Lovel Pratt

The League of Women Voters of Washington has joined Friends of the San Juans, Washington Conservation Action, Sierra Club Washington State, RE Sources, Communities for a Healthy Bay, Evergreen Islands, Washington Physicians for Social Responsibility, Whale Scout, San Juan Islanders for Safe Shipping, Center for Sustainable Economy, Friends of Grays Harbor, Endangered Species Coalition, Orca Network, Citizens for a Clean Harbor, 350 Tacoma, Seattle Aquarium, The Lands Council, Friends of the Earth, Center for Biological Diversity, Columbia Riverkeeper, Puget Soundkeeper, Sound Action, Wild Orca, The Conversation 253, Spokane Riverkeeper, STAND.earth, and Natural Resources Defense Council on the attached comment letter.

Friends of the San Juans · Washington Conservation Action · Sierra Club Washington State
RE Sources · Communities for a Healthy Bay · Evergreen Islands
Washington Physicians for Social Responsibility · Whale Scout
San Juan Islanders for Safe Shipping · Center for Sustainable Economy
Friends of Grays Harbor · Endangered Species Coalition · Orca Network
Citizens for a Clean Harbor · 350 Tacoma · Seattle Aquarium · The Lands Council
Friends of the Earth · Center for Biological Diversity · Columbia Riverkeeper
Puget Soundkeeper · Sound Action · Wild Orca · The Conversation 253 · Spokane Riverkeeper
STAND.earth · Natural Resources Defense Council · League of Women Voters of Washington

March 8, 2024

Diana Davis
Department of Ecology, Northwest Regional Office
Spill Prevention, Preparedness, and Response Program
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Shoreline, WA 98133-9716

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,

Thank you for the opportunity to comment on the draft rule that will establish the new Chapter 173-187 WAC Financial Responsibility. The undersigned represent 27 nonprofit organizations that work on environmental health and safety issues in Washington State.

It is critical that financial responsibility requirements are established for Washington State's onshore oil handling facilities. While there is unlimited liability for oil spills in Washington State,[1] financial responsibility requirements are needed to ensure that these facilities won't go bankrupt before covering all of their oil spills' response and damage costs.

> In the event of an oil spill for which the costs for cleanup and damages exceed the assets of a responsible party, that party may face insolvency.[2]

[1] RCW 90.56.370 Strict liability of owner or controller of oil—Damages—Exceptions.
[2] Mercer Management Consulting. June 1993. *Analysis of Oil Spill Costs and Financial Responsibility Requirements*. PDF page 247. https://fortress.wa.gov/ecy/ezshare/sppr/preparedness/MercerStudy1993_CombinedFiles.pdf.

These comments will focus on this rulemaking's establishment of financial responsibility requirements for Class 1 facilities, the state's largest oil handling facilities that transfer, process, or transport oil on or near the navigable waters of the state. Class 1 facilities include refineries, pipelines, and other bulk oil handling facilities.

Washington State's Class 1 facilities put the well-being and health of communities and cultures, wildlife, clean water, clean air, and the Salish Sea ecosystem at risk.

As required by RCW 88.40.025:

> An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the department as necessary to compensate the state and affected federally recognized Indian tribes, counties, and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state.[3]

Instead of determining what financial responsibility amount would be needed to compensate the state, Tribes, counties, and cities for damages from a Class 1 facility's oil spill, Ecology's proposed rule is based primarily on just one of these five considerations, "*the commercial availability and affordability of financial responsibility*":

> The department shall adopt a rule that considers such matters as the worst case amount of oil that could be spilled, as calculated in the applicant's oil spill contingency plan approved under chapter 90.56 RCW, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill, and the commercial availability and affordability of financial responsibility. In order to demonstrate financial responsibility as required under this section, the owner or operator of a facility must obtain a certificate of financial responsibility from the department. The requirements of this section do not apply to an onshore or offshore facility owned or operated by the federal government or by the state or local government.[4]

Financial responsibility necessary to compensate the state, Tribes, counties, and cities for damages:

RCW 88.40 sets the financial responsibility requirements for vessels and directs Ecology to set the financial responsibility requirements for facilities. RCW 88.40 does not direct Ecology to base the financial responsibility requirements for Washington State's industrial facilities on other West Coast states' financial responsibility requirements.

