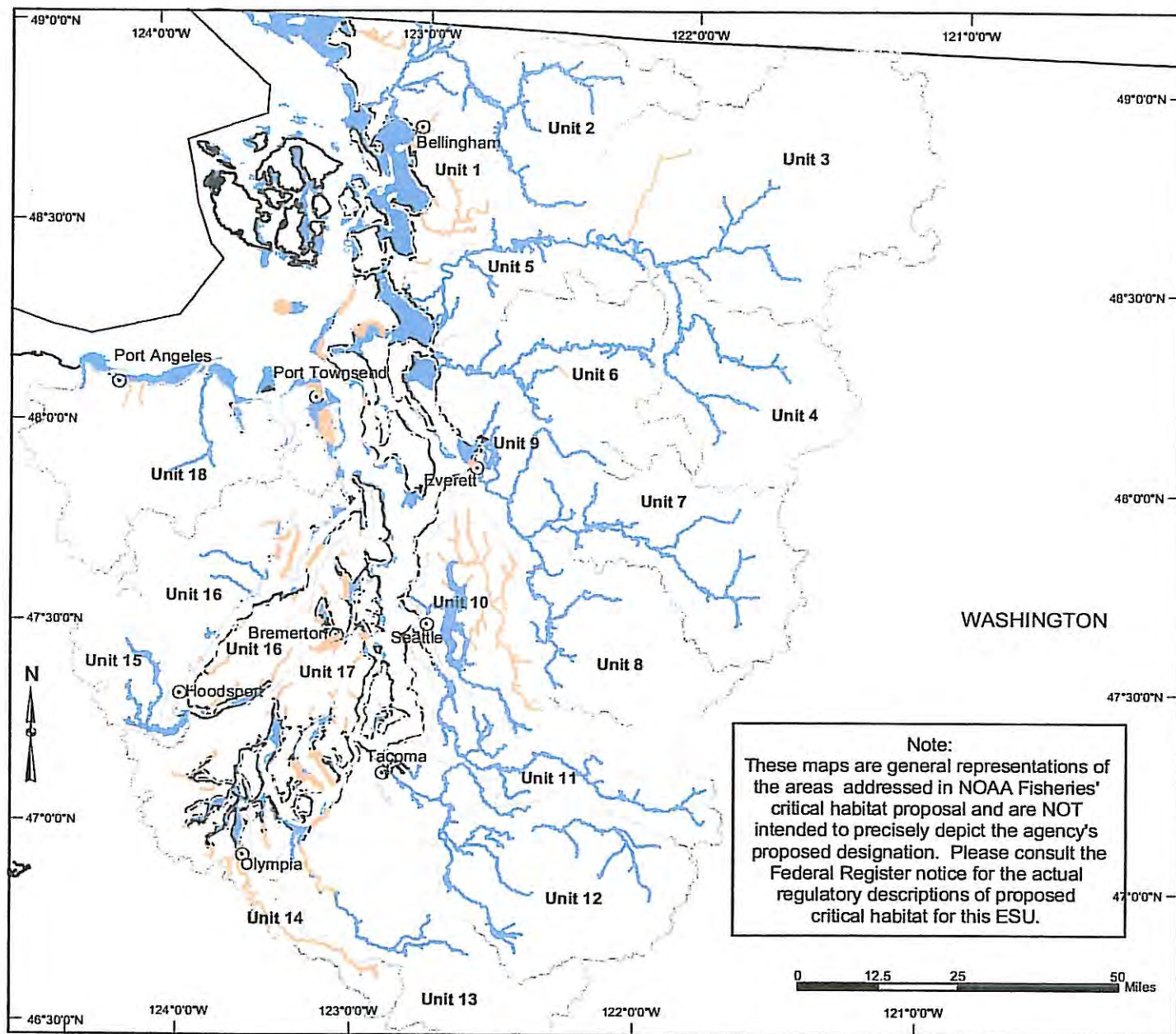
Map 4

**Proposed Critical Habitat for Southern Resident Killer Whales**  
**May 2006**  
**NOAA Fisheries, Northwest Region**





# Map of the Proposed Critical Habitat for the Puget Sound Chinook Salmon ESU



## Legend

⊙ Cities / Towns

## Species Distribution

- Proposed Critical Habitat
- Occupied But Not Proposed
- Subbasin Boundaries

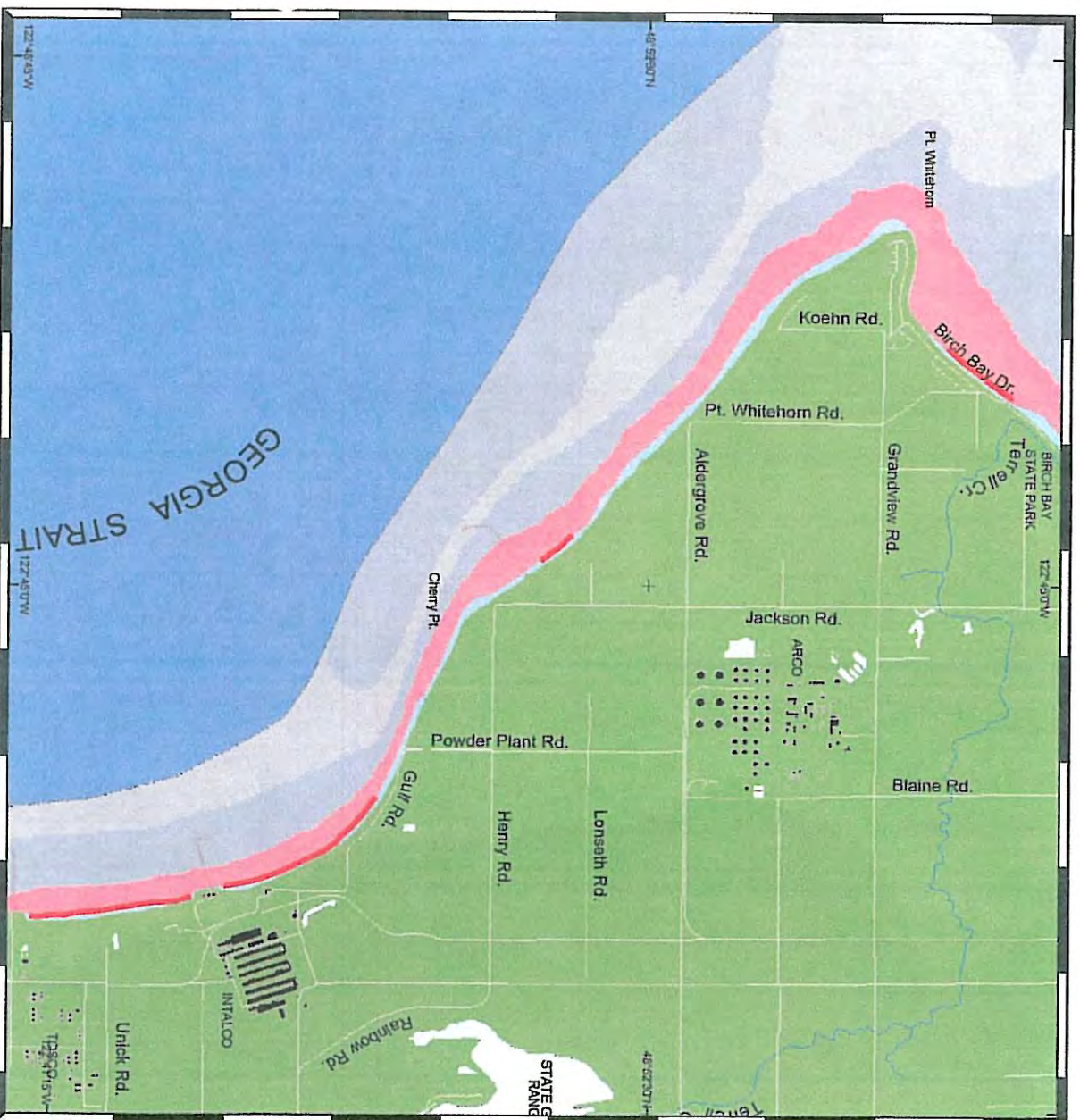
## Unit Index

- Unit 1 Strait of Georgia Subbasin
- Unit 2 Nooksack Subbasin
- Unit 3 Upper Skagit Subbasin
- Unit 4 Suak Subbasin
- Unit 5 Lower Skagit Subbasin
- Unit 6 Stillaguamish Subbasin
- Unit 7 Skykomish Subbasin
- Unit 8 Snoqualmie Subbasin
- Unit 9 Snohomish Subbasin
- Unit 10 Lake Washington Subbasin
- Unit 11 Duwamish Subbasin
- Unit 12 Puyallup Subbasin
- Unit 13 Nisqually Subbasin
- Unit 14 Deschutes Subbasin
- Unit 15 Skokomish Subbasin
- Unit 16 Hood Canal Subbasin
- Unit 17 Kitsap Subbasin
- Unit 18 Dungeness/Elwha Subbasin

## Area of Detail





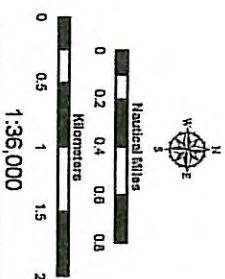


## Forage Fish

### Whatcom County Marine Resources Cherry Point Area

#### Legend

- Smelt Spawning Areas
- Herring Spawning Areas
- Herring Holding Areas



**Forage Fish Map Metadata:**  
This map is one in a series of 11 maps displaying generalized features of marine resources in Whatcom County marine waters. This maps show the known distribution of forage fish in Whatcom County waters and combines 3 different data layers: "Smelt Spawning Areas", "Herring Spawning Areas" and "Herring Holding Areas". The forage fish data is plotted on the bathymetry base map.

Sources of formatted base map and layers: (See detailed metadata for complete information.)

