

Diana Davis, Department of Ecology, Northwest Regional Office, Spill Prevention,
Preparedness, and Response Program
Sent as attachment via Department of Ecology's online tool

Re: New Chapter 173-187 WAC Financial Responsibility.

Dear Ms. Davis:

Please accept our comment (pp. 1-7) on the proposed new Chapter 173-187 WAC, to establish financial responsibility (FR) for clean up and damage costs for oil spills and the Preliminary Cost Benefit Analysis (CBA) that supports the proposal. Thank you for this opportunity to comment on these important rules. Our comment addresses only the rules proposed for onshore facilities: refineries, pipelines and other bulk facilities (Class 1 facilities).

We are residents of Skagit County where two of state's five refineries are located and through which the Olympic Pipeline, operated by BP, transports oil, jet fuel, gasoline and diesel fuel to various facilities in Washington and Oregon. We moved to Skagit County nearly two decades ago because of its beautiful diverse natural environment, rich farmlands and proximity to the Cascade Mountains and fragile Salish Sea. We enjoy exploring Skagit's natural beauty and the many creatures supported by its special environment.

Like many Skagit residents we are concerned about the long term health of Skagit's bays, estuaries, rivers and streams and the ability of these features to support the uniquely diverse small and large life forms that inhabit them (including eel grass beds, floating bull kelp, shorelines, fish, birds, invertebrates and all other wildlife). Consequently, we have worked as volunteers commenting on various environmental regulatory issues including coal export, oil by rail and oil refinery worker safety. We advocate for regulatory measures that we believe best protect Skagit, the Salish Sea and navigable waters throughout Washington affected by your rules. Although large oil spills may be low probability incidents they can result in high, ongoing, long-lasting and sometimes permanent consequences. We urge you to ensure that financial responsibility requirements for Class 1 facilities will provide sufficient compensation for oil spill impacts by those responsible for the costs and ensure that responsible parties cannot evade clean up and damage costs through bankruptcy or otherwise, leaving the major costs of clean up for government entities and Tribes. Unfortunately, we believe the FR amounts you have proposed for Class 1 facilities will not achieve the goals of the rulemaking effort. We request that you re-write the Class 1 facility rules and revise portions of the CBA that accompanies them.

The rules must adequately address FR for large spills from Class 1 facilities, including worst case spills.

The recent large gasoline spill from the Olympic Pipeline in Skagit County into waterways serves as a reminder for the Department and Skagit residents that oil spills can happen any time, anywhere and for any reason. The root cause of that spill

is still unknown. Also unknown is whether there was delay between the beginning of the spill until any warning device notified BP or delay in BP's notification of the Unified Command.

An incident involving a Class 1 facility can release any amount of hazardous liquids into waterways. Causes of such incidents can range from a large or small failure (caused by a damage mechanism such as corrosion) of refinery process equipment or of storage tank or pipeline equipment, human error or natural causes like a severe storm or seismic events. See, the following 4 examples: 1.) an incident at the Husky Refinery near Lake Superior in which flying debris from an explosion and fire ruptured an asphalt tank (17,000 barrels of hot asphalt were released and flowed outside the tank's containment area) and narrowly missed the rupture of a Hydrogen Fluoride storage tank. An investigation found that the refinery had failed to implement appropriate process safety management operating procedures during a shutdown. U.S. Chemical Safety Board, *Final Investigation Report. FCC Unit Explosion and Asphalt Fire at Husky Superior Refinery Superior, WI, Incident Date: April 26, 2018*. Report No. 2018-02-I-WI published December 23, 2022. <https://www.csb.gov/husky-energy-superior-refinery-explosion-and-fire/>; 2.) an oil spill into the Kalamazoo River cited in the agency's CBA in which on July 25, 2010, over 1 million gallons of heavy bitumen spilled from a cracked and corroded Enbridge Energy pipeline (and whose operators ignored an automated breach signal and continued to pump for 17 hours) contaminating the River for 35 miles and costing more than \$1.2 billion (\$60,153 per barrel) for a cleanup work that took 5 years. *Kalamazoo River oil spill*, https://en.wikipedia.org/wiki/Kalamazoo_River_oil_spill; 3.) CBA footnote 12, p. 14 states that Hurricane Katrina in 2005 resulted in approximately 8 million gallons of oil released from Louisiana facilities damaged by the storm; and 4.) In 2021 Hurricane Ida released an unknown quantity of oil from area oil facilities smearing crude oil across 11 miles of the Gulf of Mexico. Partlow, J. September 7, 2021. *Oil spill in Gulf of Mexico is one of more than 2,000 reports of water pollution after Ida*. Washington Post." <https://www.washingtonpost.com/climate-environment/2021/09/07/oil-spill-hurricane-ida/>. These incidents a few among others throughout the country demonstrating that any kind of large oil spill incident can result from any number of causes.