[3] RCW 88.40.025 Financial responsibility for onshore or offshore facilities.
[4] RCW 88.40.025 Financial responsibility for onshore or offshore facilities.

Yet $300 million maximum financial responsibility for Class 1 facilities is based on California's regulations which were established in 1995 and based on a 1993 study that used 1992 US dollar values to identify the cost of oil spill response and the damages that could result from a spill.

This 30+ year-old study identified the oil spill response and damages costs at $12,500 - $18,900 per barrel. In today's dollars, those costs would range from $27,916 – $42,209 per barrel.[5] The $18,900 per barrel cost was recommended for facilities given that "[n]atural resource damage claims are expected to rise in the future."[6] However, California based its 1995 regulations on the low range of $12,500 per barrel.

Oil spill response and damage costs:

Ecology's only comprehensive valuation of oil spill impacts is based on 2006 numbers: "a large spill could cost the state $10.8 billion and 165,000 jobs."[7] In today's dollars the cost would be $16.8 billion.[8]

Regarding the cost estimate above, Ecology states:

> We note that this estimate was based on open-water spills significantly disrupting fishery activities (such as might occur from a large vessel) and impacts specific to an onshore facility spill may differ.[9]

However, no analysis was conducted on the costs of a vessel's large oil spill as compared with an onshore facility's large oil spill. In Ecology's review of potential oil spill damages, the only reference to an onshore facility's oil spill is the 1999 Olympic pipeline gasoline spill and explosion, concluding that "in today's dollars it could cost over $404 million."[10] These costs are $104 million above the proposed maximum financial responsibility requirement.

In today's dollars, the total cost of a Class 1 facility's large oil spill could cost $16.8 billion. The proposed $300 million maximum financial responsibility requirement would cover less than 2%. In addition to the funds available in Washington State's oil spill response account (RCW

[5] U.S. Bureau of Labor Statistics CPI Inflation Calculator: The value of $12,500 from January 1992 to January 2024 = $27,916.09; the value of $18,900 from January 1992 to January 2024 = $42,209.13. https://www.bls.gov/data/inflation_calculator.htm.
[6] Mercer Management Consulting. June 1993. *Analysis of Oil Spill Costs and Financial Responsibility Requirements*. PDF page 37. https://fortress.wa.gov/ecy/ezshare/sppr/preparedness/MercerStudy1993_CombinedFiles.pdf.
[7] Ecology's Spill Prevention, Preparedness, and Response Program webpage: https://ecology.wa.gov/About-us/Who-we-are/Our-Programs/Spills-Prevention-Preparedness-Response.
[8] U.S. Bureau of Labor Statistics CPI Inflation Calculator: The value of $10.8 billion from January 2006 to January 2024 = $16,797,300,000. https://www.bls.gov/data/inflation_calculator.htm.
[9] Ecology. January 2024. *Preliminary Regulatory Analyses for Chapter 173-187 WAC Financial Responsibility.* Page 36. https://apps.ecology.wa.gov/publications/documents/2408001.pdf.
[10] *Ibid*.

90.56.500),[11] the federal Oil Spill Liability Trust Fund, can provide up to $1 billion dollars per oil spill event for response and damage costs.[12] All of these funds combined would cover less than 8% of the potential costs of a large oil spill.

Who would pay for the remaining costs if the Class 1 facility is bankrupt after covering just $300 million of the total oil spill costs? The draft rule fails to identify a financial responsibility amount for Class 1 facilities necessary to compensate the state and affected federally recognized Indian Tribes, counties, and cities for damages that might occur during a reasonable worst case spill of oil. Washington state taxpayers, state and local governments and Tribes and businesses should not have to pay for these costs.

Financial responsibility requirements should be based on the estimated spill response and damage costs in today's dollar values. Where there is a range of estimated costs, the high end of the range should be the basis for financial responsibility requirements to ensure that the necessary funding is available to address all spill response and damage costs.

Worst case spill of oil:

Ecology defines Class 1 facilities' worst case spill volumes solely on the volume of each facility's largest above ground storage tank. Ecology does not consider complications from adverse weather, or the site characteristics and storage, production, and transfer capacity, in defining worst case spill volume, as is included in WAC 173-182-030 (73).

