

Docket No. CWA 05–2016–0015
Regional Hearing Clerk
Mail Code E-19J
U.S. EPA Region 5
77 W. Jackson Blvd
Chicago, IL 60604

July 12, 2016

Via email: whitehead.ladawn@epa.gov

Re: Public Notice: CWA 05–2016–0015 BP Products North America, Inc.

Director of the Water Division, U.S. EPA Region 5:

We submit the following written comments as interested persons who are not a party to the proposed Consent Agreement and Final Order between U.S. EPA Region 5 and BP Products North America, Inc., as is our right under 40 CFR §22.45 (c).

These comments are submitted on behalf of the primary authors – Southeast Environmental Task Force, Dunelands Environmental Justice Alliance, Southeast Side Coalition to Ban Petcoke, 350Kishwaukee, Break Free Midwest Network, and ALERT, a project of Earth Island Institute—as well as all of the supporting signatories.

Southeast Environmental Task Force (SE Task Force) is a Chicago-based 501(c)3 organization dedicated to serving the southeast side of Chicago. SETF formed in 1989 by Marian Byrnes as a coalition of 30 grassroots organizations working to promote sustainable development, environmental restoration and justice, and pollution prevention.

Dunelands Environmental Justice Alliance (DEJA) is a anti-racist, multiracial coalition of grassroots organizations in the Calumet industrial corridor of Northwest Indiana fighting for a healthy environment in communities of color.

Southeast Side Coalition to Ban Petcoke (SSCBP) is a multicultural group of area residents, families, and community-based environmental and social justice organizations working together to rid the community of petroleum coke, a toxic byproduct of the oil refining process. As one of the largest and oldest industrial regions in the world, we are working together to raise our voices in a fight for a just transition to a cleaner future that benefits our community and the region.

350Kishwaukee is a 501(c)3 nonprofit corporation, based in DeKalb, Illinois, and representing citizens from throughout the Great Lakes region seeking to reduce pollution in our land, water, and air.

Break Free Midwest Response Network is a coalition of organizations in the U.S Midwest that are seeking a just transition to a low-carbon future in response to the threats of Climate Change.

ALERT, a project of Earth Island Institute was founded by *Exxon Valdez* oil spill survivor Dr. Riki Ott in 2014 to make healthy people and healthy communities part of our energy future. ALERT works in local communities nationwide, sharing science and skills to empower people impacted by oil and chemical activities to have a meaningful voice in determining what activities occur in their region.

I. OUR STATEMENT & REQUESTS

A. Overview

Lake Michigan is a priceless and irreplaceable resource. Present generations are responsible for maintaining the health and wellbeing of these waters for future generations. By the people's consent, this responsibility is entrusted as a duty to all governments – local, state, and federal. Ensuring the viability and health of the waters of Lake Michigan is paramount. Past and present operations of the BP Whiting refinery jeopardize this goal. It is our firm belief that business-as-usual practices cannot continue without serious and perhaps irreparable harm befalling our precious resource – Lake Michigan, this gift of living waters.

Among large industrial companies operating in the United States, British Petroleum (BP) has one of the worst records of worker safety and environmental violations. Examples that follow from BP America subsidiaries indicate pervasive and systemic problems within British Petroleum's management culture. The record shows that BP America subsidiaries are risk takers with a repeated pattern of cutting costs to increase profits. The record shows that the costs of this risk behavior are human lives, worker safety, the environment, and the health and wellbeing of people living in communities near BP operations. The occasional million or billion dollar civil or criminal penalties and fines have not served to change BP's cultural risk-prone mindset or deter environmentally risky business decisions.

This proposed CAFO follows the same pattern as previous settlements by requiring more technology and more internal company monitoring and inspections. This is just more of the same fox guarding the same henhouse, and it will produce the same results – more self-reported or unreported pollution discharges into Lake Michigan from daily operations, more oil and chemical spills into Lake Michigan, further weakening of industry-government vigilance, and declining environmental and social standards. This CAFO and its token agreements provide us with no sense of relief or confidence that the operations at the BP Whiting refinery will be any safer. We want and deserve more. Lake Michigan deserves more. The people of the United States deserve more.

B. REQUESTS

In our comments in Sections II through IV, we justify each of our requests for maximum penalties for eight violations; three additional conditions under this settlement; and a neutral third party fiduciary recipient of funds from penalties and settlement conditions. Our requests are summarized below.

Sec. II. Maximum fines for all three original violations listed in the proposed CAFO, based on BP's repeated pattern of reckless, negligent, and/or grossly negligent behavior, relating oil spill prevention and response planning. Also,

maximum fines for an additional five violations, as discussed.

Sec. III. Additional conditions under this settlement including:

A. Establishment of an independent Lake Michigan Regional Citizens' Advisory Council (RCAC) with key stakeholder groups, modeled after the Prince William Sound RCAC established under the Oil Pollution Act of 1990, and \$10Mn (million) annually, inflation-proofed, for program implementation;

B. Establishment of an independent Lake Michigan Area Committee comprised of local, state, and federal agencies, as mandated under the Oil Pollution Act of 1990, and \$10Mn annually, inflation-proofed, for program implementation;

C. Establishment of an independent environmental monitoring program for the BP Whiting refinery WWTP, modeled after the environmental monitoring program conducted by the Prince William Sound RCAC for the Alyeska tanker terminal; \$250,000 to design the program; and \$250,000 annually, inflation-proofed, to implement the program.

Sec. IV. A neutral third-party fiduciary recipient such as the National Fish and Wildlife Foundation of all penalties and funds resulting from this CAFO and settlement agreement for any of the following explicit purposes:

A. Funding an independent review and analysis of data and information received from our July 11, 2016, Freedom of Information Act request to EPA, relating to operations and maintenance of the BP Whiting refinery wastewater treatment plant from December 2011 to June 2016; and

B. Funding for any or all of the additional conditions in Section III; or

C. Funding for local and/or regional citizens' advisory projects at the same levels and with the same goals of the organizational structures defined in the conditions set forth in Section III.

Justification for each individual request is provided in the sections. We also compiled a partial track record of pervasive, systemic environmental and safety issues for BP operations in the United States from 1976 to 2016 to justify our charges of repeated willful, reckless behavior, negligence, and gross negligence. The track record is found in two tables – one for the BP Whiting refinery and the other for other large BP facilities operating in the United States.

Table 1. Track Record of Environmental & Safety Issues for BP Whiting Refinery

2015: In February, two malfunctions in three days at the BP Whiting refinery caused BP to shut down its largest distillation tower for extended repairs. Meanwhile a compressor malfunctioned in the pollution-reduction system, causing a massive flare-up and spikes in emissions at the refinery. No penalties or fines were issued.

2014: In August, the BP Whiting refinery self-reported to the Indiana Department of Environmental Management that more than 500 pounds of sulfur dioxide were released into the air, following an explosion and fire where one worker was taken to an area hospital for treatment. No penalties or fines were issued.

2014: In March, the BP Whiting refinery spilled over 1,600 gallons of tar sands oil into Lake Michigan. Despite a delayed spill response, within a week the U.S. Coast Guard decided that no further cleanup efforts were needed. Concerned residents, informed citizens, and media requested information of public agencies, triggering an EPA investigation at the refinery that found other Clean Water Act violations.

2012: In August, BP was ordered to pay \$12,600 for two OSHA violations at the BP Whiting refinery for violation of the process safety management of highly hazardous chemicals and confined spaces codes required by its permit.

2012: In May, BP agreed to pay \$8 million in Clear Air Act penalties and was ordered to install \$408 million in pollution controls to cut air emissions at its Whiting refinery. BP was cited for not living up to all of its obligations under an earlier settlement agreement while committing new violations under the Clean Air Act.