Whatcom County GIS  
Applied GIS Services (AGIS)  
Anchor Environmental 2002 NWSC Maps  
People for Puget Sound

**GENERAL MAP INFORMATION:** Map Projection is UTM 18Q 27 Zone 18. Maps Created By Applied GIS Services (AGIS), January 2002. Based on maps by Anchor Environmental, People for Puget Sound and Whatcom County GIS. Map Data is complete only for Whatcom County waters and is not intended for use for other counties.

**CAUTION:** Map Should Not Be Used For Navigation.  
**DISCLAIMER:** The data shown on this map was provided primarily for use by the Whatcom County Marine Resource Committee. The maps may contain errors of content, completeness and positional accuracy. Testing of the positional accuracy of the data with respect to National Map Accuracy Standards has not been completed and therefore it does not conform to National Map Accuracy Standards. The data shown on this map is not intended for use for navigation. Whatcom County Marine Resource Committee and its staff do not assume any responsibility or liability for the use of the map or data.



This map was funded in part through a cooperative agreement with the National Oceanic and Atmospheric Administration. The views expressed herein are those of the author(s) and do not necessarily reflect the views of NOAA or any of its sub-agencies.







FRIDAY HARBOR LABORATORIES  
UNIVERSITY OF WASHINGTON  
620 UNIVERSITY ROAD  
FRIDAY HARBOR, WA 98250  
October 17, 2006

RECEIVED

OCT 18 2006

REGULATORY

Ms. Olivia Romano  
U.S Army Corps of Engineers  
Seattle District Regulatory Branch  
P.O. Box 3755  
Seattle, WA 98124-3755

Dear Ms. Romano,

We talked several months ago when I asked to be put on the list for notices on the sites and times of meetings on the EIS for the BP Cherry Pt. Dock. I have received no notices but am informed by Amy Trainer, of Friends of the San Juans, that comments are being received on the planned EIS.

This letter expresses continuing concern that extreme care be taken in avoiding oil spills in this region and asks that the probabilities and extents of impacts from the dock expansion, both direct and indirect, be fairly and thoroughly documented.

Many of the environmental impacts of oil spills are well documented. In the enclosed waters from the Strait of Juan de Fuca through the San Juan Islands to the Cherry Pt. dock, spills will reach shore in a great variety of depositional habitats where the spilled materials will persist for long periods. Mapping of shoreline marine habitats by the Department of Natural Resources (DNR) of the state of Washington and data from other agencies can aid assessments of marine impacts that will result from spills and help put a dollar estimate on affected marine resources.

But in addition to these familiar marine environmental concerns, the impact on research and education in this region should also be addressed. Marine laboratories for education and research in this region include the Shannon Pt. Marine Center and the Friday Harbor Laboratories. Associated with the Friday Harbor Laboratories are several marine protected areas that have aided studies of impacts of fisheries and introduced species. These facilities serve students and researchers from Washington state and from institutions of higher education nationally. A large investment in education and research depends on the quality of the marine environment near the Cherry Pt. dock and routes for tanker traffic.

Sincerely,



Richard Strathmann  
Resident Associate Director, Friday Harbor Laboratories

cc: Ken Seben, Director, FHL



-----Original Message-----

From: Fred Felleman [mailto:felleman@comcast.net]

Sent: Friday, January 19, 2007 12:15 PM

To: Romano, Olivia H NWS; Walker, Michelle NWS

Subject: BP/Cherry Point EIS

Ocean Advocates  
3004 NW 93rd St.  
Seattle, WA 98117  
206.783.6676

1.19.07

Dear Ms. Romano -

It was stated during the Army Corps' scoping meetings for the BP Cherry Point EIS that you will be accepting comments up until the time you make final decisions. It has come to my attention that you will be meeting with your cooperating agency, the Coast Guard, on the 25th of this month to make final decisions on the project's scope. The reason for this letter is to: 1) reiterate our scoping comments and support the Coast Guard's 12.7.06 request for the expansion of the study's scope to include all the readily available VTS data for the approaches to the Strait of Juan de Fuca and Puget Sound (Captain Metruck's letter to you is attached for the docket); 3) A copy of the Baker Report on BP's US refinery operations is attached for the docket; 3) A January 6th story from the Aberdeen World reporting on the 6th barge to lose its tow off Washington in the past 3 years is included for the docket; and 4) wanting to be sure that the Corps understood its public obligations to be sure that the vessel traffic study part of the EIS is adequate independent of what BP and I settled on prior to the initiation of the scoping process.

The GWU investigators have already obtained the VTS data from the US and Canadian Coast Guard, making the requested expansion of limited burden. It is concerning to me that it was represented at the Governor's Oil Spill Advisory Committee yesterday that any expansion of the study beyond what my settlement agreement required would be at BP's expense. It strikes me that the Courts told the Corps they needed to do a comprehensive oil spill risk assessment and BP has agreed to fund the base model, but that does not obviate the need of the Corps from being responsive to public comment. It is my understanding that you will also be receiving a similar letter from the Governor's Oil Spill Advisory Committee shortly.