The list of Class 1 facilities (provided by Ecology) includes each facility's worst case spill volume, the total cost of a worst case spill based on the outdated and low estimate of $12,500 per barrel, and the percentage of that total cost that would be covered by the proposed $300 million maximum financial responsibility requirement. Only five of the thirty Class 1 facilities would be covered by the $300 million requirement. See the *Proposed Financial Responsibility Requirements for Class 1 Facilities* on page 11.

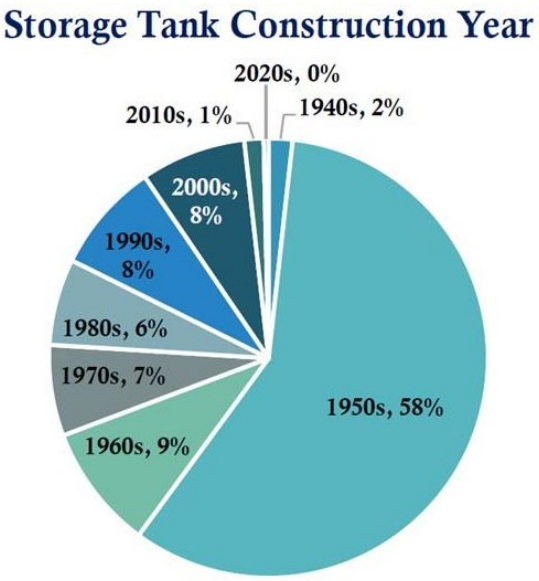
The proposed $300 million maximum financial responsibility requirement would cover only a small fraction of the total cost of a worst case spill from these refineries:

- Phillips 66 Ferndale Refinery: 3.64%
- Marathon Anacortes Refinery: 4.00%
- BP Cherry Point Refinery: 4.82%
- HollyFrontier Sinclair Puget Sound Refinery: 7.97%
- Par Pacific U.S. Oil Refinery: 8.74%

[11] The most recent State Oil Spill Response Fund cash balance is in the Treasurer's Report-Nov 2023 (Fund 223, page 13): $6,459,388.45. https://www.tre.wa.gov/wp-content/uploads/011_-November-2023-Monthly-Report-Web.pdf.

[12] U.S. Environmental Protection Agency. Oil Spill Liability Trust Fund webpage: https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/oil-spill-liability-trust-fund.

Ecology defines Class 1 facilities' worst case spill volumes solely on the volume of each facility's largest above ground storage tank (per WAC 173-182-030 (73)). There is reason to be concerned about spills from above ground storage tanks. According to an economic impact assessment of Western States Petroleum Association (WSPA) member facilities in Washington State, "[t]he existing tankage infrastructure is aged, with 89% of the tanks being built prior to the first implementation of WAC 173-180-330 in 1994."[13]



For pipelines, "worst case spill" is defined in WAC 173-182-030 (73)(d). The Puget Sound spur of Canada's Trans Mountain Pipeline transports Alberta tar sands crude and other oil products to Washington State's northern refineries. The financial responsibility requirement for the Trans Mountain Pipeline should be based on the higher oil spill response and damage costs for spills of tar sands products (also known as bitumen, diluted bitumen, and dilbit).

A spill from the Puget Sound spur of the Trans Mountain Pipeline could impact the Nooksack River, Lower Skagit River, Samish River, Sumas River, Swinomish Channel, Padilla Bay, the Salish Sea, and all the human and animal communities that surround and live within these waters. The construction of Canada's Trans Mountain Pipeline expansion project is more than 98% complete and expected to be operational in the second quarter of 2024.[14] This expansion project will increase the pipeline's current capacity by 590,000 barrels per day.[15]

The response, remediation, and restoration costs for the 2010 pipeline spill of tar sands crude oil into the Kalamazoo River was over $1,208,000,000 or $60,153 dollars per barrel.[16]

The spill response and damage costs could be much higher for a tar sands oil spill in the Salish Sea and its watershed as compared with the Kalamazoo River. According to Ecology:

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[13] Turner Mason & Company. February 16, 2023. *Refining Industry Economic Impact Assessment Washington State Amendment to WAC Chapter 173-180, 184*. The quote is on page 4; the pie chart, *Storage Tank Construction Year*, is on page 16. https://scs-public.s3-us-gov-west-1.amazonaws.com/env_production/oid100/did200006/pid_204735/assets/merged/vn0mi00_document.pdf?v=13730.