2011: in July, BP Whiting refinery self-reported to the Indiana Department of Environmental Management (IDEM) that it violated its NPDES permit by discharging too much phosphorous into Lake Michigan. Specific levels were never quantified. An IDEM inspector confirmed the issue in a letter to the company. No penalties or fines were issued.

2011: In April, the Indiana Department of Environmental Management cited the BP Whiting refinery for multiple violations after a state inspector reported nearby "water is turbid and dark due to excessive solids and biomass." Discharges from the refinery reached more than 3,000 feet into Lake Michigan, according to the report. The refinery was sent a letter noting the violation, but no penalties or fines were issued.

2010: Indiana Department of Environmental Management inspectors found excessive pH levels in the water from a pipe dumping into Lake Michigan at the BP Whiting refinery. A letter was sent to BP, but no penalties or fines were issued.

2010: In August, a BP Whiting refinery pipeline at the intersection of 175th Street and White Oak Avenue in a residential area in Hammond, Indiana, was discovered to have

Table 1. continued

released an estimated 38,640 gallons of refined petroleum. Since the emergency response and initial remediation efforts, groundwater gauging and sampling has been conducted on a quarterly basis beginning in March 2011. The current well network consists of 36 groundwater-monitoring wells and four recovery wells.

2009: EPA cited the BP Whiting refinery for Clean Air Act violations for emitting 16-times the allowable limit of cancer-causing benzene at its wastewater treatment plant without proper air pollution control equipment between 2003 and 2008.

2007: Northwest Indiana crews, installing new storm sewers under Indianapolis Boulevard at 165th Street, discovered petroleum products in the soil and groundwater at the site. The gasoline and diesel fuel components were determined to be remnants of a 1996 underground BP pipeline leak at the intersection. BP Pipelines Co., the owner of the line, handled site remediation. No penalties or fines were issued.

2007: EPA cited the BP Whiting refinery for failing to obtain a permit when it made major modifications to its fluidized catalytic cracking unit. The unpermitted modification caused significant increases of nitrogen oxide, sulfur dioxide, particulate matter, and carbon monoxide emissions, according to the EPA. The refinery also allegedly violated new source performance standards by modifying flares without complying with requirements, exceeding sulfur dioxide emission limits and failing to monitor emissions from several sources. BP was also cited for failing to conduct timely performance tests of hydrogen chloride emissions from its catalytic reforming units.

2006: In October, Indiana Department of Environmental Management cited the BP Whiting refinery for NPDES violations for disposal of oil from its wastewater treatment plant into Lake Michigan, due to a temporary pump installed to take the overflow into the Once Through Cooling Water. The refinery's daily records from the year prior indicated another violation of solid pollution dumped into the lake—this time exceeding the limit by about 150 pounds. No penalties or fines were issued.

2005: In May, BP agreed to pay a \$58,687 penalty for discharging at the BP Whiting refinery more than twice as much lead and cadmium from its hazardous waste incinerator during a test in March 2004 than is allowed by the Clean Air Act.

2004: BP Whiting refinery self-reported to the Indiana Department of Environmental Management that it violated its permit for Total Suspended Solids (TSS) released into Lake Michigan—by almost 350 pounds above the allowable limit. State regulators confirmed the violation in March 2005. No penalties or fines were issued.

2002–2003: BP Whiting refinery self-reported to the Indiana Department of Environmental Management four violations of its NPDES permit due to exceeding limits for Total Suspended Solids (TSS). IDEM inspectors cite observations of oil sheen on

Table 1. continued

Lake George from outfall 004 and turbid condition at outfall 001 in Lake Michigan as violations of NPDES permit. No penalties or fines were issued.

2001: In January, BP agreed to pay a civil penalty of \$9.5 million to the U.S. Treasury and \$500,000 to the State of Indiana for monitoring and reducing volatile organic compounds in the vicinity of the BP Whiting refinery. Under the settlement, BP agreed to install and operate innovative pollution control technologies to reduce emissions of nitrogen oxides and sulfur dioxide from refinery process units by more than 50,000 tons annually. In addition, BP agreed to implement comprehensive, facility-wide, enhanced monitoring and fugitive emission control programs; employ significantly improved engineering practices to eliminate excess flaring of hydrogen sulfide; undertake measures to ensure that carbon monoxide emissions from its process units meet applicable requirements; monitor incinerator performance and install monitoring and controls; and install particulate matter controls to comply with federal emission requirements.

II. REQUEST FOR MAXIMUM FINES

A. Justification for commenters' request

EPA has proposed a civil penalty of \$151,899 in this CAFO for an oil discharge that occurred at the BP Whiting refinery on March 24, 2014.

The proposed civil penalty is based on three alleged types of violations of the Clean Water Act.

- 1–3.
1. Failure to maintain and implement the 2014 SPCC Plan in violation of 40 CFR § 112.1(b)
 2. Failure to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge in violation of 40 CFR § 112.3
 3. Failure to address the typical failure mode and the most likely quantity of oil that would be discharged in violation of 40 CFR § 112.7(c)

In addition, we have identified five (5) more potential violations.

- 4–8.
4. Failure to amend the SPCC Plan for a change in operation that materially affects potential for discharge in violation of 40 CFR § 112.5(a)
 5. Failure to include all connecting lines in the Facility diagram for the SPCC Plan in violation of 40 CFR § 112.7(a)(3)
 6. Failure to include a prediction of the direction, rate of flow, and total quantity of oil that could be discharged as a result of a major equipment failure from equipment previously known to be a source of failure in violation of 40 CFR § 112.7(b)
 7. Failure to observe effluent treatment facility frequently enough to detect possible system upsets that could cause a discharge in violation of 40 CFR § 112.8(c)(9)
 8. Failure to operate the facility and systems necessary to achieve compliance with the SPCC Plan in violation of 40 CFR § 112.1(e)

Each of these potential violations is addressed separately, along with requests for additional information.

1. Failure to maintain and implement the 2014 SPCC Plan

In the proposed CAFO, EPA states that BP “failed to maintain and implement the 2014 Spill Prevention, Control, and Countermeasure (SPCC) Plan so as to prevent the discharge of oil from the Facility to navigable water (Lake Michigan), in violation of 40 CFR § 112.3” (para. 50). EPA counts this as one type of violation of the CWA.

We find the code citation is an oversight of EPA, as the described violation corresponds with 40 CFR § 112.1. We concur with this charge and corrected citation.

from the effluent wastewater during daily operations and 2) contain and treat contaminated water during Incidents such as occurred on March 24, 2014. To perform both operations, the permit requires secondary containment equipment to have sufficient freeboard to receive an extra quantity of contaminated water suddenly.

One contributing factor to the March 24, 2014, spill was that Six Separator in the WWTP did not have sufficient freeboard and the discharge exceeded its oil removal capacity (para. We also note that BP is required to identify in its Facility diagram for its SPCC Plan the type of oil in each container [40 CFR § 112.7(a)(3)]; and to record within 60 days a change in the type of oil handled, stored, or transferred that materially alters the required response resources [40 CFR § 112.20(d)(1)(ii)]. This is because type of oil determines appropriate resources required for response [Appendix E to Part 112—Determination and Evaluation of Required Response Resources for Facility Response Plans].

This is particularly relevant as “modernization” and expansion of the BP Whiting Facility, completed in December 2013, was actually in large part a repurposing the Facility to handle much greater volumes of Canadian tar sands and heavier oils.¹ These changes in type of oil should be reflected in the SPCC Plans from January 2014 onward.