Reasons for including the approaches to Juan de Fuca include: 1) The purpose of BP's new refinery dock was for the export of refined product, much of which is destined to be sent out the strait and down the coast to the Columbia River and ports south, making the evaluation of the risk to the coast and Puget Sound appropriate to the scope of the study; 2) the high frequency of oil barges transitting through the Olympic Coast Sanctuary ATBA is a major source of risk needing to be addressed and these data are archived by the Olympic Coast National Marine Sanctuary (see last page of VEAT 2005 atached); 3) the frequency of barges losing their tows off the high seas of coast is a major source

of risk also needing to be addressed; 4) the evaluation of the Neah Bay rescue tug intervention can only be done responsibly if the study includes the majority of the geographic scope of service the tug provides along the coast and strait.

As far as we are concerned the inclusion of the vessel traffic data from Puget Sound and the Olympic Coast are basic ingredients for the Corps to include in order to complete a comprehensive oil spill risk evaluation for the EIS and should not pose a significant financial or time consuming burden. We would be happy to have the oil outflow aspect of the models for these expanded areas excluded if it helped the Corps in agreeing to the expansion for it would still allow for a risk evaluation to be conducted.

In closing, it is hoped that the Corps will incorporate these issues so that the oil spill portion of the EIS can be considered complete and of the maximum utility to decision makers like yourselves who are in the position of permitting such significant structures in the marine environment.

Sincerely,

Fred Felleman, MSc.  
NW Director  
Ocean Advocates



8-11-11  
MAY 11 2011  
REGULATORY

STATE OF WASHINGTON  
OIL SPILL ADVISORY COUNCIL

302 Sid Snyder Ave. PO Box 43113 \* Olympia, Washington 98504-3113 \* (360) 902-3061 \* FAX (360) 664-8941  
E-mail: [osac@gov.wa.gov](mailto:osac@gov.wa.gov)

January 22, 2007

Ms. Michelle Walker, Chief  
Regulatory Branch  
U.S. Army Corps of Engineers, Seattle Branch  
4735 East Marginal Way South  
Seattle, WA 98134-2385

Scott McCreery, EIS Project Manager  
BP, Cherry Point Refinery  
4519 Grandview Road  
Blaine, WA 98230

Re: Scope expansion for Vessel Traffic Risk Assessment and Environmental Impact Statement

Dear Ms. Walker and Mr. McCreery:

I am writing on behalf of the Washington Oil Spill Advisory Council regarding the scope of the Vessel Traffic Risk Assessment (VTRA) that will be done as part of a court-ordered National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) pursuant to litigation brought over BP's efforts to expand the north dock at its Cherry Point oil refinery.

The Council met on Thursday, January 18, 2007, to discuss the scope of the VTRA and the EIS. The Council requests that you geographically expand the scope of the study as provided herein.

An environmental impact statement should evaluate direct, indirect, and cumulative impacts that could reasonably be anticipated from the proposed activity. The proposed dock expansion will make possible: (1) additional vessel traffic and (2) an additional volume of oil that will be transported by vessel over Washington's waters. Therefore, in order to be properly scoped, the

EIS and VTRA should include all of the vessel traffic that the additional traffic and oil volume would reasonably encounter on Washington's waters. The indirect and cumulative impacts to Washington waters from the additional elements can properly be evaluated only if these additional elements are analyzed holistically and in light of all vessel traffic that the additional BP vessels and additional oil volume will encounter within the State of Washington. The members of the Council support the United States Coast Guard's December 7, 2006, request that you geographically expand the VTRA's scope.

In addition to the vessel traffic already within the scope of the VTRA, the Council believes it is important to evaluate risk in light of all vessel traffic in Puget Sound and on the outer west coast, from buoy Jay to the mouth of the Columbia River.

Additionally, we hope you will be consulting with Washington tribes that may be affected by the proposed dock expansion.

I would be pleased to meet with you about this matter. Please feel free to contact me or the Council's staff at the above-provided number.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mike Cooper".

Mike Cooper, Chairman  
Washington Oil Spill Advisory Council

cc: Dale Jensen, Program Manager, Washington Department of Ecology  
Steve Robinson, Policy Analyst, Northwest Indian Fisheries Commission  
Jack Harrald, Ph.D., The George Washington University  
Stephen P. Metruck, Captain, United States Coast Guard  
Keith Phillips, Executive Policy Advisor, Office of the Governor  
Tom Fitzsimmons, Chief of Staff, Office of the Governor





# MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 206-645-2201



Olivia Romano  
U.S. Army Corps of Engineers  
Seattle District Regulatory Branch  
PO Box 3755  
Seattle, WA 98124-3755  
Fax # 206 764 6602

RECEIVED  
JAN 25 2007  
REGULATORY

January 25, 2007

Ms. Romano:

The Makah Tribal Council (MTC) affirms the importance of the protection of our treaty reserved marine resources by contributing scoping comments to the Army Corps of Engineers (ACOE) for the British Petroleum (BP) Cherry Point Refinery Environmental Impact Statement (EIS). The comments below are intended to assist the ACOE in determining what conditions should be placed on the continued operation of the BP dock expansion. These comments are intended to address cumulative vessel traffic impacts associated with increases in vessel traffic through our Usual and Accustomed (U&A) marine treaty area and to ensure compliance with the Magnuson Amendment to the Marine Mammal Protection Act. The MTC reserves the right to enter into a government-to-government consultation with the ACOE and the Department of Defense (DOD) concerning the National Environmental Policy Act (NEPA) process.