[14] Trans Mountain blogpost. January 12, 2024. *Trans Mountain Receives Decision on Variance Application*. https://www.transmountain.com/news/2024/trans-mountain-receives-decision-on-variance-application. Reuters. January 24, 2024. *Canada's Trans Mountain pipeline expansion to start in April*. By Arathy Somasekhar and Georgina Mccartney. https://www.reuters.com/world/americas/canadas-trans-mountain-pipeline-start-up-second-quarter-2024-01-24/.

[15] U.S. Energy Information Administration. January 8, 2024. Canada's Trans Mountain Pipeline expansion reportedly 95% complete. https://www.eia.gov/todayinenergy/detail.php?id=61184.

[16] UNITED STATES SECURITIES AND EXCHANGE COMMISSION. FORM 10-Q. September 30, 2014, Quarterly Report. Page 19. https://media.mlive.com/grpress/news_impact/other/Enbridge%20FORM%2010-Q.pdf.

> Bitumen from Alberta, even once diluted, is uniquely difficult to remove after a spill, because of its properties. Alberta bitumen oils are potentially sinking oils, or some portion may sink after weathering, which renders ineffective conventional techniques to contain and remove oil from the water's surface. Potentially sinking oil poses a risk of contamination to sediments and their ecosystems, which include economically and culturally valuable shellfish and fisheries.[17]

The draft rule should be revised to address the higher spill response and damage costs for tar sands products. The basis for the financial responsibility requirement for Class 1 facilities that transfer, process or transport tar sands products should be increased to at least $60,153 per barrel.

Commercial availability and affordability of financial responsibility:

The draft rule does not address the current costs and damages from oil spills, focusing instead on "the commercial availability and affordability of financial responsibility." This elevates oil industry profits above the financial responsibility requirements needed to compensate the state, Tribes, counties and cities for their oil spill costs.

To justify the $300 million maximum financial responsibility requirements for Class 1 facilities, the rulemaking's *Preliminary Regulatory Analyses* quotes the same section of the 2003 ESB 5938 (Updating financial responsibility laws for vessels) three times to justify using California's financial responsibility requirements for this rulemaking (on pages 15, 37, and 44):

> The legislature finds that the current financial responsibility laws for vessels are in need of update and revision. The legislature intends that, whenever possible, the standards set for Washington state provide the highest level of protection consistent with other western states and to ultimately achieve a more uniform system of financial responsibility on the Pacific Coast.

However, ESB 5938 does not address financial responsibility requirements for Class 1 facilities. The 2022 legislation that required this rulemaking, E2SHB 1691 (Concerning financial responsibility requirements related to oil spills), and RCW 88.40 make no mention of a uniform system of financial responsibility on the Pacific Coast or parity among west coast states.

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[17] Ecology. 2012. *Final Cost-Benefit and Least Burdensome Alternative Analysis Chapter 173-182 WAC Oil Spill Contingency Plan*. Pages 8-9. (Web address is no longer provided.)
See also: H. Gary Greene, John Aschoff. 2023. *Oil spill assessment maps of the central Salish Sea – Marine seafloor & coastal habitats of concern – A tool for oil spill mitigation within the San Juan Archipelago, Washington State. USA*, Continental Shelf Research, Volume 253, 2023, 104880, ISSN 0278-4343, https://doi.org/10.1016/j.csr.2022.104880.
https://www.sciencedirect.com/science/article/pii/S0278434322002333.

The draft rule prioritizes oil industry profits above Ecology's mission "to protect, preserve, and enhance Washington's environment for current and future generations."[18] Ecology considered a $600 million financial responsibility requirement, but decided against this amount solely because of perceived affordability concerns:

> 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 [financial responsibility] in the marketplace. Having to demonstrate FR for $600 million would require companies to pay significant costs into the millions of dollars per year to remain in business.[19]

For over 20 years, passenger vessels with a fuel capacity of at least 6,000 gallons have been required to demonstrate financial responsibility to pay $300 million, and tank vessels that carry oil as cargo in bulk have had to demonstrate financial responsibility to pay $1 billion.[20] It makes no sense that the $300 million maximum financial responsibility requirement for facilities is the same amount that is required for passenger vessels with a fuel capacity of just 6,000 gallons.

It should not be too burdensome for Class 1 facilities to have at least a $600 million financial responsibility requirement. Tank vessels and barges are able to comply with the $1 billion financial responsibility requirement. Why? The answer is mutual insurance associations.