→ Does the January 2014 SPCC Plan, and all subsequent SPCC Plans, specifically mention the change in the type of oil handled, stored, and transferred at the Facility after the “modernization” and expansion was completed in December 2013?

→ If so, what changes were made, if any, to the response equipment and materials to respond to spills of heavy oil and Canadian tar sands oil that are more likely to sink, rather than float, when spilled.

Further, heavier oil and tar sands oil in particular have more particulates and sediment than conventional crude. This means that sediment might accumulate more rapidly in the WWTP, a critical component of the SPCC Plan.

→ What changes have been made, if any, in the SPCC Plan or at the Facility to deal with effects of heavier oil and tar sands oil on function of the WWTP and Six Separator, in particular?

2. *Failure to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge*

¹ Cattaneo, Claudia, 2013, “BP’s Whiting refinery overcomes opposition, providing relief for Canadian crude,” *Financial Post*, Feb. 13, 2014.

http://business.financialpost.com/news/energy/bps-whiting-refinery-overcomes-opposition-providing-relief-for-canadian-crude?_lsa=4362-a960

eight years of operation: The fishermen figured the missing sludge was all sitting at the bottom of Port Valdez. All this added up to Port Valdez being declared a Toxic Impaired Waterbody in 1988 from chronic pollution at the mostly BP-owned terminal the year before the Exxon Valdez oil spill.²

It is conceivable that much of this story from 30 to nearly 40 years ago may well be – and may well have been for quite some time – replaying at the BP Whiting refinery. Stakes are higher as Lake Michigan is used as drinking water for millions of people, just counting those who live near the southern part of the lake.

EPA states in this CAFO In the proposed CAFO, EPA states that BP “failed to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge, as described in 40 CFR § 112.1(b)...” (para 51). EPA counts this as one type of violation.

² Resources for the Alyeska narrative include:

Alaska Department of Environmental Conservation, ADEC Review of Alyeska’s Data, prepared by Dan Lawn, Juneau, Alaska, 1986.

Balden Environmental Management, Inc., report to Michele Brown, Assistant Attorney General (Juneau: State of Alaska, July 25, 1988).

Benjamin, Mark, Responses to Questions posed by Mary Pinkel, Assistant Attorney General, State of Alaska, Juneau, Alaska, April 17, 1988.

Epler, Patti, “Scientist Says Valdez Harbor Pollution Poses Serious Threat to Environment,” *Anchorage Daily News*, February 22, 1986.

McCoy, Charles, “Broken Promises: Alyeska Record Shows How Big Oil Neglected Alaskan Environment; Pipeline Firm Cut Corners and Scrapped Safeguards, Raising Risk of Disaster; Allegation of Fabricated Data,” *Wall Street Journal*, July 6, 1989.

Ortega, Bob, “EPA Verifies Pipeline Air Pollution, Valdez Emissions Confirmed High,” *Anchorage Times*, March 6, 1988.

Ortega, Bob, “Records Verify Pipeline Emission, Pollution Control Flawed for Years,” *Anchorage Times*, April 7, 1988. Ortega, Bob, “System Snafu Forces Valdez Shutdown. Pipeline Pollution System Will Need Major Overhaul,” *Anchorage Times*, July 31, 1988.

Ott, Riki, *Not One Drop: Betrayal and Courage in the Wake of the Exxon Valdez Oil Spill* (Chelsea Green Publishing, 2008).

Pasztor, Andy and Robert Taylor, “Unsafe Harbor: Alyeska Pipeline Firm is Accused of Polluting Sea Water Since 1977 – Alyeska Documents Support Claims of Lax Procedures at Water-Treatment Plant – Company Insists It Complies,” *Wall Street Journal*, February 20, 1986.

U.S. EPA, Performance Evaluation of Ballast Water Treatment Plant in Valdez, Alaska, prepared by Ihor Lysyj (Seattle, Wash., 1985).

U.S. EPA, Compliance Order No. 1085-07-350309A, Region 10, Seattle, Wash., July 12, 1985; U.S. EPA, Action Items for Valdez Ballast Water Treatment Plant, Region 10, Seattle, Wash., October 29, 1985; U.S. EPA, Amendment to Compliance Order No. 1085-07-35-309A, Region 10, Seattle, Wash., November 6, 1985.

U.S. General Accounting Office, Water Pollution: EPA Controls over Ballast Water at Trans-Alaska Pipeline Marine Terminal, report to U.S. House, Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, GAO/RCED-87-118, Washington, D.C., June 1987.

Valdez Vanguard, “Alyeska Fined for Criminal Pollution,” February 18, 1987.

Woodward-Clyde Consultants, “Ballast Water Treatment Facility Effluent Plume Behavior, A Synthesis of Findings,” prepared for APSC (Alyeska Pipeline Services Company), Valdez, Alaska, March 1987.

Woodward-Clyde Consultants, “Data Report, Port Valdez Receiving Water Study, Ballast Water Treatment Facility, 1985–86,” 2 vols., prepared for APSC, Valdez, Alaska, 1987.

takes time for sediment to accumulate to the levels observed by EPA inspectors seven weeks after the discharge (CWA-05-2016-0014, para. 28). We find this behavior constitutes gross negligence and deserving of additional conditions under this settlement.

The historic issues described above at the mostly BP-owned Alyeska terminal in Port Valdez were addressed and the air and water quality improved – due primarily to establishment of a Regional Citizens' Advisory Council (RCAC) in Prince William Sound, as mandated by the Oil Pollution Act of 1990, and subsequent creation of the Terminal Operations Program and the Environmental Monitoring Program.

We find similar aWe find the code citation is an oversight by EPA, as the described violation corresponds with 40 CFR § 112.3. We concur with this charge and corrected citation.

BP's 2014 SPCC Plan provides that secondary containment for No. 12PS is the WWTP. This means that the WWTP is required to do double duty: 1) remove pollutants 40). However, not only did Six Separator not have sufficient freeboard for emergency operations, it did not have sufficient capacity for normal daily operations because of sediment buildup.

We find that failure to properly operate and maintain the secondary containment system, specifically by allowing accumulation of sediment in the separators constitutes gross negligence and deserves a maximum fine, because, quite simply, BP knows better.

During the mid 1980s, Cordova fishermen and EPA learned that BP, which owned (and still owns) over 50 percent of the Trans-Alaska Pipeline System including the tanker terminal, and the other six TAPS owners were responsible for oil, grease, heavy metals, and other pollutants entering the receiving waters of Port Valdez in uncontrolled quantities from the tanker terminal's WWTP—and that this practice had been occurring since pipeline startup in August 1978. The WWTP was not being operated as designed.

For example, the planned sludge incinerator had never been built; the terminal vapor recovery system was flaring VOCs, not incinerating them; and the terminal vapor recovery system did not include the WWTP, which turned out to be a significant source of VOCs. Further, tanker operators were not practicing Load-on-Top, so oily sludges were being pumped into a treatment plant that was designed to handle BETX, not heavy sludges. Further, the environmental monitoring program conducted by Alyeska consultants (and for which BP and the other TAPS owners were directly responsible) proved to actually demonstrate 73 percent noncompliance with the NPDES permit, rather than compliance as the Alyeska contractor had claimed, once the raw data were reviewed and the statistics untangled by a state regulator. This investigation itself was something of a miracle, because the effluent monitoring data

had failed to indicate anything was amiss—until it was discovered that compliance samples were drawn from a “miracle barrel” that met state and federal standards – and not the daily effluent; i.e., the effluent monitoring data had been completely fabricated.