A representative of the Makah Office of Marine Safety attended the public scoping meeting on September 5, 2006 in Port Angeles, WA. It is the understanding of the MTC that the Vessel Traffic Risk Assessment (VTRA) portion of the EIS is not scheduled to include an analysis of the impacts of increased tug and barge traffic in the outer coast portion of our treaty protected area that will result from the Cherry Point dock expansion. The MTC requests that the VTRA include the Washington outer coast from Cape Flattery south to the Columbia River. The MTC understands that any impacts or increased risks to our ocean fish stocks must be accounted for as the Washington outer coast supports our tribal fisheries, which represent the largest tribal commercial and subsistence ocean fishing effort by federally recognized treaty tribes in the nation. A number of other federally recognized Washington State Treaty Tribes lay with-in the outer coast area. Increased vessel traffic presents a dual threat, the risk of a spill and the risk of a vessel in violation of the Area-to-be-Avoided (ATBA).

We are fully aware of the risks presented by the transportation of refined products from the BP Cherry Point facility through our treaty area to destinations in Oregon and California. In 2004, the Olympic Coast National Marine Sanctuary (OCNMS) recorded 142 violations of tugs with oil barges transiting through the International Maritime Organization designated ATBA established to provide additional protection from the threat of an oil spill on the outer coast. The potential impacts of non-compliance with the ATBA associated with increased marine vessel traffic through our treaty area due to increased activity at the Cherry Point refinery dock should be evaluated as falling within the scope of the EIS.

The MTC is also concerned about the impacts of cumulative vessel traffic associated with expanded growth in both Seattle, the fastest growing port in the United States in 2005, and Vancouver, British Columbia. Our geographic location at Cape Flattery makes us susceptible to an assortment of marine transportation accidents that occur both offshore and at the entrance to the Strait of Juan de Fuca. Increased vessel traffic itself poses one distinct threat but the additional transportation of petroleum products poses a greater threat to both our terrestrial and marine natural and cultural resources. The dual nature of the risk presented by the expansion of the BP Cherry Point dock and the Strait of Juan de Fuca's use by vessels bound for both British Columbia and Washington ports requires the Makah Tribe to be additionally concerned about the protection of our natural and cultural resources. It is essential that the EIS and VTRA include the most current traffic statistics and volume increase projections for these ports in order to accurately quantify the risk of expanded dock operations at the Cherry Point refinery.

The introduction of invasive species in ballast water from expanded oil tanker and barge traffic is an additional matter to which the MTC would like the EIS to address. Invasive species are nearly absent in the Cape Flattery region compared to other west coast locations such as San Francisco Bay and Monterey Bay. The MTC needs to be assured that the impacts poised by expanded oil tanker and barge traffic is adequately accounted for to minimize the disturbance to the natural ecosystem processes that have supported our traditional way of life for millennia.

The MTC believes that air pollution from increased oil tanker and barge traffic needs to be adequately accounted for in the EIS. Low sulfur fuel could be considered as a means to mitigate the increases in emissions from additional oil tanker and barge traffic through our treaty area. Furthermore, air quality monitoring in the vicinity of Cape Flattery should be required as a condition of the EIS as many pollutants from existing vessel traffic currently present themselves as a visible spike on our tribal air quality monitoring data sheets. The MTC believes that should there be a finding of significant negative impacts to air quality from increased vessel traffic the finding should be addressed in the EIS.

In closing, we understand the risk and probability of an oil spill from a tanker or barge is higher in the Cape Flattery region than in the more protected waters of the North Puget Sound. The MTC is committed to securing pre-staged rescue, salvage, fire fighting and



spill response resources in Neah Bay through our work with the U.S. Coast Guard District 13 and USCG DC HQ, EPA, NOAA and the U.S. Navy. We look forward to working with the U.S. Army Corps of Engineers on the development of the VTRA and EIS as part of our effort to achieve adequate protection for the Makah treaty area. Please do not hesitate to contact the head of our marine safety initiative, Chad Bowechop, at (360) 645-2433 or email address at bowechop@centurytel.net regarding the comments above or with any other questions you may have.

