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VIA ELECTRONIC SUBMISSION

March 8, 2024

Diana Davis
Financial Responsibility Unit Supervisor
Department of Ecology
Northwest Regional Office, Spill Prevention,
Preparedness, and Response Program
P.O. Box 330316
Shoreline, WA 98133-9716

Re: Rulemaking – Chapter 173-187 WAC

Dear Ms. Davis:

Thank you for the opportunity to submit written comments on the Washington Department of Ecology's ("Department of Ecology") proposed rulemaking on financial responsibility for petroleum products, Washington Administrative Code Chapter 173-187, pursuant to RCW 88.40.005, *et seq.* These comments are submitted on behalf of BP America Inc. and its subsidiaries (collectively, "bp") which own and/or operate a petroleum refinery, terminal, and pipeline in the State of Washington. Under the proposed rule, bp would be required to provide financial responsibility for several Class 1 facilities.

We appreciate the comments and revisions that the Department of Ecology has already incorporated into its proposed rule. bp offers the following additional comments to identify several issues that are likely to impede the regulated community's capacity to comply with the proposed rule. In each case, we suggest minor modifications intended to improve compliance and meet the Department of Ecology's primary goal of providing strong, durable financial assurance instruments that protect the State and its citizens from the cost of marine oil spills. Thank you for considering these comments as you prepare the final rule.

1. The final rule should expressly allow an owner or operator's parent or sister corporation, or a firm with a substantial business relationship with the owner or operator, to provide a guarantee for the owner or operator.

The proposed guarantee language should be modified to harmonize and match the approach used in the Department of Ecology's Dangerous Waste financial assurance regulations, which expressly allow a "direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator [i.e. a sister corporation], or a firm with a 'substantial business relationship' with the owner or operator" to provide a

guarantee for a facility owner or operator if the parent company, sister company, affiliate, or other related entity meets the "financial, application, and reporting" requirements of proposed WAC 173-187-220(g) (relating to self-insurance). *See* WAC 173-303-620(4) (incorporating by reference 40 C.F.R. § 264.143(f)(10)).

That approach has been approved for use at other sites in Washington that face a similar risk of a future spill or release of a substance or substances that may result in harm to people, wildlife, and the environment. It allows an owner or operator to obtain a guarantee from a related corporate entity that is strong and structured to meet the financial requirements in a wide range of potential future economic conditions that might impact the owner, operator, and potentially the broader petroleum refining, marketing, and transportation industry in Washington. The State and its citizens have an interest in securing guarantees from the strongest corporate entities. Allowing corporate guarantees from a related corporate entity would help provide assurance and security to the State and its citizens, who ultimately seek protection against the risk of non-performance or non-payment.

2. The requirement to provide duplicative financial assurance when an insurance deductible is above 1% is unnecessarily onerous, does not provide any additional protection for the State of Washington or the environment, and should be removed from the final rule.

The current proposed rule only allows a deductible in an insurance policy if the applicant demonstrates supplemental financial responsibility coverage for the amount of the deductible when the deductible is greater than 1% of the policy amount. This rule would apply even though the insurer issues a policy that agrees to pay all claims on a first-dollar basis. As you know, first-dollar coverage means that the insurer pays the claim first without any deductible. The insurer then seeks reimbursement for the deductible from the insured. The requirement to provide additional financial assurance for the deductible is duplicative, unnecessary, and does not provide any additional protection for the State of Washington when the State is paid in full without any deductible under a 'first dollar' policy.

As the Department of Ecology acknowledged in the Preliminary Regulatory Analyses for Chapter 173-187 WAC, "insurance from the commercial insurance market is not generally available to the regulated industry for pollution control and damages above $200 million." Preliminary Regulatory Analyses for Chapter 173-187 WAC, Jan. 2024, p. 48. When proposing a $300 million maximum financial responsibility requirement for Class I facilities, the Department of Ecology acknowledged that multiple insurance products, or a combination of insurance and other financial responsibility instruments, will need to be obtained and 'stacked' to reach the $300 million total required amount of financial responsibility. Providing additional layers of insurance (likely with their own deductibles) on top of that, in order to meet a requirement to insure the deductible, will further tax the capacity of the commercial insurance market, without providing any financial benefit to the State or its citizens.

3. The requirement to use a standby trust in connection with a surety bond, letter of credit, and guarantee is burdensome and unnecessary.

The proposed rule requires a standby trust be established if a surety bond, letter of credit, or guarantee is used as the financial responsibility mechanism. WAC 173-187-220(b), (c), (d). Maintaining a standby trust is an expense and an administrative burden, and it is not clear what benefit a standby trust serves where the financial responsibility instrument—whether a surety bond, letter of credit, or a guarantee—can be drawn on by the State of Washington in the event of an oil spill.

In particular, it is not clear why a standby trust is needed for a guarantee, when a standby trust is not required for a guarantee in the Department of Ecology's rules for Dangerous Waste, WAC § 173-303-620(4) (incorporating by reference 40 C.F.R. § 143(f)(10)). Instead, the Dangerous Waste regulations for a corporate guarantee provide that the guarantor can either perform the cleanup itself or establish a trust with the required amount of funds for cleanup. We believe that a similar approach would be equally effective for marine oil spills.