BP and the other TAPS owners’ response to the growing public chorus to fix the problems at the tanker terminal was to request a 10-fold increase of its mixing zone to accommodate its effluent plume to allow it to legally pollute a larger portion of Port Valdez—which EPA granted. An EPA consultant calculated that the plant should have produced enough sludge to cover four football fields three feet deep during its first that BP did not remove the sediment from Six Separator until August 2015 – nearly 17 months after the discharge (para. 48). This means that BP was out of compliance with its permit and in violation of the CWA for at least 17 months, and likely longer, as it tention and actions need to happen at the BP Whiting refinery.

3. Failure to address the typical failure mode and the most likely quantity of oil that would be discharged

In the proposed CAFO, EPA states that BP “failed to address the typical failure mode and the most likely quantity of oil that would be discharged from the oil-filled equipment with potential to discharge to Lake Michigan, in violation of 40 CFR § 112.7(c)” (para. 51). EPA counts this incident as one violation.

We concur with this assessment.

Further, we find that BP failed to identify the chemicals in the Number 12 Pipestill (No. 12PS) brine line that flowed back into the WWTP and Lake Michigan after a pressure build up, described below.

→ Does EPA know what chemicals were discharged into Lake Michigan, other than oil, on March 24, 2014? Please provide a list of known chemicals and quantities.

→ Is the WWTP designed to remove chemicals other than oil from the effluent stream?

→ If not, what action has EPA required, if any, to prevent a similar reoccurrence of this Incident; specifically, a discharge of undisclosed chemicals into a WWTP that may not be designed to remove such chemicals from the effluent stream?

4. Failure to amend the SPCC Plan for a change in operation that materially affects potential for discharge

We find that not only did BP fail to provide appropriate containment and diversionary structures, but BP actually intentionally and willfully created a diversionary structure that greatly increased the likelihood of an oil discharge.

equipment failure from equipment previously known to be a source of failure

In October 2006, the Indiana Department of Environmental Management cited the BP Whiting refinery for NPDES permit violations for disposal of oil from its wastewater treatment plant iBP began operating its Number 12 Pipestill (No. 12PS) in June 2013. BP installed a temporary quench line (emphasis added) on October 11, 2013, connecting No. 12PS brine line to the Once Through Cooling Water (OTCW) system that flows to Six Separator in the WWTP (para. 37–39).

On March 24, 2014, due to abnormal conditions – a pressure build up at No. 12PS, pressure in the brine line exceeded the pressure in the OTCW system, causing the check valves on the temporary quench line to fail, and resulting in flowback of a mixture of brine, chemicals, and crude oil through the quench line into the OTCW system, Six Separator, and Lake Michigan (para. 38).

The temporary quench line was removed on March 25, 2014 (para. 39), after it had remained in place for 116 days.

We find that a line left in place for over 60 days does not qualify as a temporary structure. Amendments to the SPCC Plan are required “when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for a discharge...” [40 CFR § 112.5(a)] This includes installation of piping systems.

The most recent SPCC Plan at the time of the March 24, 2014, oil discharge – caused by installation of the quench line – was January 2014.

→ Did the January 2014 SPCC include the quench line connecting No. 12PS to the OTCW?

If not, we find that failure to amend the SPCC to report a change in facility design is a violation of 40 CFR § 112.5(a).

5. Failure to include all connecting lines in the Facility diagram for the SPCC Plan in violation of 40 CFR §112.7(a)(3)

BP is required to prepare a SPCC Plan in accordance with good engineering practices [40 CFR §112.7]. Specifically, the facility diagram must include all transfer stations and connecting pipes [40 CFR §112.7(a)(3)].

→ Did the January 2014 SPCC include the quench line connecting No. 12PS to the OTCW?

If not, we find that failure to include the quench line in the Facility diagram required by the SPCC Plan is violates good engineering practices and is a violation of 40 CFR § 112.7(a)(3).

6. Failure to include a prediction of the direction, rate of flow, and total quantity of oil that could be discharged as a result of a major nto Lake Michigan, due to a temporary pump installed to take overflow into the Once Through Cooling Water (OTCW) system.

As previously noted, on October 11, 2013, BP installed a temporary quench line (emphasis added) connecting the No. 12PS brine line to the OTCW system.

We find that a reasonable person could anticipate similar consequences from repeating the action – i.e., connecting temporary lines to the OTCW – that caused the 2006 discharge from the WWTP. Therefore, we find that the October 2013 action stems from equipment previously known to be a source of failure, resulting in oil discharge in to Lake Michigan.

BP is required to include in its SPCC Plan a prediction of the direction, rate of flow, and total quantity of oil that could be discharged as a result of an equipment failure from equipment previously known to be a source of failure.

→ Did the January 2014 SPCC include a prediction of the direction, rate of flow, and total quantity of oil that could be discharged the quench line connecting No. 12PS to the OTCW?

If not, we find that failure to include such information for the quench line connecting No. 12PS to the OTCW is a violation of 40 CFR § 112.7(b).

7. Failure to observe effluent treatment facility frequently enough to detect possible system upsets that could cause a discharge

As noted in subsection 2 above, one contributing factor to the March 24, 2014, spill was that secondary containment facility – the WWTP – did not have sufficient freeboard to accommodate an overflow due sediment accumulation in Six Separator (para. 40). Also noted is that this buildup occurred over time.

BP is required to “observe effluent treatment facility frequently enough to detect possible system upsets that could cause a discharge” [40 CFR § 112.8(c)(9)]. It is beyond our imagination how such an accumulation of sediment – reported by EPA inspectors to be within two feet of the water surface in several locations of Six Separator – could have escaped even infrequent observations (CAFO-05-2016-0014, para. 28).

Therefore, we find that the failure to observe the effluent treatment facility frequently enough to sediment accumulation in Six Separator that contributed to the system upset that caused the March 24, 2014, oil discharge into Lake Michigan is a violation of 40 CFR § 112.8(c)(9). Further, we find that the failure to properly operate

and maintain the WWTP constitutes gross negligence and is deserving of maximum fines as it is repeating pattern of behavior.

8. *Failure to operate the facility and systems necessary to achieve compliance with the SPCC Plan*

BP completed removal of the sediment accumulated in Six Separator in August 2015 (para. 48). As previously noted, sediment accumulation in Six Separator was cited as a contributing factor of the March 24, 2014, oil discharge into Lake Michigan.

We find the fact that it took BP fully 17 months to address and remedy a factor identified as contributing to the March 2014 oil discharge gross negligence – and a glaring failure to operate the Facility and systems necessary to achieve compliance with the SPCC Plan in violation of 40 CFR § 112.1(e).

B. Justification & Request: Maximum fines

The violations described in this Section reflect a pervasive, ongoing pattern of negligence well beyond isolated incidences of sloppy operations, poor maintenance, lack of updated state-of-art equipment and/or improper use of equipment, and an entrenched corporate culture and managerial disregard for environmental regulations, worker safety, and area residents' health and wellbeing. Unfortunately, this pattern is widespread through BP America operations, as illustrated in Table 2. For this ongoing pattern, we demand the maximum penalty for each type of violation as follows.

Table 2. Track Record of Environmental & Safety Issues for Other BP Operations in the United States from 1976 to 2016

2015: In July, BP and five states announced a \$18.5 billion settlement for Clean Water Act penalties and other claims, stemming from the 2010 BP Deepwater Horizon well blowout and oil drilling platform explosion in the Gulf of Mexico that killed 11 workers and created the largest U.S. maritime oil spill to-date.³

2012: In November, BP and the US Department of Justice reached a settlement for the BP Deepwater Horizon disaster, under which BP agreed to pay \$4.5 billion in fines and other payments, the largest of its kind in U.S. history.

2012: In September, BP was ordered to pay a \$210,000 penalty and implement an enhanced oil spill response program at its oil terminals nationwide, as well as a comprehensive compliance audit to resolve alleged violations of oil spill response regulations at its Curtis Bay terminal in Maryland.