> RCW 88.40 outlines the amount of financial responsibility a vessel must demonstrate and provides authorization to establish a process for verification of protection & indemnity (P&I) club membership. P&I clubs are mutual insurance associations that serve the vessel community and that provide risk pooling for their members. They provide insurance type protection for oil pollution risk, as well as other risks that are common for the vessel industry.[21]

Class 1 facilities could establish their own mutual insurance association to pool their resources and meet higher financial responsibility requirements.

The draft rule should be revised to remove the $300 million limit and require Class 1 facilities to demonstrate their ability to pay their full worst case spill costs as currently calculated (with the outdated and low estimate of $12,500 per barrel – see the *Proposed Financial Responsibility*

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[18] Department of Ecology State of Washington webpage: https://ecology.wa.gov/About-us.

[19] Ecology. January 2024. *Preliminary Regulatory Analyses for Chapter 173-187 WAC Financial Responsibility.* Page 48. https://apps.ecology.wa.gov/publications/documents/2408001.pdf.

[20] ESB 5938 - Updating financial responsibility laws for vessels. Sec. 3.(2)(a) and (3)(a) https://lawfilesext.leg.wa.gov/biennium/2003-04/Pdf/Bills/Session%20Laws/Senate/5938.SL.pdf?q=20240122064544.

[21] PROPOSED RULE MAKING CR-102 (July 2022) (Implements RCW 34.05.320). Page 2. https://ecology.wa.gov/getattachment/9e8bf4e8-8007-4afd-938f-165a24983191/WSR-24-03-115.pdf.

Requirements for Class 1 Facilities at the end of these comments). Alternatively, and at the very least, Class 1 facilities' financial responsibility requirement should be increased to $1 billion.

This rulemaking's focus on "the commercial availability and affordability of financial responsibility" implies that the oil industry can't do business responsibly, and is an example of how the oil industry benefits from "externalized costs" – costs that are generated by producers but paid for by society as a whole.

The petroleum industry is one of the most profitable on the planet, with many of its members consistently among the top performing companies in the world. The financial responsibility requirements must be based on the amount "necessary to compensate the state and affected federally recognized Indian tribes, counties, and cities for damages," at today's costs, not 1990's costs, and not "affordability" for the oil industry. Washington State's Class 1 facilities should be obligated to pay for all of their oil spill response and damage costs.

In summary:

1. **The draft rule fails to identify a financial responsibility amount for Class 1 facilities necessary to compensate** the state and affected federally recognized Indian Tribes, counties, and cities for damages that might occur during a reasonable worst case spill of oil.
2. **The draft rule should be revised to address the higher spill response and damage costs for tar sands products**. The basis for the financial responsibility requirement for Class 1 facilities that transfer, process or transport tar sands products should be increased to at least $60,153 per barrel.
3. **The draft rule should be revised to remove the $300 million limit and require Class 1 facilities to demonstrate their ability to pay their full worst case spill costs** as currently calculated (with the outdated and low estimate of $12,500 per barrel – see the *Proposed Financial Responsibility Requirements for Class 1 Facilities* on page 11).
4. **Alternatively, and at the very least**, Class 1 facilities' financial responsibility requirement should be increased to $1 billion.
5. **If this rulemaking process does not allow for the financial responsibility requirements for Class 1 facilities to be increased in the final rule, the requirement for an update to be completed within two years should be included in the final rule**.
6. **To ensure that the financial responsibility requirements reflect current costs**, the final rule should include a provision that directs Ecology to conduct annual reviews and updates as needed to the financial responsibility requirements similar to 33 CFR § 138.240 - Procedure for updating limits of liability to reflect significant increases in the Consumer Price Index (Annual CPI–U) and statutory changes.[22]

Thank you for your attention to these comments.

[22] 33 CFR § 138.240 - Procedure for updating limits of liability to reflect significant increases in the Consumer Price Index (Annual CPI–U) and statutory changes. https://www.ecfr.gov/current/title-33/chapter-I/subchapter-M/part-138/subpart-B/section-138.240.

Sincerely,

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Proposed Financial Responsibility Requirements for Class 1 Facilities

Even using the outdated low estimate of $12,500 per barrel as the basis for total oil spill costs, the $300 million maximum financial responsibility requirement would, for most of the Class 1 facilities, cover only a fraction of the total cost of their worst case spill. Given the $12,500 per barrel cost, the $300 million maximum financial responsibility requirement would cover a 24,000 barrel oil spill. Only five of the thirty Class 1 facilities have a worst case spill volume less than 24,000 barrels.