Sincerely,



Ben Johnson Jr., Chairman  
Makah Tribal Council

Cc: Senator M. Cantwell  
Fax # 202 228 0514  
Attention: MR. Geerloof

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FEB 15 2007

REGULATORY



STATE OF WASHINGTON  
OIL SPILL ADVISORY COUNCIL

302 Sid Snyder Ave. PO Box 43113 \* Olympia, Washington 98504-3113 \* (360) 902-3061 \* FAX (360) 664-8941  
E-mail: [osac@gov.wa.gov](mailto:osac@gov.wa.gov)

February 13, 2007

Ms. Michelle Walker, Chief  
Regulatory Branch  
U.S. Army Corps of Engineers, Seattle Branch  
4735 East Marginal Way South  
Seattle, WA 98134-2385

Scott McCreery, EIS Project Manager  
BP, Cherry Point Refinery  
4519 Grandview Road  
Blaine, WA 98230

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Dear Ms. Walker and Mr. McCreery:

I am again writing on behalf of the Washington Oil Spill Advisory Council regarding the scope of the Vessel Traffic Risk Assessment (VTRA) that will be done as part of a court-ordered National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) pursuant to litigation brought over BP's efforts to expand the north dock at its Cherry Point oil refinery.

As I mentioned in my earlier letter, the Council met on Thursday, January 18, 2007, to discuss the scope of the VTRA and the EIS. At that meeting, the Council directed me to request a geographic expansion of the VTRA's scope. During the Council's discussions of the VTRA, it seemed to go without saying that the EIS component that will review the Neah Bay tug's efficacy would include data from the full geographic area that lies within the tug's response range.

At a Wednesday, February 7, 2007, Harbor Safety Committee meeting in Seattle, Council members were surprised to learn that your study of the Neah Bay tug's efficacy will not include vessel traffic incident data, or any other data, that originates from a geographic area outside of the current VTRA geographic scope. The current geographic scope of the VTRA does not include a large portion of the Neah Bay tug's response area. Therefore, limiting your evaluation to data from an area east of buoy J will eliminate your ability to evaluate information about risks that occur within a large portion of the tug's range.

I am, therefore, writing on behalf of the Council to request that you alter your plan of study to include all data relevant to the Neah Bay tug's efficacy. A study of the tug's efficacy will have merit only if it includes risk data from the tug's full response area—the Strait of Juan de Fuca and from Cape Flattery south to the Columbia River. It would seem illogical to study whether any risk intervention would adequately ameliorate risk if one does not fully evaluate all of the risks present within the entire geographic area in which the risk intervention is to be applied.

I would be pleased to meet with you about this matter. Please feel free to contact me or the Council's staff at the above-provided number.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Cooper", with a long horizontal flourish extending to the right.

Mike Cooper, Chairman  
Washington Oil Spill Advisory Council

cc: U.S. Senator Maria Cantwell  
U.S. Senator Patty Murray  
U.S. Representative Norm Dicks  
U.S. Representative Jay Inslee  
Dale Jensen, Program Manager, Washington Department of Ecology  
Steve Robinson, Policy Analyst, Northwest Indian Fisheries Commission  
Jack Harrald, Ph.D., The George Washington University  
Stephen P. Metruck, Captain, United States Coast Guard  
Keith Phillips, Executive Policy Advisor, Office of the Governor  
Tom Fitzsimmons, Chief of Staff, Office of the Governor



February 20, 2007

Ms. Michelle Walker, Chief  
Regulatory Branch  
U.S. Army Corps of Engineers, Seattle Branch  
4735 East Marginal Way South  
Seattle, WA 98134-2385

Mr. Scott McCreery, EIS Project Manager  
BP, Cherry Point Refinery  
4519 Grandview Road  
Blaine, WA 98230

RECEIVED  
FEB 22 2007  
REGULATORY

Re: Scope expansion for Vessel Traffic Risk Assessment and Environmental Impact Statement

Dear Ms. Walker and Mr. McCreery:

I am a member of the Washington State Oil Spill Advisory Council, representing Seattle Audubon and all those who envision a healthy environment in balance with nature, where people enjoy, respect, and care for the natural resources that sustain the community of life. In this effort, Seattle Audubon and the many chapters of Audubon in Washington State are concerned about the dangers of oil pollution and the continuing risk to our environment resulting from increased vessel traffic.

I am writing with regard to the scope of the Vessel Traffic Risk Assessment (VTRA) that will be conducted as part of a court-ordered National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) pursuant to litigation brought because of BP's expansion of the north dock at its Cherry Point oil refinery. I had the opportunity to discuss the design of this study with the research team prior to the Wednesday, February 7, 2007, Harbor Safety Committee meeting in Seattle. I was surprised to learn that this study incorporates only historic environmental data and does not anticipate alterations that will be caused by climate change. How can a study that projects risks into the future not include anticipated climate changes?