The requirement to establish a series of empty standby trust accounts for guarantees, surety bonds and letters of credit creates an administrative burden for the regulated community, with no apparent benefit to the State or its citizens. It would be more appropriate to require the creation of a trust account, if one is needed, at the point when the obligation to make payment or perform cleanup has been triggered under one of these financial responsibility mechanisms, and to further limit the obligation to situations where the State seeks to have funds deposited into a trust account, rather than to have a guarantor or surety perform the required response actions.

4. The proposed financial responsibility forms are an integral part of the rule and should be submitted to the public for comment.

We understand that proposed forms are being developed for the financial responsibility mechanisms in the rule and for a standby trust. Those forms have not yet been made available for public comment. Those forms should be: (1) made available for public comment and (2) incorporated into the final rule to identify the terms and conditions that the Department of Ecology would require or accept for each of the available financial responsibility mechanisms. Public comment will help address any potential issues or inconsistencies between the proposed forms and proposed rulemaking language. It is better—for both the Department of Ecology and the regulated community—to address those issues now than to deal with inconsistencies in a future rulemaking or on an ad hoc basis.

It is our understanding that these proposed forms will track the language used by the United States Environmental Protection Agency ("EPA") for facilities providing financial responsibility for underground storage tanks, found in 40 C.F.R. Part 280, Subpart H. We agree that the language in those forms is useful, and in many cases, contains provisions we would like to see in the Department of Ecology's final rule in WAC 173-187. However, since the Department of Ecology's

proposed rule differs from the federal underground storage tank rule, it is important to consider how EPA's forms will be used or adapted to the final rule that the Department of Ecology adopts.

5. The sources of insurance should be broadened to ensure sufficient coverage and reduce strain on the Washington insurance market.

The current proposed rule requires insurance to be purchased from an entity authorized to sell insurance in Washington or through a licensed surplus line broker. This requirement will likely strain the capacity of the Washington insurance market heavily. The Department of Ecology's stated reason for this choice is that other insurance "may be a high risk insurance that cannot be relied upon to provide coverage in the event of an oil spill." Preliminary Regulatory Analyses for Chapter 173-187 WAC, Jan. 2024, p. 51. Although this may be a valid concern in the case of insurance originating from a market outside the United States, the Department of Ecology should consider whether an alternative approach will provide equivalent protection.

The current rules for financial assurance for dangerous wastes, WAC § 173-303-620(4)(d) and 40 C.F.R. § 264.143(e)(1), require an insurance company to be licensed in a state within the United States, or to carry a certain financial strength rating. We believe the proposed rule could be modified to harmonize with and adopt the same approach for marine oil spills. It is notable that the Washington legislature found it appropriate for other financial assurance mechanisms to be purchased outside the State of Washington. For bonds, for example, the statute only requires that a bond be issued by a bonding company authorized to do business in the United States. RCW 88.40.030. Insurance and surety bonds are both nationwide industries, and the provisions that apply to surety bonds can be applied to insurance to achieve a similar level of financial strength and protection.

The Department of Ecology should also revise this rule to expressly allow insurance instruments issued by affiliate companies, often called "captive insurance," in order to prevent undue strain on the Washington insurance market.

6. We support the Department of Ecology's selection of a $300M maximum amount of financial responsibility and note that additional funds for oil spill response actions may be available from other sources, such as the Oil Spill Liability Trust Fund.

In the proposed language for the rule, Ecology declined to include a maximum of $600M in financial responsibility for Class I facilities, recognizing that no insurers offer such coverage in the United States, and that an unachievably high requirement would not "meet the specific objective of considering commercial affordability and availability of financial responsibility in the marketplace," and would place financial responsibility instruments and compliance out of reach for many facilities. Preliminary Regulatory Analyses, Jan. 2024, p.48. This is consistent with the statutory objectives in RCW 88.40.025, which require the Department of Ecology to consider the commercial affordability and availability of financial responsibility.

We recognize that some commenters on the proposed rule have asked for higher levels of financial responsibility. In response, the Department of Ecology may find it useful to point out

that the Oil Pollution Act of 1990 created an Oil Spill Liability Trust Fund ("OSLTF") which already provides up to $1.5 billion to respond to a release of oil into navigational US waterways, including up to $750 million for the initiation of natural resource damage assessments and claims in connection with any single incident. 26 U.S.C. § 9509(c). Owners, operators, and other parties who are responsible for the release must reimburse the OSLTF for funds that are used to respond to the release. *Id.* § 9509(d). This is fully consistent with the Department of Ecology's goal to make sure that the entity responsible for a spill pays to clean it up.

The OSLTF is another layer of funding—and significant funding at that—to ensure that Washington's navigable waters will be protected in the event of such a spill. The net effect of the rule that the Department of Ecology is considering now is to increase the amount of financial assurance that may be available for oil spill response in marine waters up to $1.8 billion per facility and incident.

