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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

May 13, 2022

Dan Ferguson, Facility Engineer Lead
WA Dept. of Ecology Spills Program
Via email: dan.ferguson@ecy.wa.gov

Re: Comments on the Safe and Effective Threshold Determination for the Tesoro Refining and Marketing Company LLC, Anacortes Wharf

Dear Mr. Ferguson,

Thank you for the opportunity to provide comments on the Safe and Effective Threshold Determination Report for the Tesoro Refining and Marketing Company LLC, Anacortes Wharf (the "Report"). The Swinomish Indian Tribal Community ("Swinomish Tribe" or "Tribe") submits these comments in recognition of the disproportionate impacts and historic and ongoing risks to its Treaty fishing access and salmon recovery efforts from the Tesoro Refinery at March Point.

The Swinomish Tribe is a federally recognized Indian tribe and political successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott, which among other things reserved fishing, hunting and gathering rights and established the Swinomish Reservation on Fidalgo Island in Skagit County, Washington. The Swinomish Reservation sits at the mouth of the Skagit River, the largest river system draining to Puget Sound and the only river in the Lower 48 states that still has all species of wild Pacific salmon spawning in its waters. Since time immemorial, the Swinomish Tribe and its predecessors have occupied and utilized vast areas of land and water in northern Puget Sound up to the Canadian border to support the Swinomish way of life.

March's Point is located between Fidalgo Bay and Padilla Bay, two important estuaries of the Skagit River. In 1980, Padilla Bay was selected to be included in the National Estuarine Research Reserve System because of its extensive eelgrass meadows, giving nearly 11,000 acres of critical intertidal and upland habitat protected status¹. Eelgrass provides habitat for rearing salmon, forage fish, crabs, and other species. This ecologically sensitive area is especially vulnerable to the impacts of oil spills, which would coat eelgrass meadows and wildlife, and

¹ <https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Padilla-Bay-Reserve>

create anoxic conditions for fish, shellfish, invertebrates, and aquatic vegetation in the shallow water of the bay. Extreme tidal flushing of the bay would draw oil from spills into the inner bay and along the shoreline, increasing the severity of even a small spill. Fidalgo Bay, located east of March Point, was designated as an aquatic reserve in 2008, and is characterized by expansive eelgrass beds, tidal flats, salt marshes, gravel beaches, and pocket estuaries covering over 781 acres of state-owned aquatic lands². The bay provides spawning habitat for surf smelt, a keystone species that is important for salmon and Southern Resident killer whale recovery³.

Fish and fish habitat are crucial to the cultural, spiritual, subsistence and commercial activities of the Swinomish Tribe, and the Tribe exercises Treaty-protected fishing rights in its usual and accustomed fishing areas, which include an extensive portion of the Salish Sea and the entirety of the Skagit River and its tributaries. See *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975). For generations, Tribal fishers have fished northern Puget Sound and the Salish Sea for a variety of fish and shellfish species, including Chinook, coho, steelhead, and halibut. Fidalgo and Padilla bays are located near where the mouth of the Skagit River meets Puget Sound, and are especially important areas because of their close proximity to the Swinomish Reservation, and ease of access by the Swinomish Tribe's fishing fleet. The Swinomish Tribe holds 3-6 bait clam harvests a year on Crandall Spit (west side of March Point); Dungeness crab is also harvested in that area. For the Swinomish tribe, the proximity of oil refineries to the shellfish beds poses a potential threat to human health for members involved in subsistence gathering activities in those areas. Ensuring that the quality of the marine waters in northern Puget Sound remain free of oil spills and hazardous contamination is of the utmost importance to the Swinomish Tribe.

We reviewed the Tesoro Report in light of the clear legislative intent in Chapter 90.56 RCW, Oil and Hazardous Substance Spill Prevention and Response. The intent of that statute, and its implementing regulations, is that oil spill prevention is the priority and only true way to achieve the state's declared "zero spills" goal for Washington waters. Section 90.56.005 states in part that:

(2) The legislature finds that prevention is the best method to protect the unique and special marine environments in this state. The technology for containing and cleaning up a spill of oil or hazardous substances is at best only partially effective. Preventing spills is more protective of the environment and more cost-effective when all the response and damage costs associated with responding to a spill are considered. Therefore, the legislature finds that the primary objective of the state is to achieve a zero spills strategy to prevent any oil or hazardous substances from entering waters of the state. (Emphasis added).

We also reviewed the Tesoro Report in light of the declared purpose of Chapter 173-180 WAC, Facility Oil Handling Standards. That chapter establishes "minimum standards for safe oil

² <https://www.dnr.wa.gov/managed-lands/aquatic-reserves/fidalgo-bay-aquatic-reserve>

³ Sobocinski, K.L. 2021. The State of the Salish Sea. G. Broadhurst and N.J.K. Baloy (Contributing Eds.). Salish Sea Institute, Western Washington University. <https://doi.org/10.25710/vfhh-3a69>.

transfer operations to meet a zero spill goal established by the legislature” and states that “preventing oil spills from occurring and emphasizing that oil spill prevention is the top priority strategy for reaching the legislature's goal of zero spills.” WAC 173-180-015.