A recent report on climate change released by the Washington Department of Ecology and Department of Community, Trade, and Economic Development (*Impacts of Climate Change on Washington's Economy, A Preliminary Assessment of Risks and Opportunities*, November 2006, available at <http://www.ecy.wa.gov/pubs/0701010.pdf>) states:

*"Climate change is creating circumstances in which the planning and decision-making patterns of the past are of diminishing relevance for the future. Decision makers at all levels must be open to new ways of thinking*



*and new possibilities, and they must be prepared for surprises. As warming increases, climate change will test Washington's decision makers like never before. Future Washingtonians have a major stake in the decisions made today."*

The report further states:

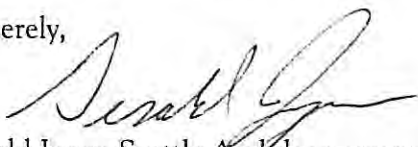
*"Recent climate modeling results indicate that 'extreme' events may become more common in some regions, including the western U.S., as rising average temperatures produce a more energetic climate system."*

When I asked members of the research team why these factors were not included, I was told that such work was feasible but was not within the scope of the current research plan. For this predictive modeling to have meaning, the following factors, at a minimum, must be included:

- Adjustment of the historic weather data to compensate for storm intensification
- Revision of visibility data to recognize the effect of increased precipitation
- Inclusion of sea level, current, and tidal changes in channel navigation

Because this predictive study is dependent on weather and other physical conditions, we cannot accept the results of this study if these anticipated climate-change effects are not included in the modeling. Therefore I urge you to expand the scope of this study to include models adjusted for these factors in order to make the results relevant to the protection of our waters.

Sincerely,



Gerald Joyce, Seattle Audubon representative to the Washington State Oil Spill Advisory Council

Cc: Mr. Mike Cooper, Chair, Washington State Oil Spill Advisory Council  
U.S. Senator Maria Cantwell  
U.S. Senator Patty Murray  
U.S. Representative Norm Dicks  
U.S. Representative Jay Inslee



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000  
TTY 711 or 800-833-6388 (for the speech or hearing impaired)

March 8, 2007

RECEIVED

MAR 15 2007

REGULATORY

Ms. Michelle Walker  
U.S. Army Corps of Engineers  
4735 E. Marginal Way South  
Seattle, WA 98134-2385

Dear Ms. Walker:

The Spill Prevention, Preparedness & Response Program is a primary steward of Washington State's marine environment. We are responsible to prevent major oil spills. We have many initiatives underway to improve maritime safety in Puget Sound and the Strait of Juan De Fuca.

I appreciate the efforts of the Army Corps of Engineers (ACOE), British Petroleum, and Ocean Advocates to revise the Environmental Impact Statement (EIS) for the Cherry Point north dock expansion project. The EIS will provide more information on vessel traffic and oil spill risk.

We are very interested in the project's Vessel Traffic Risk Assessment (VTRA) study. We provide vessel incident data and agency expertise to support the effort.

Captain Metruck, U.S. Coast Guard, proposes to expand the VTRA study to include "*. . . the substantive tanker and barge traffic that transits between the northern refineries/terminals and the facilities throughout Puget Sound.*"

As a second priority, Captain Metruck proposes to expand the geographic scope of the VTRA study to include "*. . . the approaches to the Strait of Juan de Fuca.*" The intent of Captain Metruck's second priority is to analyze vessel traffic data from within the Canadian Coast Guard's Maritime Communications and Traffic Services (MCTS) Tofino monitoring area to the extent feasible.

I support expanding the VTRA study if the budget is sufficient to maintain the study's depth while expanding its scope. The timeline to complete the expanded study should be acceptable to the parties involved in the settlement. Note it is important for us to access and use VTRA study data, even if the study is not expanded.



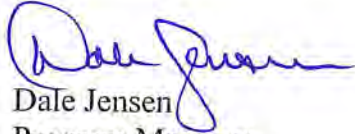
Ms. Michelle Walker

March 8, 2007

Page 2

Please consider our recommendations when you meet with the Coast Guard. We would be happy to contribute to an expanded project scope of work.

Sincerely,



Dale Jensen

Program Manager

Spill Prevention, Preparedness & Response Program

slm

cc: Keith Phillips, Governor's Office  
Mike Cooper, Oil Spill Advisory Council  
Captain Steve Metruck, U.S. Coast Guard  
Steve Robinson, Northwest Indian Fisheries Commission  
Scott McCreery, British Petroleum  
Dave Sawicki, British Petroleum  
Fred Felleman, Ocean Advocates  
Jack Harrald, Ph.D., The George Washington University  
Martha Grabowski, Ph.D., Rennselear Polytechnical Institute

U.S. Department of  
Homeland Security

United States  
Coast Guard



Commander  
United States Coast Guard  
Sector Seattle

1519 Alaskan Way South  
Seattle, WA 98134  
Staff Symbol: spw  
Phone: (206) 217-6042  
Fax: (206) 217-6244  
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16635  
DEC - 7 2006

U. S. Army Corps of Engineers, Seattle Branch  
Attn: Ms. Michelle Walker  
Chief, Regulatory Branch  
4735 E. Marginal Way South  
Seattle, WA 98134-2385

Dear Ms. Walker:

As a Cooperating Agency in the completion of the Army Corps of Engineers' (ACOE) Environmental Impact Statement (EIS) for the BP Cherry Point north dock expansion project, the Coast Guard is committed to ensuring that the impacts of vessel traffic are carefully and comprehensively evaluated. The complex and systematic nature of vessel traffic movement in the Pacific Northwest requires that any assessment of risk be completed holistically.