Class 1 Facilities	**Type**	**Location**	**Worst Case Spill Volume (in Barrels)**	**Worst Case Spill Cost at $12,500/barrel**	**Cost exceeds $300 Million by**	**$300 Million as a % of total cost**
BP Cherry Point	Refinery/Marine Terminal	Blaine	498,438	$6,230,475,000	$5,930,475,000	4.82%
Holly Frontier Sinclair	Refinery/Marine Terminal	Anacortes	301,316	$3,766,450,000	$3,466,450,000	7.97%
Marathon Anacortes	Refinery/Marine Terminal	Anacortes	600,000	$7,500,000,000	$7,200,000,000	4.00%
Phillips 66	Refinery/Marine Terminal	Ferndale	659,222	$8,240,275,000	$7,940,275,000	3.64%
US Oil	Refinery/Marine Terminal	Tacoma	274,655	$3,433,187,500	$3,133,187,500	8.74%
Trans Mountain	Pipeline and Pipeline/ Tankage	Canada to Northern Refineries	89,455	$1,118,187,500	$818,187,500	26.83%
BP NW Pipelines - Olympic	Pipeline and Pipeline/ Tankage	I-5 Corridor	110,000	$1,375,000,000	$1,075,000,000	21.82%
SeaPort Sound Terminal	Marine Terminal	Tacoma	78,336	$979,200,000	$679,200,000	30.64%
Alon Asphalt Company	Marine Terminal	Point Wells/ Richmond Beach	131,754	$1,646,925,000	$1,346,925,000	18.22%
Kinder Morgan	Marine Terminal	Seattle	82,400	$1,030,000,000	$730,000,000	29.13%
Tesoro	Marine Terminal	Port Angeles	80,000	$1,000,000,000	$700,000,000	30.00%
Andeavor Logistics	Pipeline	Salt Lake to Pasco to Spokane	4,669	$58,362,500	NA	NA
REG Grays Harbor	Refinery/Marine Terminal	Hoquiam/ Grays Harbor	52,143	$651,787,500	$351,787,500	46.03%
Tesoro	Marine Terminal	Pasco	58,533	$731,662,500	$431,662,500	41.00%

Class 1 Facilities	Type	Location	Worst Case Spill Volume (in Barrels)	Worst Case Spill Cost at $12,500/barrel	Cost exceeds $300 Million by	$300 Million as a % of total cost
Maxum	Marine Terminal	Seattle	604	$7,550,000	NA	NA
Nustar Energy	Marine Terminal	Tacoma	78,830	$985,375,000	$685,375,000	30.45%
Nustar Energy	Marine Terminal	Vancouver	109,509	$1,368,862,500	$1,068,862,500	21.92%
Phillips 66	Spokane Terminal Tank	Spokane	80,000	$1,000,000,000	$700,000,000	30.00%
Phillips 66	Moses Lake Terminal Tank	Moses Lake	45,000	$562,500,000	$262,500,000	53.33%
Phillips 66	Renton Terminal Tank	Renton	54,510	$681,375,000	$381,375,000	44.03%
Phillips 66	Marine Terminal	Tacoma	43,000	$537,500,000	$237,500,000	55.81%
Phillips 66 Yellowstone	Pipeline	Spokane to Moses Lake	5,491	$68,637,500	NA	NA
Shell Oil	Marine Terminal	Seattle	113,226	$1,415,325,000	$1,115,325,000	21.20%
Tidewater	Marine Terminal	Pasco	45,272	$565,900,000	$265,900,000	53.01%
Tidewater	Marine Terminal	Vancouver	65,558	$819,475,000	$519,475,000	36.61%
Tidewater	Pipeline	Pasco Terminal Tanks-Dock	45,272	$565,900,000	$265,900,000	53.01%
Sea Port Sound Terminal	Pipeline	Tacoma	3,652	$45,650,000	NA	NA
TLP Management Services	Marine Terminal	Seattle	115,629	$1,445,362,500	$1,145,362,500	20.76%
Tesoro	Marine Terminal	Vancouver	92,538	$1,156,725,000	$856,725,000	25.94%
US Oil	Pipeline	Tacoma to McCord	1,985	$24,812,500	NA	NA