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Submitted via the online comment portal:
https://sppr.ecology.commentinput.com/?id=Njtx23iVBu

RE: Draft Rule, Chapter 173-187 WAC Financial Responsibility

Dear Ms. Davis:

The following comments are submitted by Sierra Club regarding Dept. of Ecology's ("DOE") draft rule to establish new financial responsibility requirements for Washington State's onshore petroleum handling facilities (Chapter 173-187 WAC). Sierra Club has already provided many of its comments in a joint letter submitted by a group of environmental NGO's regarding the proposed rulemaking for "Class 1 facilities." Class 1 facilities are the state's largest facilities for transferring, processing, or transporting petroleum on or near the state's navigable waters, and include refineries, pipelines, and other bulk oil handling facilities. The content of that joint comment letter is incorporated here by reference.

This letter focuses on DOE's position, clearly evident in its Preliminary Regulatory Analysis, that the burden on the petroleum industry of financial responsibility requirements exceeding $300 million in annual insurance coverage for Class 1 facilities is too much for the industry to bear. That aforementioned joint comment letter addresses various reasons why that position is incorrect and concludes that financial responsibility limits of at least $1 billion annually should be set. The instant letter dives deeper into DOE's analysis, and details why any concern about the industry's ability to afford at least $1 billion in annual coverage is not well-taken.

EXTERNALIZED COSTS

To begin, consider the context in which the petroleum industry operates. It is one of the most profitable industries on the planet, with many of its members consistently among Earth's top performing companies. On that basis alone, any worry about the cost of buying adequate financial responsibility is misplaced. For such a wealthy industry, with such a rich record of costly and deadly mistakes (e.g., the 1969 Santa Barbara Channel spill, the 1989 Exxon Valdez grounding, and the 2010 Deepwater Horizon blowout, among many), it is not asking too much that members of the industry fully protect society from their mistakes and negligence.

But DOE's rulemaking process focuses on maintaining industry profits, not protecting society. DOE's emphasis on "least-burdensome alternative" is an entirely economic view of how not to inconvenience the industry. This not only misunderstands the industry's economics, it also fails DOE's statutory obligation to consider factors besides economics, as well as its self-avowed mission "to protect, preserve, and enhance Washington's environment for current and future generations." (DOE website) And if there is insufficient financial responsibility required of Class 1 facilities, then in the event of a major spill that leaves the citizens of Washington having to clean up, and pay for cleaning up, the mess. This would not square with DOE's mission.

Concern about the potential burden of financial responsibility requirements on industry profits ignores how the petroleum industry enormously benefits from the "externalized costs" that they pass onto society. "Externalized costs" are generated by producers but paid for by society. A myriad of externalized costs benefit the industry, starting with government subsidies. According to U.S. Senator Sheldon Whitehouse (D-RI), Chairman of the U.S. Senate Budget Committee, speaking on May 3, 2023, about $1 trillion annually in subsidies benefit fossil fuel industries worldwide according to the International Energy Agency. (See https://www.budget.senate.gov/chairman/newsroom/press/sen-whitehouse-on-fossil-fuel-subsidies-we-are-subsidizing-the-danger-) For the U.S. alone that's about $20 billion annually. But Sen. Whitehouse goes on to detail more externalized costs that benefit the industry:

[T]he really big subsidy is the license to pollute for free. The IMF calls this global free pass an "implicit" fossil fuel subsidy. Economists call it an "unpriced externality." Behind these benign-sounding phrases is a lot of harm.

Start with harmful effects of local air pollution. Researchers from Harvard found pollutants from oil and gas combustion were responsible for 8.7 million premature deaths annually – the increased mortality rates from heat and air pollution we heard about at last week's hearing.
Then, growing costs from intensifying disasters: wildfires, floods, droughts, which according to OMB could cost the federal budget $2 trillion annually and reduce US GDP 3 to 10 percent by the end of the century.

You tally up the harms, and the IMF estimates it at a $5.4 trillion annual subsidy worldwide. In the United States, it's $646 billion – every single year.

Worse, this is almost certainly undercounting the true costs. The London School of Economics reports that studies often underestimate the harm of climate dangers by failing to account for how hazards can cascade across ecological and economic systems. These cascades can cause irreparable damage to human well-being, to ecosystems, and to the US economy. These are the systemic risks we've heard about from previous witnesses.