Neither the CBA nor the rules discuss earthquakes or tsunamis, and yet our region is predicted to experience a very large seismic event at some future time. These should be included in the CBA's discussion. The CBA and rules should also take into account and discuss the age of some of the equipment at Class 1 facilities, for example the aging storage tanks (some of which are 70 years old) at Washington's refineries.

FR of \$300 million for Class 1 facilities is grossly inadequate.

According to the Department's website and Preliminary Analysis for this rulemaking, based on 2006 dollars, "a large spill could cost the state \$10.8 billion and 165,000 jobs." The monetary cost would be a significantly higher amount in today's

dollars. The CBA should have disclosed what that amount would likely be in today's dollars. The regulation's proposed \$300 million maximum financial responsibility requirement would cover less than 3% of the \$10.8 billion costs (in 2006) of a large oil spill. How much lower would that percentage be today? The \$300 million maximum would allow Class 1 facility owners to externalize most of the costs of oil spill clean up and damages to federal, state and local governmental entities (i.e., their taxpayers) and Tribes. In today's economy, financially burdened governmental entities and Tribes would lack sufficient funds to provide a timely or effective clean up. (We note that the U.S. Oil Spill Liability Trust Fund, is limited to providing up to \$1 billion dollars per oil spill event) . The rules' FR amount violates the intent of the statute underlying this rulemaking requiring agency rules 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" RCW 88.40.025, Financial responsibility for onshore or offshore facilities. The amount of FR for Class 1 facilities in the proposed rules does not come close to meeting the Legislature's intent. It must be rewritten.

The proposed rule inappropriately gives more weight to one of the law's stated factors to be considered.

RCW 88.40.025, provides in pertinent part: "[a]n 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. 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." (Emphasis added.)

The Department has used just one of the five factors set forth in the second sentence of the statute, "the commercial availability and affordability of financial responsibility," and given this factor more weight than the other four in its decision to set the \$300 million maximum FR for Class 1 facilities. The Legislature itself did not prioritize these factors or direct that weight be added to any one to set the FR amount. The plain language uses "and" rather than "or" in setting forth the factors. They should be weighed and applied equally. Choosing one factor above others to determine appropriate FR undermines the directive of the first sentence in the statute. As discussed above, the Department has concluded that the amount necessary to compensate the state would be \$10.8 billion dollars based on 2006 dollars. The Department cannot reasonably conclude that the FR for Class 1 facilities should be as low as \$300 million without giving more weight to "commercial availability and affordability" than any other factor and ignoring its own information about costs. The rule must be rewritten to require significantly greater FR in order to meet the Legislative intent to provide "necessary" compensation.

Basing the rules on the desire to achieve “parity” with California is inappropriate.

The Legislature did not mandate parity with California in the plain language of the statute itself or its statement of intent. RCW 88.40. Nor did it require that it be used as the basis for Ecology’s Class 1 facilities’ financial responsibility requirement. Nevertheless, the Department relies on a goal of achieving parity with California’s rules in reaching its FR amount for those facilities despite knowing that its rules are inadequate to meet today’s costs. The proposed financial responsibility \$300 million amount for Class 1 facilities is based on 1995 California Rules that in turn were based on a 1993 study by Mercer Management Consulting, Inc. California based its requirements on the low range for the per barrel oil spill cost (\$12,500) cited in that study. It is unreasonable for the Department of Ecology to follow California’s outdated rules with amounts based on 1993 dollars.

The Department acknowledged the California rules were out of date in its Stakeholder Workshop #6 when it explained among other things that: since the early 90s when the rules were established “... prices as reflected in the Consumer Price Index (CPI), have risen by a multiplier of approximately 2.176. When the 2.176 CPI inflation factor is applied to \$12,500, the result is \$27,200. When the 2.176 CPI inflation factor is applied to \$300,000,000, the result is \$652,800,000.” Meanwhile, oil company profits have risen substantially. See, for example, Reed, S. New York Times. Feb. 2, 2024. Oil Giants Pump Their Way to Bumper Profits. <https://www.nytimes.com/2024/02/02/business/oil-gas-companies-profits.html?smid=nytcore-android-share>. The \$300 million amount is not even as much as the 1999 Bellingham Olympic Pipeline settlement amount reported in the CBA to be \$404 million in today’s dollars (the CBA p. 36 acknowledges that settlement amounts do not necessarily capture the true costs: “[s]ettlements are often made for lesser amounts than the real costs of the spill.”