Table 2. continued

³ United States. EPA, Civil Cases and Settlements. <https://cfpub.epa.gov/enforcement/cases/index.cfm>

2012: In July, BP agreed to pay \$13 million to resolve yet more violations from the March 2005 Texas City refinery explosion.

2011: In November, several subsidiaries of BP America Inc., operating in Alaska, California, Illinois, Indiana, Ohio, Texas, and Utah, agreed to pay a \$426,500 penalty and ensure that more than \$240 million in funds are secured to resolve violations of hazardous waste, drinking water and Superfund financial assurance requirements. Financial assurance protects public health and the environment by ensuring that companies have the financial resources available to properly close facilities and clean up pollution at contaminated industrial sites.

2011: In May, BP paid the federal government \$25 million for its Prudhoe Bay oil spill in 2006. The penalty was the *largest per-barrel civil penalty assessed*, exceeding the statutory maximum because the settlement also resolved other claims. The settlement required BP Exploration Alaska Inc. to install a system-wide program to manage pipeline integrity of its 1,600 miles (2,500 km) of pipeline on the North Slope, based on the Pipeline and Hazardous Materials Safety Administration's integrity management program, at an estimated cost of \$60 million.⁴

2010: In March, OSHA cited the BP Toledo (Ohio) refinery, now run jointly with Husky Energy, for 42 willful violations and proposed a fine of more than \$3 million.

2010: BP agreed to pay \$15 million in Clean Air Act penalties in connection with violations at the BP Texas City refinery.

2010: In November, the federal probation officer supervising the criminal case stemming from the 2006 Prudhoe Bay spills asked that BP's probation be extended based on the company's behavior in the 2009 Lisburne pipeline rupture. In December, the judge lifted BP's probation, ruling that the federal government failed to prove the company committed criminal negligence.

2009: In December, a federal jury awarded more than \$100 million to ten workers exposed to toxic substances at the BP Texas City facility in 2007.

2009: In November, an 18-inch flow line ruptured at the BP Lisburne field, spilling nearly 50,000 gallons of an oil and water mix onto the tundra about half a mile from Prudhoe Bay. Warnings, including sensors that showed drops in temperature and even alarms, began going off but BP operators failed to investigate or troubleshoot the cause of the alarms for months.

Table 2. continued

⁴ *Alaska Dispatch News*, Nov. 15, 2011. Timeline: BP's history of problems in Alaska.

<http://www.adn.com/energy/article/timeline-bps-history-problems-alaska/2011/11/16/>

Alaska Dispatch News, May 9, 2010. BP has a history of safety failures.

<http://www.adn.com/economy/article/bp-has-history-safety-failures/2010/05/09/>

2009: In October, OSHA announced that BP was not living up to its obligations under the settlement agreement relating to the BP Texas City refinery disaster, and proposed an even larger fine – \$87.4 million – against the company for allowing unsafe conditions to persist. BP challenged the fine and later agreed to pay \$50.6 million.

2009: In March, both the Alaska state and federal governments filed civil lawsuits against BP over the 2006 Prudhoe Bay spills. EPA accused BP of “willful failure” to correct the internal corrosion problems.

2009: BP agreed to more than \$161 million on pollution controls, enhanced maintenance and monitoring, and improved internal management practices to resolve Clean Air Act violations at its Texas City refinery. BP also agreed to pay a \$12 million civil penalty and spend \$6 million on a supplemental project to reduce air pollution in Texas City.

2008: BP and several other oil majors agreed to pay \$422 million to settle suits that had been brought by public water systems in 20 states and consolidated in federal court relating to the contamination of groundwater supplies by the carcinogenic gasoline additive MTBE.

2007: In November, BP pled guilty to criminal charges and was ordered to pay \$20 million in fines, including \$1m in criminal fines in connection with the 2006 Prudhoe Bay oil spills. BP was ordered to replace 16 miles of pipeline at a cost of \$1.56 billion and was put on three years' criminal probation.

2007: In October, BP agreed to pay \$60 million in criminal fines to the EPA, including \$50 million for violations of the Clean Air Act in connection with the 2005 BP Texas City refinery explosion. The company also pleaded guilty to a felony violation of the act and was put on probation for three years. Apart from the fine, BP agreed to spend approximately \$400 million for a facility-wide study of its safety valves and a renovation of its flare system to prevent excess emissions. This was *the largest criminal fine for air violations at the time*.

2006: In August after another 1,000 gallons of leaked oil, BP shut down half of the huge Prudhoe Bay oil field because of neglect and serious internal corrosion problems in BP's feeder pipelines. BP admitted it had not used an electronic "pig"—a device that cleans and monitors the inside of pipelines—on the feeder line in years, even though some workers suspected sludge buildup and corrosion. EPA ordered BP to correct the problems and gave the company one year to do so.

2006: In March, more than 200,000 gallons of crude oil leaked from a feeder pipeline that carried crude oil to the Trans-Alaska Pipeline at BP's Prudhoe Bay operations. It was the *largest spill on the North Slope*, yet the pipeline detection system failed to detect the leak.

Table 2. continued

2006: In April, OSHA proposed fines of \$2.4 million after finding unsafe conditions at the BP Toledo refinery, similar to those that contributed to the Texas City disaster.

2005: In March, 15 workers were killed and about 180 were injured in a massive explosion at the BP Texas City refinery. BP agreed to *pay a record* \$21.4 million in fines for nearly 300 “egregious” safety violations and many other violations deemed willful and serious.

2005: BP announced it would spend more than \$140 million to refurbish 70 oil wells at Prudhoe Bay, part of a company effort to update equipment at the aging oil field.

2005: In March, BP agreed to pay California \$25 million in cash penalties and \$6 million in past emissions fees for violations stemming from the BP Carson refinery operations. In addition, BP agreed to spend \$20 million on environmental improvements at its refinery and \$30 million on community programs focused on asthma diagnosis and treatment.

1996–2004: Between 1996 and 2004, combined operations at the Prudhoe Bay oil fields and the Trans-Alaska Pipeline System (TAPS) resulted in an *annual average* of 504 spills of diesel, crude, or hydraulic oil, or other toxic substances, according to the Alaska Dept. of Environmental Conservation. BP is the majority owner of TAPS.⁵

2003: California’s South Coast Air Quality Management District filed an omnibus complaint against BP, seeking \$319 million in penalties for thousands of air pollution violations over an 8-year period at the BP Carson refinery, a facility it acquired through its purchase of Atlantic Richfield in 2000. The agency later filed another suit against BP for \$183 million.

2002: In December, responding to worker accusations that BP broke its federal probation, a U.S. District Court found BP had not installed a leak detection system that could promptly detect pipeline spills at Prudhoe Bay and had failed to comply with Alaska’s requirements for best-available technology for crude oil pipelines. The federal judge ordered the company to allow BP’s probation officer unrestricted access to its oil facilities and records to verify it is in compliance with environmental and safety laws.

2002: In November, the State of Alaska fined BP \$675,000 in civil penalties and assessments for cleanup problems with a 60,000-gallon pipeline spill at Prudhoe Bay.

2002: In August, an explosion at a Prudhoe Bay oil well house seriously injured a worker. Regulators found that BP allowed excessive pressure to build up in the well. BP paid more than \$1.2 million in fines.

Table 2. continued

⁵ The Wilderness Society, *Drilling and Spilling on Alaska’s North Slope*, 2006.
<http://www.nytimes.com/packages/pdf/national/15spill.pdf>

2002: In June, Alaska regulators fined BP up to \$300,000 for taking too long to install a sensitive system to detect leaks from Prudhoe Bay's huge oil trunk feeder lines. BP was supposed to comply with the law by 1997, yet was still behind schedule in mid-2002.