The Facility Oil Handling Standards must be read in concert with the legislature’s declared purpose of Chapter 173-182 WAC, Oil Spill Contingency Plan. That chapter directs Ecology to, among other things:

(d) Provide for the protection of Washington waters, natural, cultural and significant economic resources by minimizing the impact of oil spills; and

(e) Provide the highest level of protection that can be met through the use of best achievable technology and those staffing levels, training procedures, and operational methods that constitute best achievable protection (BAP).

The definitions of “best achievable protection” and “best available technology” are found in both Chapters WAC 173-180 and 173-182, demonstrating the legislature’s intent that both oil spill contingency plans and the rules governing oil handling facilities be consistent. Those definitions state:

"Best achievable protection" means the highest level of protection that can be achieved through the use of the best achievable technology and those staffing levels, training procedures, and operational methods that provide the greatest degree of protection available. The director's determination of best achievable protection must be guided by the critical need to protect the state's natural resources and waters, while considering: The additional protection provided by the measures, the technological achievability of the measures, and the cost of the measures.⁴

"Best achievable technology" means the technology that provides the greatest degree of protection taking into consideration: Processes that are being developed, or could feasibly be developed, given overall reasonable expenditures on research and development; and processes that are currently in use. In determining what best achievable technology is, the director must consider the effectiveness, engineering feasibility, and commercial availability of the technology.⁵

These protection standards, carried forward from the statute into both regulation chapters governing oil spill prevention and handling, must be applied to utilize spill prevention as the primary means to achieve the goal of “zero spills.”

The Tesoro Report is under this prevention priority umbrella, and the “approval process” in WAC 173-180-224 (3) requires Ecology to also consider:

(iii) Accepted industry standards regarding the performance of boom and associated response equipment in various operating environments.

⁴ WAC 173-180-025 (1) and 173-182-030 (3).

⁵ WAC 173-180-025 (2) and 173-182-030 (4).

We reviewed the Report against the background of the vital, treaty protected practices of the Tribe and found the Report to lack entirely a review of how fishing and other cultural activities may impact oil transfer operations as required by WAC 173-180-224 (1)(d)(ii)(E) (The report must address, at a minimum: “Other conditions such as vessel traffic, fishing activities, and other factors that influence the oil transfer operation”). Without a discussion of how the extensive fishing, shellfish harvesting, and other Treaty protected practices in close vicinity to this facility can influence oil transfer activities and how the Report proposes to protect those practices, the Report is insufficient as a matter of law and must be rejected by the Department of Ecology.

As stated above, the Tribe has extensive treaty protected practices at and around this facility that undoubtedly influence oil transfer operations and must be taken into account when determining a safe and effective threshold for pre-booming. It is the Tribe’s preference that pre-booming be the default for all oil transfer and that transfers without pre-booming should only occur in truly exceptional circumstances, not at the arbitrary discretion of facility employees. The result of a spill, even a minor one, without booms would be devastating to the Tribe’s fishing operations and cultural practices because of the extremely close proximity of this refinery to Tribal usual and accustomed fishing and shellfish harvesting areas.

In the Tesoro Report, the standard for invoking discretion about whether or not to preboom an oil transfer, or to cease booming an already in-process oil transfer, is quite low – any one of the following conditions can be the basis upon which on-site personnel are allowed to exercise the discretion not to pre-boom an oil transfer:

- Ability of the boom boat to operate in current and forecast conditions
- Winds 15 knots or greater
- Wave height greater than 1 foot
- Currents of 0.5 to 1.0 knots
- Ability of the boom to contain oil

It is unclear why these thresholds are so low. These sea state and weather conditions in Tesoro’s Report simply do not represent the “accepted industry standard” for pre-booming oil transfers. These pre-booming thresholds do not meet the regulatory requirement to provide the “highest level of protection” nor the legislative declaration that oil spill prevention is a “top priority” of Ecology. Further, the Ecology data for the Tesoro Refinery oil transfers shows that a handful of transfers occur each year without pre-booming, which points to the fact that it would ***not be a financial hardship to require all vessels to be pre-boomed***. That is, if Ecology upholds the sea state and weather conditions in the Tesoro Report as the threshold for pre-booming, in the instances when the sea state or weather exceeds those thresholds, the oil transfer can be delayed until such time as pre-booming could be employed with little financial consequence to the refinery. Implementing a “no boom, no oil transfer” standard would be a small change that could have significant effects to actually achieve the State’s “zero spills” goal as a top priority and

ensure that the Swinomish Tribe's treaty resources throughout northern Puget Sound and the Salish Sea actually receive the best achievable protection that they deserve.

Thank you again for this opportunity to comment on the Report. We look forward to working with the Department of Ecology and the Applicant in developing a revised Report that takes into account important Tribal resources at and around this facility and meets all applicable legal requirements.

Sincerely,

A handwritten signature in cursive script that reads "Amy Trainer". The signature is written in black ink and includes a long horizontal flourish extending to the right.

Amy Trainer, Environmental Policy Director
Swinomish Indian Tribal Community