Ecology’s reliance on 2003 legislative intent is likewise misplaced.

The use of 2003 legislative intent as a justification for the \$300 million FR appears to involve an attempted sleight of hand. First, the agency explains that the relevant bill is Engrossed Second Substitute House Bill (E2SHB) 1691. “Through Engrossed Second Substitute House Bill (E2SHB) 1691, codified in RCW 88.40, the Legislature directed Ecology to adopt rules regarding financial responsibility (FR) requirements for oil handling facilities and vessels.” This is the 2022 Bill that underlies the present version of RCW 88.40, including the stated legislative intent in RCW 88.40.005.

Yet, the agency then relies heavily on language in section 1 of Engrossed Senate Bill 5938 of 2003 to justify its inadequate FR amount for Class 1 facilities: “[i]t also meets the legislative intent of Engrossed Senate Bill 5938, passed in 2003” Time, experience and rising costs of cleanup and damages, together with the fact that the Legislature in 2022 included a new statement of intent in the law and did not repeat the language from 2003, all demand that the FR requirements in these rules be rewritten to account for today’s likely clean-up costs and damage amounts.

Importantly, the more than 20-year old Engrossed Senate Bill 5938 intent statement was specifically directed at vessels. “The legislature finds that the current financial responsibility laws for vessels are in need of update and revision.” (Emphasis added.) That statement did not include Class 1 facilities. There is nothing in the current statute, the older statute or in the 2003 or 2022 Engrossed Bills requiring, recommending or even suggesting parity with other states’ rules for Class 1 onshore or offshore facilities.

Additionally, even the 2003 Bill does not mandate consistent dollar amounts of FR. It stated “[t]he 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. (Emphasis added.) Consistency of administering various rules and statues does not require mathematical equality in FR levels set at different points in time. Additionally the modifier in the second sentence “whenever possible” can be read as allowing higher FR even for vessels if 1995 rules in California, for example, are, as now, out-of-date and determined to be ineffective to protect our unique and fragile environment in Washington State. The Legislature was not demanding ineffective rules just for the sake of west coast consistency, but was seeking the “highest level of protection.”

The oil Industry has the ability to comply with FR requirements greater than \$300 million. The CBA says in §6.3.1 that the agency “learned” that insurance from the commercial insurance market is not “generally available” 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.” The CBA again gives greater weight to one factor out of 5 in the 2003 legislation: “availability and affordability.” It drops FR down to an amount - \$300 million - that has been in effect for more than 20 years for commercial passenger vessels with a fuel capacity of at least 6,000 gallons and concludes that a 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.” It defies belief that one of the most profitable industries in our country cannot “afford” higher FR. Oil tanker vessels have complied with their \$1 billion FR requirement for over 20 years and they have done so using risk pools including P&I (protection & indemnity) clubs or other mutual insurance associations. See CR102, p. 2 for description. Class 1 facilities can do the same.

The agency should not succumb to oil industry pressure concerning available insurance. After 7+ years of working on Washington’s recently adopted refinery worker safety rules including attending numerous stakeholder meetings with representatives of the state’s 5 refineries and studying California’s rulemaking process for that state’s refinery safety rules, we know that the oil industry has a tendency to overstate its compliance costs and ability to comply when engaged in rulemaking with state agencies. We request that you take a hard look at the information provided by that industry about the ability to obtain and/or afford

insurance coverage over \$300 million and rewrite rules that come closer to providing adequate FR. In light of the costs of clean up that have resulted from earlier incidents elsewhere and the critical need to ensure that those responsible for oil spill incidents pay for their oil spills, and not push costs onto governments and Tribes, we believe that a more reasonable financial responsibility requirement for Class 1 facilities would be \$1 billion (the same amount as for tanker vessels which participate in mutual insurance associations).

Oil spills of Alberta tar sands (bitumen) must be treated differently in the rules.

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. This pipeline is in the (nearly complete) process of expanding. The expansion is expected to increase the volume of the pipeline's current capacity by 590,000 barrels per day. A spill into the Salish Sea or our region's rivers, including the Skagit River near us, from the transport of bitumen would be particularly devastating given the unique properties of bitumen.