2002: In January, BP replaced a faulty valve used to isolate oil and gas leaks at Prudhoe Bay – nearly four years after its workers first asked the company to fix the problem following a 1,200-gallon oil spill. Workers took it upon themselves to test the valve to convince BP managers that it leaked dangerously.

2001: In fall, responding to whistleblower complaints, BP conducted an internal audit and released the results, which found some employees were concerned about Prudhoe Bay staff cuts, maintenance backlogs and other problems that could threaten

operation of the field: "Management's top priority is controlling costs and achieving short-term budget targets," not safety and regulatory compliance.

2001: In spring, Alaska regulators discovered that safety valves atop of some Prudhoe Bay oil wells, which shut down production if pressure drops because of a leak, have high failure rates. This prompted regulators to step up inspections and call on BP to do a better job of inspecting wellheads.

2001: A work crew injects oil and fluids underground to dispose of them after a small spill at Prudhoe Bay. BP pays \$675,000 in fines for not consulting with state environmental regulators before dumping the material.

1999: In September, BP agreed to pay \$6.5 million in civil penalties, \$15.5 million in criminal fines, and agreed to set up a nationwide environmental management program that ultimately cost about \$40 million, all stemming from an incident in which a contractor dumped thousands of gallons of toxic material underground at the BP oil field on Endicott Island, Alaska during the 1990s. BP also was placed on five years federal probation. BP also admitted that it failed to provide adequate oversight, audits and funding to ensure proper environmental management on Endicott Island, Alaska. Under the plea agreement, BP Amoco agreed to establish an environmental management system (EMS) at all of the BP Amoco facilities in the United States and the Gulf of Mexico that are engaged in exploration, drilling or production of oil. The EMS was the *first of its kind* in the oil industry to result from a federal prosecution.

1995: By year-end, BP and the other six Trans-Alaska Pipeline System owners reported close-out of most of the action items from the 1993 federal audit. This turned out not to be true. An investigative report funded by private citizens found that of the 4,920 audit action items, Alyeska had only closed out 27 of 96 (28 percent) top priority items; i.e., those with the greatest impact on safe operations and the most expensive to fix – and it had failed to close out top priority items in areas specifically cited by the

Table 2. continued

General Accounting Office in August as specific examples of Alyeska's improvement. Further, harassment and intimidation of internal whistleblowers continued.⁶

1993: In December, BP and the other six Trans-Alaska Pipeline System owners, Alyeska Pipeline Services Company, and Wackenhut (private security firm) agreed to pay targets of Alyeska sting operation undisclosed amounts to settle private lawsuits.

1993: In July and November, Congressional oversight hearings of the ongoing audit of the Trans-Alaska Pipeline System, stemming from Alyeska sting operation, confirmed internal whistleblowers' reports of a complete breakdown of the quality control/quality assurance inspection program, harassment and intimidation of inspectors, thousands of electrical wiring code violations ("weeping wires"), faulty welds, and an attempted cover up (i.e., the File Stuffing Incident) with technicians falsifying safety records. Hearings led to more internal whistleblowers reporting more safety problems within the Trans-Alaska Pipeline System; at least ten whistleblowers filed complaints to the U.S. Dept. of Labor against Alyeska.⁷

1993: In July, BP and five major owners of the Trans-Alaska Pipeline System (TAPS) agreed to pay \$98 million to settle claims of Alaska Natives, fishermen, and thousands of other Alaskans for harm from the Exxon Valdez oil spill. This is the first time that plaintiffs other than state and federal governments have been awarded damages arising from an oil disaster.

1992: BP and five major owners of the Trans-Alaska Pipeline System paid \$31.3 million to settle state and federal claims for Exxon Valdez-related damages to the natural resources in Prince William Sound and for lost tax revenues.

1992: The EPA charged BP Chemicals with violating hazardous waste laws at its plant in Lima, Ohio, and sought almost \$600,000 in penalties.

Table 2. continued

⁶ Alyeska Pipeline Service Company, Jim Hermiller (BP employee on loan and Alyeska president), "State of the Trans-Alaska Pipeline: A Report to the People of Alaska," ad, *Anchorage Daily News*, February 4, 1996.

Richard Fineberg, Pipeline in Peril: A Status Report on the Trans-Alaska Pipeline, prepared for Alaska, Valdez, September 1996, 3.19. <http://eisalaska.net/afer/rowhist/afer/103AFER.pdf>

⁷ *Anchorage Daily News*, "Audit Slams Pipeline Operation. Wiring, Welds, Records Call Safety into Question, Nov. 10, 1993.

Garde, Billie Pirner (attorney, Hardy & Johns), letter to Stan Stephens, Valdez, Alaska, Sept. 23, 1994. Re: U.S. Department of Labor (USDOL) Complaints, Bureau of Land Management Investigation, the Dept. of Transportation Inspector General's Investigation, and Other Concerns, plus attachments, including USDOL Complaints for Michael Shelton-Kelly, #4; James Schooley, #7; R. Glen Plumlee, #8; Robert Plumlee, #10; Kenneth Hayson, #12; and Richardo Ray Acord, #12, among others. <http://eisalaska.net/afer/rowhist/Ss/101SS.pdf>

United States. Congress. House, Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, 1993. *Oversight Hearings on Trans-Alaska Pipeline*, 103rd Cong., 1st sess., Washington, DC, serial no. 103-83, July 14 and November 10, 1993.

1991: Congressional oversight hearing of Alyeska's underground sting operation led to a federal audit of safety practices and operations of the entire Trans-Alaska Pipeline System.⁸

1991: In July, BP was one of ten major oil companies the EPA cited for discharging contaminated fluids from service stations into or directly above underground sources of drinking water. BP agreed to pay a fine of \$74,000, and to clean up the contaminated water sources by the end of 1993.

1990: BP agreed to pay a \$2.3 million fine as part of a settlement of an \$11 million suit that the EPA brought against the company in connection with illegal discharges from the BP Marcus Hook refinery into the Delaware River.

1990: In February, BP executive on loan to and president of Alyeska Pipeline Services Company, initiated a covert surveillance (undercover sting) operation of Alyeska's primary environmental critics, including Chuck Hamel and six Alaskans—one being author of these comments, in order to identify internal company whistleblowers who were an information conduit to the critics.⁹

1989: In March, the tanker Exxon Valdez ran aground in Prince William Sound, Alaska, spilling between 11 to 35 million gallons of oil, as reported by Exxon and State of Alaska investigators, respectively. Fishermen and others sued Exxon and the other Trans-Alaska Pipeline System owners, including majority owner BP, asserting that TAPS owners had failed to take adequate measures to prevent a catastrophic spill.

1980s: As majority owner of the Trans-Alaska Pipeline System and with an employee on loan serving as president of Alyeska Pipeline Services Company, British Petroleum (BP) was (and still is) accountable for these operations. During the 1980s, Alaska fishermen (including one primary author of these comments) and former oil broker Chuck Hamel successfully exposed a number of illegal activities involving TAPS tanker and terminal operations that led, ultimately, to criminal fines, civil fines, state and congressional oversight hearings, federal agency investigations, and gradual improvements in these operations. Examples of illegal activities include: massive air quality violations from an improperly functioning incinerator, i.e., the third largest emitter of benzene in the United States); massive water quality violations from an improperly functioning wastewater treatment plant, leading to Port Valdez being designated as a Toxic Impaired Water Body in 1988; and a "common (illegal) practice"

Table 2. continued

of transferring tank washings, oily sludge, slops, and other hazardous materials from tankers in the Lower 48 to TAPS-trade tankers for disposal at Alyeska's tanker terminal, i.e., basically

⁸ United States. Congress. House. Committee on Interior and Insular Affairs. 1992. Alyeska Pipeline Service Company covert operation: report of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, One Hundred Second Congress, second session. Washington: U.S. GPO, 1992.