And [. . .] extracting these dirty fuels has terrible consequences for human health - especially for children. From higher rates of birth defects to childhood leukemia, there's ample evidence that communities around oil and gas extraction sites pay an especially high price.

It's textbook economics that the price of a good should reflect its true cost. The fossil fuel industry violates this rule of market economies. [Italics added]

(End of quotation)

All of these externalized costs are borne by society, not the industry. And yet, DOE's focus on affordability seems more concerned that adequate financial responsibility instruments not be too expensive for the industry. Again, this contradicts DOE's statutory mandate (as explained by DOE itself) and DOE's role in protecting society (as stated in DOE's website).

DOE'S PRELIMINARY REGULATORY ANALYSIS

Chapter 6 of DOE'S Preliminary Regulatory Analysis (PRA) is the "least-burdensome alternative" analysis, DOE's justification for its proposed financial limits of required insurance or other financial instruments. It's flaws are explained below.

PRA Chapter 6.1 and 6.2

Chapter 6.1, the introduction to what is titled "Least-Burdensome Alternative Analysis," notes that RCW 34.05.328(1)(e) requires that DOE, "to be able to adopt the [financial responsibility] rule, . . . must determine that the requirements of the rule are the least burdensome set of requirements that achieve the goals and objectives of the authorizing statute(s)." (Italics added.) Chapter 6.2 of the PRA clarifies that the authorizing statute, Chapter 88.40 RCW, has as its goals and objectives:

• To define and prescribe FR [Financial Responsibility] requirements for vessels that transport petroleum products as cargo or as fuel across the waters of the state of Washington.
• To define and prescribe FR requirements for facilities that store, handle, or transfer oil or hazardous substances in bulk on or near the navigable waters.

DOE says this means that the authorizing statute requires it "to adopt a rule that considers worst-case oil spill scenarios, the cost of cleaning up spilled oil, the frequency of operations at facilities, damages that could result from spills, and the commercial availability and affordability of FR."

This means that DOE must consider, according to the authorizing statute, five different items: (1) worst-case oil spills, (2) spilled oil clean-up costs, (3) frequency of facilities operations [that could cause spills], (4) damages that could result from spills, and (5) commercial availability and affordability of financial responsibility. But the rest of chapter 6 – DOE's actual least-burdensome alternative explanation – focuses on only financial burden, the last item. This isn't the analysis the statute requires. The full five-part analysis must be done, and a financial responsibility requirement of at least $1 billion in annual coverage should be imposed.

PRA Chapter 6.3.1 Requiring higher financial responsibility for facilities

Chapter 6.3.1 says that (italics added):

We . . . believed a higher amount [of financial responsibility] would provide better assurance that the costs and damages associated with a worst-case spill to Washington's unique waters and resources could be covered by the company. This higher level could have provided a higher level of protection for the state but failed to meet the specific objective of considering commercial affordability and availability of FR in the marketplace.

By requiring a greater FR, this rule would have been more burdensome for facilities. We expect that many facilities will choose to meet the FR requirements through self-insurance. Setting a maximum FR of $600 million would have caused roughly half of Class 1 facilities to fail to meet the self-insurance requirements. We learned insurance from the commercial insurance market is not generally available to the regulated industry for pollution control and damages above $200 million. Industry is able to supplement the available insurance with other financial means to meet the $300 million requirement but would find it burdensome to find a means to meet a $600 million requirement.

This is problematic in many ways. It focuses entirely on financial affordability, with nothing said about the other four items DOE acknowledges it must look at. Between externalized costs and the other four items, DOE should require the industry to pay whatever it takes to protect the people, animals, habitat, and environment of the State of Washington.

In the second quoted paragraph, DOE says that greater FR would be burdensome for facilities, noting that half of Class 1 facilities fail

to meet self-insurance requirements, apparently because insurance from the marketplace is "not generally available" above $200 million. But what this actually means is not explained and seems to contradict the fourth paragraph of the Executive Summary of the PRA (p. 9), which says that insurance markets "for onshore facilities do not presently provide coverage" above $200 million. Which is it? Not generally available indicates that there is limited availability, but coverage that is not presently provided means there is nothing available. This needs to be clarified.