Accordingly, I recommend that the scope of the Vessel Traffic Risk Assessment (VTRA) for the EIS be modified to include the substantive tanker and barge traffic that transits between the northern refineries/terminals and the facilities throughout Puget Sound.

As a second priority, I also recommend that consideration be given to expanding the scope of the VTRA in the offshore environment to the maximum extent possible given available vessel traffic data. Although there are finite data limitations in this area, expansion of the current VTRA offshore boundary (buoy "J") to include the approaches to the Strait of Juan de Fuca would be most consistent with a holistic and systematic approach.

We look forward to continuing to work together as a Cooperating Agency on this unique and important project. Please feel free to contact myself or Lieutenant Commander Jason Tama at 206-217-6203 if you would like to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "S. P. METRUCK".

S. P. METRUCK  
Captain, U.S. Coast Guard  
Commander, Coast Guard Sector Seattle

Copy: BP, attn: Mr. Scott McCreery  
Washington Department of Ecology, attn: Mr. Norm Davis,  
Canadian Coast Guard Pacific Region, attn: Mr. David Heap  
George Washington University, attn: Dr. John Harrauld  
Coast Guard District Thirteen (dp)

28 December 2007

Martha Grabowski  
Rensselaer Polytechnic Institute  
CII 5015 110 8<sup>th</sup> St.  
Troy, NY 12180-3590  
VIA FAX: 518.276.8227

Martha –

Rather than filling out one of your questionnaires I decided to instead highlight some of the findings from the Independent Safety Review Panel's report on BP's refinery operations with specific attention to Cherry Point. In addition, I have included a copy of my 11-23-07 OPED that provides some context for BP's operations more broadly and an 11.28.07 job description BP published for an operations technician opening at Cherry Point.

I have repeatedly expressed my reservations about your survey effort because I do not believe you are likely to get candid responses to your questions given that industry is distributing the questionnaire for you. Similarly, I read the significantly more positive findings of the Independent Study Panel for the Cherry Point refinery as compared to other BP facilities with some skepticism for the following reasons.

The report states: "At each of the five refineries, the Panel's staff interviewed a broad cross-section of hourly employees who were believed to be representative of the general hourly workforce, including employees of different positions, crafts, and seniority. The Panel's staff selected BP hourly employees at the Carson, Texas City, Toledo, and Whiting refineries from lists that BP and the USW compiled jointly and at Cherry Point from a list that BP compiled individually."

"Beneath the first level leaders are the BP hourly employees, who are typically operators and maintenance personnel. All BP hourly employees participate in the VPP. At all of the U.S. refineries except Cherry Point, the BP hourly employees are members of the USW and are subject to a collective bargaining agreement."

Furthermore, the report goes on to state: "BP's legal counsel attended interviews of the refinery manager at each refinery, as well as interviews of those who directly report to the refinery manager."

Cherry Point is the only refinery operated by BP in which whose employees are not represented by a union. The report goes on to note that the isolated location of the refinery, the lack of other large employers and the small community surrounding the facility makes for a closer-knit community. It could also be interpreted that with corporate lawyers present, without Union representation of their own and with few alternative sources of employment, BP did not have a hard time hand selecting positive minded employees to be interviewed for this study especially in light of the fact that they new they were under the scrutiny of the legal findings that resulted in the EIS process.

Despite these obvious potential sources of bias, the Panel found (p. 100) two particular issues meriting further attention along with a variety of other findings that have excerpted in the attached fax. The two issues included an expectation for employees to work significant hours that is a classic issue for safety mindedness and one that unions are most attentive to. The other pertains to a sense of over confidence that various inspection reports do not seem to justify.

While the Panel notes that BP is making strives to address some of the shortcomings found in the study, a current job application suggests that they still have a way to go (attached). Their advertisement for an Operations Technician states in bold that operators work in 12-hour rotating shifts and must be available for overtime to be considered. Furthermore, the only required training is a GED though additional experience is preferred.

In closing, one cannot look at the operations at Cherry Point without also acknowledging the system wide problems that have been occurring at BP as a result of an aggressive cost-cutting profit motive. Delayed maintenance at refineries as well as on North Slope pipelines are a result of the same corporate culture. Furthermore, BP decision to remove the mooring system that would allow them to pre boom their ships prior to transfers was described by Scott McCreery as a cost savings measure to a group in Bellingham just last month. Such cost savings were made despite the explicit assurances BP gave the US Army Corps of Engineers that all transfers were to be preboomed as a condition for being allowed to build their new dock.

While I do not doubt there is some merit in the Panel's finding that some of the safety culture at Cherry Point is part of the ARCO-legacy and that the small community has helped to bond employees. However, if this human factors analysis is going to be objective, it will also need to look at the corporate cultural at BP where they have appeared to spend disproportionate amounts on public relations over taking care of the business they are in.

I hope the following 17 pages from the Independent Safety Review Panel, the one page job description and my two page OPED are included in your deliberations. I will be making them part of the formal record as well.

Thank you for your consideration,

Sincerely,

Fred Felleman  
3004 NW 93<sup>rd</sup> St.  
Seattle, WA 98117  
206.783.6676

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