United States. Congress. House, 1992. *Alyeska Pipeline Service Company Covert Operation, Draft report*, Committee on Interior and Insular Affairs of the U.S. House of Representatives, One Hundred Second Congress, second session. Washington: U.S. GPO, 1992.

⁹ Ott, Riki, *Not One Drop: Betrayal and Courage in the Wake of the Exxon Valdez Oil Spill*, Chelsea Green Publishing, 2008.

dumping hazardous materials into Port Valdez (dubbed “Ballast Watergate”), among other things.

1976: Congressional oversight hearing on the Trans-Alaska Pipeline System quality control system reported a total collapse of the inspection system, falsification of weld records, harassment and intimidation of pipeline inspectors, and more during construction of the pipeline. BP is the majority owner of TAPS.¹⁰

1. Legal justification for penalty recalculation

Paragraph 21 of the CAFO states that EPA may assess a class II civil penalty of up to \$16,000 per violation for each day of violation up to a maximum of \$187,500 for violations that occurred after December 6, 2013. As it is phrased, this statement could be misinterpreted as stating that \$187,500 is the maximum penalty for all violations in the aggregate. In fact, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B) provides that the maximum penalty applies *to each violation*, not all the violations in the aggregate: “The amount of a class II civil penalty under paragraph (1) may not exceed [\$16,000] per day for each day during which the violation continues; except that the maximum amount *of any class II civil penalty* under this subparagraph shall not exceed [\$187,500.]” (emphasis added). The use of the singular (“penalty”) makes clear that each violation triggers a separate maximum penalty.

This was explained *In the Matter of Crown Cent. Petroleum Corp., Respondent*, CWA-08-20, 2002 WL 56519, at *51 (ABAWQWCN Jan. 8, 2002):

“I correct Respondent's incorrect assumption as to what the maximum penalty can be. Respondent assumes that \$137,500 is the maximum overall penalty that could have been assessed in this case, thus putting EPA's assessment of a combined \$137,300 for Counts I and II just a couple of hundred dollars less than the maximum. However, the statute's limitations apply to each individual count alleged in the Complaint rather than acting as an overall limitation of penalties for various violations committed at a Facility. The language of the statute is instructive as it sets a limit as to singular, individual violations. For example, “the amount of a class II civil penalty . . . during which the violation continues.” CWA § 311(b)(6)(B)(ii) (emphasis supplied).”

(Although that case involved CWA § 311(b)(6)(B)(ii), the section is identical to CWA § 309(g)(2)(B).)

As discussed in subsection A of this section, we find a total of eight violations, including the original three identified by EPA. We find that each of these violations is distinct and triggers a separate maximum penalty under Section 309(g)(2)(B) of the

¹⁰ United States. Congress. House, Committee on Interstate and Foreign Commerce, Subcommittee on Energy and Power, 1976. *Oversight Hearing on Alyeska Oil Pipeline: Problems Concerning the General Lack of Quality Control in the Welding During the Construction of the TAP*, 94th Cong., 2nd sess., Washington, DC, serial no. 94-125, June 21, 1976.

CWA, 33 U.S.C. § 1319(g)(2)(B).

Given that the Section 309(g)(2)(B) of the CWA does not set forth a minimum penalty, only a maximum. a “top down” approach should be applied to determining the amount of the penalty. In other words, the Administrator should begin with regulatory maximum and adjust downward, only if justified, based on the statutory factors indicated in Section 309(g)(3) of CWA, rather than starting at \$0 or some other arbitrary baseline and working up from there. As was explained in *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), “the district court should first determine the maximum fine ... [I]f it chooses not to impose the maximum, it must reduce the fine in accordance with the factors [i.e., those described in Section 309(g)(3) of CWA]”. See also *United States v. Marine Shale Processors*, 81 F.3d 1329, 1327 (5th Cir. 1996), “courts often begin by calculating the maximum possible penalty, then reducing that penalty only if mitigating circumstances are found to exist”. Public policy dictates that Respondent should bear the burden of justifying any reduction from the maximum, rather than the public justifying an increase from \$0.

2. Commenters’ request

As part of this settlement agreement, BP has agreed to install new monitoring equipment, implement an inspection and cleaning schedule for its wastewater treatment plant, and enhance storm-water controls and inspections to prevent unauthorized discharges.¹¹

We find this extremely disingenuous of BP and EPA. All of these things—the “new” monitoring equipment, inspection and cleaning schedules, better storm-water controls and inspections—should have been in place as a condition of operating in the first place or a part of standard operations to upgrade to new state-of-art equipment when available. In fact, we find anything less than this a violation of operating procedures and permits. These token offerings are just that, as well as a ploy to seek smaller penalties.

Given the history of repeated and various violations, outlined in detail in Section I, we request that the maximum penalty of \$187,500 is assessed in this case for each of the three (3) violations identified by EPA and described in the CAFO, for a subtotal penalty of \$562,500. In addition, we request the maximum penalty of \$187,500 for each of the five (5) additional violations we have identified, for a subtotal penalty of \$937,500. In all, we request a total penalty of \$1,500,000 for these violations.

Further, we request that BP fulfills its obligations to reduce air and water pollution by implementing the agreed-upon conditions, noted above.

¹¹ Puente, Michael, “BP agrees to penalty for its 2014 oil spill into Lake Michigan,” *WBEZ91.5 Chicago*, June 14, 2016.
https://www.wbez.org/shows/wbez-news/bp-agrees-to-penalty-relating-to-2014-oil-spill/31a0248d-9baf-4fa6-8085-f7a0fcdc9d75?utm_source=twitter&utm_medium=referral&utm_campaign=Web-S-here

III. ADDITIONAL CONDITIONS UNDER THIS SETTLEMENT AGREEMENT

A. Justification for commenters' request

Previous events set precedent for our following request for three additional conditions under this settlement agreement. The Track Record for BP operations in the United States in Table 1 shows a history of systemic problems resulting in large penalties and systemic solutions as part of settlement conditions.

For example, BP was found to be grossly negligent in the BP Deepwater Horizon well blowout that resulted in the largest offshore oil disaster in the United States. Of the resulting \$18.5 billion settlement, \$2.4 billion was directed to the National Fish and Wildlife Foundation that has a 30-plus year history of investing mitigation and settlement funds in communities and areas injured by the event that led to the restitution and settlement funds. Another \$500,000 was directed to the National Academies of Sciences, Engineering, and Medicine to establish a new program to fund and conduct activities to enhance oil system safety, human health, and environmental resources in the Gulf of Mexico and outer U.S. outer continental shelf regions that support oil and gas production. The \$4.5 billion civil settlement for this arguably preventable disaster was the largest of its kind in U.S. history.

Further, in May 2012 BP paid \$8Mn (million) in fines and was ordered to install \$408Mn in pollution controls at the BP Whiting refinery as a condition of settlement for chronic air pollution emissions in violation of the Clean Air Act (see 2009). The "conditions cost" of \$408Mn was 51 times greater than the fines.

In May 2011 BP was ordered to install a system-wide program to manage integrity of the Trans-Alaska Pipeline System at an estimated cost of \$60Mn, in addition to paying \$25Mn, the largest per barrel civil penalty assessed at the time. The "conditions cost" was 2.4 times greater than the fines.