Years ago we attended a presentation about oil spills in the Salish Sea hosted by the Northwest Straits Foundation at which, among other things, Ecology's Dave Byers explained to attendees the important difference between the behavior of spilled crude oil and Alberta tar sands oil (bitumen). We learned that that heavy bitumen, even diluted, is extremely difficult remove after a spill. "Regular" oil removal efforts can neither contain nor remove bitumen from the surface of a water body. And the bitumen will sink in the water column. The sunken bitumen will contaminate sediments and destroy ecosystems. The 2010 Kalamazoo River oil spill and the following multi-year clean up discussed above is instructive. However, the depth and geography of the Salish Sea would make the clean up more complex and more costly than that of the Kalamazoo River.

The Class 1 facilities' FR requirements applicable to bitumen transport must be even higher than those applied to spills of other oil based on the expected significantly higher costs of damages and clean up. Even bearing in mind that a spill into the Salish Sea would likely be more costly than the clean up of the Kalamazoo River, that oil spill disaster's per barrel clean up cost could reasonably be applied to create a special FR requirement for the Trans Mountain Pipeline bitumen of \$60,153 per barrel. We request that the agency rewrite the rules to add a special FR rule for tar sands oil spilled from Class 1 facilities, or, in the alternative, begin a new rulemaking for this purpose.

The CBA omits full analysis of qualitative costs to the environment.

In weighing costs and benefits the Department is required by the Washington Administrative Procedure Act (APA; RCW 34.05.328(1)(d)) to "determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs" (Emphasis added.) Disappointingly, the CBA fails to discuss in any detail (or even identify) the fragile natural resources at stake in §4.2.2, "Establish required levels of financial

responsibility for oil handling facilities and pipelines.” Despite the APA language, the CBA ignores these qualitative costs of oil spills on the state’s natural resources.

Among other things a large and certainly a worst case oil spill from a Class 1 facility could result in the extinction of the critically endangered Southern Resident Orca Whales (See, NOAA Fisheries Recovery Plan for Southern Resident Killer Whales (Orcinus orca), January 17, 2008.

<https://www.fisheries.noaa.gov/resource/document/recovery-plan-southern-resident-killer-whales-orcinus-orca>} and devastate other killer whale species’ populations as well as kill other marine mammals. Salmon and other prey species would be lost not only from spilled oil killing individual animals but from suffocating nursery habitats like eel grass beds and floating bull kelp upon which the animals depend. Forage fish and invertebrates could be destroyed. Indeed the entire food web in affected parts of the Salish Sea could be devastated. Shorebirds, seabirds, waterfowl, Great Blue Herons and other birds and their food sources would be lost. One of the lessons learned from the Olympic Pipeline explosion and other incidents like the 1989 Exxon Valdez vessel incident is that the oil spill impacts on water bodies and species that depend on them can be very long lasting, even permanent.

Contrast Ecology’s CBA to Washington Dept. of Labor and Industries (L&I), Final Cost-Benefit Analysis for Safety Standards for Process Safety Management of Highly Hazardous Chemicals, June 2023, §4.6 pp.98-101, Process Safety Management (PSM),Chapter 296-67 WAC, Safety standards for process safety management of highly hazardous chemicals <https://www.lni.wa.gov/rulemaking-activity/>. In discussing qualitative costs, L&I’s CBA describes in detail the numbers and names of the various species dependent upon the health of the Salish Sea and the proximity to the Salish Sea of the facilities (in this case the state’s refineries) that can spill oil into the Sea’s unique and fragile environment.

It seems inconceivable that the state’s environmental agency would omit a qualitative analysis of the harm to the natural environment in its CBA. A revised CBA should include this information. Like the L&I rules, effective FR rules also serve a deterrent function against conscious risk taking to save money or lack of conscientious performance of tasks. That, in turn, will help prevent externalization of costs and reduce the likelihood of spills and harm to the environment. Ecology’s CBA §4.2.2 only analyzes the quantitative costs of the loss of some species in terms of financial damages that would be incurred from those who use the resources. The impacts on fragile and unique natural resources in Washington’s navigable waters should be added to a revised CBA as qualitative damages.

We ask that you rewrite the rules for Class 1 facilities, write a special FR rule for bitumen transport (or initiate a new rulemaking for this purpose) and revise the accompanying CBA for all of the above reasons. We are counting on you to make the rules strong, effective and enforceable. Too much is at stake for Washington's citizens and natural resources for you to fail in your purpose. Thank you for considering our comment.

Sincerely,
Mary Ruth and Phillip Holder