The "unavailability" conclusion also needs more explanation and support. DOE should detail how it determined the availability of insurance in the marketplace. According to the recent public comment sessions, DOE consulted with the State Dept. of Insurance and a private insurance consultant. But what research did they do? What exactly were their conclusions? Who was it that DOE communicated with? What is the expertise of those DOE communicated with? Was the private consultant someone DOE found on their own, or was it a referral from the industry? If it was an industry referral, did DOE try to find an independent consultant?

Similarly, how did DOE reach the conclusion that "[i]ndustry is able to supplement the available insurance with other financial means to meet the $300 million requirement but would find it burdensome to find a means to meet a $600 million requirement"? The undersigned's experience as an attorney litigating for years against the petroleum industry indicates that oil company insurance placements became cheaper as more is bought (reflecting that because lower insurance layers must be used up before reaching the next layer, the likelihood of higher layers being at risk is reduced). Again, what research was done? Who did DOE talk to? All questions raised in the preceding paragraph apply.

While requiring more FR may create more burden, the level of burden should be very high given the benefit of externalized costs and the extreme profitability of the petroleum industry. And burden is supposed to be just one of four items considered in DOE's analysis.

PRA Chapter 6.3.4 Requiring the State of Washington to be listed as additional insured or certificate holder on an insurance policy

This alternative was found "more burdensome on covered parties" because, as stated in chapter 6.3.4 of the PRA:

Insurance companies are likely to charge an additional premium to add an additional insured to the policy. It is also possible that insurance companies will not allow additional insureds or certificate holders, which would result in fewer insurance options for the regulated industry. Additionally, requiring the State to be listed as additional insured or certificate holder may not be effective in guaranteeing that the State would receive a payout in the event of an oil spill, so it is questionable that there would be any benefit to this requirement. Our insurance industry advisors communicated that the most effective way to ensure the state is paid for a loss is to require an insurance company representative to sign a certificate of insurance agreement with the State as the beneficiary.

This raises more questions. Why is it unduly burdensome for insurance companies to charge an additional premium to add an Additional Insured (AI)? That would have to be a huge premium. AI premiums usually don't cost much. This raises the question of whether DOE appreciates the difference between an AI and an Additional Named Insured (ANI)? ANI's do carry much greater premiums. But again, the benefit of externalized costs indicates that the industry should pay the greater premiums.

How will the mere possibility "that insurance companies will not allow additional insureds or certificate holders" result in fewer insurance options? If it's only a possibility, then it might not occur. And insurance companies generally insure anything legal if the requested premium is paid. If insuring AI's or ANI's requires a higher premium, that shouldn't be a reason not to require that Class 1 facilities acquire such coverage. Better that the industry pay for this than that society pay to clean up a major spill. And even if options were reduced, how is that too much of a burden? Reduced options do not mean no options.

And how is the possible ineffectiveness of guaranteeing the State a payout a reason not to do it? No insured is guaranteed a payout. Questions as to whether "there would be any benefit to this requirement" begs the question of whether there is any benefit to any required insurance, as there is always the question of whether the insurance will pay out.

Also, who are "our insurance advisors," why do they think "the most effective way to ensure the state is paid for a loss" is to list the State as beneficiary, and what is meant by "a certificate of insurance agreement"? Finally, did DOE do any analysis of the value to the State of being able to make a claim on an insurance policy? Having the ability to present a claim, and to demand that a defense be provided by an insurance company – rights that come with being an ANI, but not an AI – are quite valuable. The details of DOE's insurance analysis should be described, and if shown to be inadequate that analysis should be re-done.

CONCLUSION

To summarize, DOE's conclusions relating to affordability are poorly supported and don't address all five items that DOE says it should address. DOE's analysis should also incorporate an unbiased analysis of externalized costs, and a thorough detailing of the who's and how's of its insurance consulting. DOE, for all the reasons in this letter and in the joint letter Sierra Club signed onto, should recognize that affordability to the petroleum industry should not be the focus of its analysis, and acknowledge that financial responsibility requirements of at least $1 billion are required to protect the public interest.

Sincerely,

Rick Eggerth
Co-chair, Mt. Baker Group
On Behalf of Sierra Club Washington State