7. The Department of Ecology should clarify the "significant changes" provision.

Under proposed rule section WAC 173-187-300, owners and operators must notify the Department of Ecology of a "significant change" within seven days, and the Department of Ecology may suspend/terminate the certificate of financial responsibility ("COFR") if the owner or operator can no longer demonstrate financial responsibility based on the "significant change." "Significant change" is defined in WAC 173-187-300 as:

> Significant changes include, but are not limited to:
> (a) A change in ownership or operational control;
> (b) That a method of demonstrating financial responsibility will be terminated or any coverage thereunder will cease;
> (c) Any financial responsibility coverage amount that will be changed or adjusted.

The underlined language above (i.e., "include, but are not limited to") should be replaced with "are." Facility owners and operators should not have to predict what may constitute a significant change beyond the identified change in ownership or operational control, termination of a financial responsibility instrument, or a change in the required amount of financial responsibility for a facility. Particularly where the consequence is suspension or termination of the COFR, it should be clear what each facility owner and operator must do to ensure compliance with the rule.

8. The Department of Ecology should clarify who can make the authorized representative designation.

The proposed rule allows an authorized representative to apply for a COFR on behalf of an owner or operator. We understand that the Department of Ecology intends this provision to make sure that a company and its leadership understand that they are bound by the financial responsibility obligations signed and submitted by the authorized representative. We also understand that the Department of Ecology is developing a form for the authorized representative designation. As discussed above, it is important for this form and any other proposed form to be made available

to the public for review, as there may be inconsistencies in the language of the rule and what is contemplated on the form. In particular, the "authorized representative" definition in the proposed rule ("a person who has the authority, or delegated authority, to submit and attest to relevant information," WAC 173-187-040) seems broad enough that it could include any person so designated by an applicant. If the Department of Ecology intends only for a limited set of persons to serve as an authorized representative, that should be made clear now in the rulemaking process.

9. The Department of Ecology should provide appropriate process for the revocation of approval of an alternate financial responsibility amount.

Under the proposed rule section WAC 173-187-120, the Department of Ecology may revoke approval of an approved alternate financial responsibility calculation "at any time in response to new information or after operational or engineering changes that alter the conditions of approval." This provision should also include a defined period of time in which the owner or operator can propose a revised alternative financial responsibility amount that accounts for the new information or operational or engineering changes, and a 60-day time period to adjust its financial responsibility instruments for the new amount. The proposed rule should also include a dispute resolution procedure in the event that the Department of Ecology and the owner or operator do not agree on the required amount of financial responsibility.

10. The Department of Ecology should clarify when it will draw on a financial responsibility instrument.

The rule does not clearly identify the circumstances in which the Department of Ecology would draw on any financial responsibility instrument. For example, if an owner or operator uses a surety bond as financial responsibility, will the Department of Ecology draw on the bond as soon as an oil spill occurs, or will it draw on the bond only if the owner or operator fails to clean up the spill or adequately cover the costs of clean up and damages? The point at which the Department of Ecology intends to draw on the proposed financial responsibility instruments should be identified clearly in the final rule.

11. Financial responsibility should be required on a "per vessel" or "per facility" basis.

The proposed rule appears to require financial responsibility on a "per vessel" or "per facility" basis. If a facility operator provides adequate financial responsibility for the facility, there is no need for the owner to provide a second and duplicate layer of financial responsibility. The final rule should be clarified to make this point explicit. As an example, the federal rules for underground storage tanks contain a provision that states, "if the owner and operator of a petroleum [UST] are separate persons, only one person is required to demonstrate financial responsibility." 40 C.F.R. § 280.90. A similar approach would be appropriate here.

12. Issuance of a COFR should be an explicit affirmation of the sufficiency of the underlining financial responsibility mechanism.

The proposed rule implies that, when the Department of Ecology issues a COFR, it has determined that the applicant's financial responsibility instrument is sufficient. Specifically, the proposed rule states in WAC 173-187-250, "If Ecology approves the application for financial responsibility, it will issue a Washington COFR to the applicant stating that the proof of financial responsibility requirements have been met for each vessel or facility identified in the application." The rule should clearly state that the Department of Ecology has determined that the applicant's financial responsibility is sufficient when it issues a COFR.

13. The Moody's rating requirement for self-insurance should include all "Baa" ratings.

The credit rating required for self-insurance should be clarified. The proposed language in WAC 173-187-220(g)(i)(B) requires a credit rating of Baa or better by Moody's credit rating agency, among other acceptable credit ratings. Moody's uses several "Baa" ratings: Baa1, Baa2, and Baa3. All three "Baa" ratings should be accepted and this should be stated clearly in the final rule.

Thank you for your consideration of these comments. If you have any questions or would like further information about anything in this letter, please contact us by e-mail at Sophie.Todd@bp.com and Patsy.Williams@bp.com, with a copy to the following legal counsel who assisted us in preparing these comments: Jean.Martin@bp.com, Sara.Warren@alston.com, and Elise.Paeffgen@alston.com. We will be happy to schedule a call to answer your questions, or to respond in writing to your requests.

Sincerely,

Sophie Todd

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