In 2009 BP agreed to spend more than \$161Mn in pollution controls and enhanced internal maintenance and monitoring, in addition to \$68.6Mn in civil penalties as part of settlement for the Texas City refinery explosion that killed 15 workers. The "conditions cost" was 2.4 times greater than the fines.

In November 2007, BP pled guilty to criminal charges relating to negligent maintenance that led to the largest oil spill on Alaska's North Slope; apart from \$21 million in fines, BP was ordered to replace 16 miles of pipeline at a cost of \$1.56 billion. The "conditions cost" was 74 times greater than the fines.

In October 2007, BP paid \$110Mn in criminal and civil fines from the BP Texas City refinery explosion and an estimated \$400Mn for an internal facility-wide study of

its safety valves and renovation of its flare system. The “conditions cost” was 3.6 times greater than the fines.

In March 2005, BP paid \$25Mn in new fines at the BP Carson refinery and agreed to spend \$50Mn on internal environmental improvements and community programs focused on asthma diagnosis and treatment. The “conditions cost” was 2 times greater than the fines.

In January 2001 BP paid a \$10Mn in civil penalties and agreed to a series of actions to reduce air emissions and improve self-monitoring and reporting at the BP Whiting refinery as a condition of settlement for chronic air pollution emissions that violated the Clean Air Act. Calculation of conditions cost to fines is not possible.

In September 1999 BP paid \$22Mn in criminal and civil fines and penalties and agreed to set up an internal, nationwide Environmental Management System (EMS) at all BP Amoco facilities in the United States engaged in exploration, drilling, or production of oil. The \$40Mn EMS was the first of its kind in the oil industry to result from a federal prosecution. The “conditions cost” was 1.8 times greater than the fines.

In addition, there is an established history at the BP Whiting refinery of pollution incidents that resulted in no penalties or fines from EPA or the state of Indiana. For example, in August 2014 BP self-reported an explosion, which injured a worker and released sulfur dioxide in excess of permit limits. In July 2011 BP self-reported a violation of its NPDES permit for discharging unknown quantities of phosphorous into Lake Michigan. In April 2011, the State of Indiana cited BP but did not penalize BP for multiple violations of discharging excessive solids into Lake Michigan. In 2010, Indiana inspectors cited but did not penalize BP for excessive pH levels in Lake Michigan from a pipe discharging water from the refinery. In October 2006 the State of Indiana cited BP for discharge of oil in violation of its NPDES permit into Lake Michigan. In 2004 BP self-reported a discharge of TSS in violation of its NPDES permit. In 2002–2003, BP self-reported four discharges of TSS in violation of its NPDES permit.

People who live with the life- and health- threatening consequences of chronic pollution from daily operations are not served by decisions that lack action to correct existing problems. Self-reporting of violations does not provide a safe harbor from penalties, although it may be a mitigating factor. However, the mitigation needs to be weighed against the pattern of negligent or grossly negligent behavior, both consistent factors in BP’s U.S. operations, including the BP Whiting refinery. Failure to hold BP accountable for illegal activities also leads to a public perception of industry-government collusion that further weakens effective democratic governance.

In light of this, we request three additional conditions under this CAFO settlement Each features independent programs to involve area residents in review and oversight of BP Whiting refinery operations that potentially affect their lives, health, and wellbeing.

B. A Lake Michigan Regional Citizens’ Advisory Council (RCAC)

There are only two places on the planet where BP operations were actually made significantly safer, in terms of prevention and response, and both occurred after an oil spill “accident” – or rather, after a *predictable consequence* of BP’s cost-cutting and negligent behavior. These places are in Scotland and Alaska, at the two majority BP-owned tanker terminals in Sullom Voe and Prince William Sound, respectively. The successful solution was the same in both cases: independent, funded regional citizen advisory councils to involve local people in the process of safeguarding oil activities in their backyard.

The Oil Pollution Act of 1990 (OPA 90) specifically calls out the importance of citizen and community engagement when it comes to oversight and monitoring of petroleum facilities. Excerpting from 33 U.S.C. 2732,

(2) Findings The Congress finds that—

(A) ...

(B) many people believe that complacency on the part of the industry and government personnel responsible for monitoring the operation of the Valdez terminal and vessel traffic in Prince William Sound was one of the contributing factors to the EXXON VALDEZ oil spill;

(C) one way to combat this complacency is to involve local citizens in the process of preparing, adopting, and revising oil spill contingency plans;

(D) a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals;

(E) ...

(F) ...

(G) the present system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation;

(H) only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus;

(I) ... and

(J) similar programs should eventually be established in other major crude oil terminals in the United States because the recent oil spills in Texas, Delaware, and Rhode Island indicate that the safe transportation of crude oil is a national problem.

OPA 90 created two pilot programs in Alaska by empowering “two already existing citizens’ councils to help combat the complacency seen as responsible for the 1989 spill and to provide a needed layer of scrutiny to increase public confidence in the safety of Alaska’s oil transportation system. The council role, defined by OPA 90 as purely advisory, was to help correct the problems leading to the oil spill by fostering partnership among the oil industry, government, and local communities in addressing environmental concerns.”¹²

¹² PWSRCAC, 2012, Role of Citizen Oversight.

http://www.pwsrcac.org/wp-content/uploads/filebase/resources/citizen_oversight_and_history_of_t

When set up correctly, citizens' advisory councils work. We incorporate into our comments by reference, Prince William Sound RCAC's 2012 white paper, "The role of citizen oversight in the safe management of oil transportation operations and facilities in Prince William Sound." Of special note are the three structural attributes necessary for effective and constructive citizen oversight, including: independence, assured funding, and access.¹³

We also incorporate into our comments by reference, a white paper by professor Rick Steiner, "Citizens' advisory councils to enhance civil society oversight of resource industries," published in the United Nations Environment Program's journal *Perspectives* in June 2013, issue 10.¹⁴ Net benefits of independent, funded, and informed citizens' advisory councils include a marked improvement in spill prevention, risk reduction, and environmental and social standards.

Under OPA 90, the oil industry was not allowed to have a voting seat on the council. Local governments were, but this proved too unwieldy to be functional in densely populated regions; i.e., basically anywhere else in the nation, except Alaska, that safe transportation of crude oil is a national problem. Further, the voting seats for local government may no longer be necessary or desirable, given that OPA 90 also required a third tier of government in the national organizational and planning structure for oil spill response; specifically, Area Committees, discussed in the next subsection.

Given the marked success of the Prince William Sound RCAC and Congress' intent of establishing similar programs in areas where the handling and transporting of oil is a national concern, we request, as a condition of this settlement, establishment of a Lake Michigan Regional Citizens' Advisory Council (RCAC) with key stakeholder groups, modeled after the Prince William Sound RCAC established under the OPA 90.

It is also important to note that the Prince William Sound RCAC conducts both an Oil Spill Prevention Planning Program and an Oil Spill Response Operations Program. As described on its website, through its Oil Spill Prevention Planning Program the council develops positions and recommendations on oil spill response technologies; reviews state and federal contingency plans and plan-related issues; promotes compliance with and enforcement and funding of existing environmental regulations; supports maintenance and improvement of the Alaska Coastal Management Program process; and promotes the incorporation of local knowledge of sensitive areas in contingency planning.

http://www.pwsrca.org/role_of_citizen_oversight_in_the_safe_management_of_oil_transportation_operations_and_facilities_in_prince_william_sound-february-2012.pdf

¹³ PWSRCAC, 2012, Role of Citizen Oversight.

¹⁴ Steiner, Rick, 2013, Citizens' Advisory Councils.

http://www.unep.org/civil-society/Portals/24105/documents/perspectives/ENVIRONMENT_PAPER_DISCUSSION_10.pdf

The Oil Spill Response Operations program encompasses monitoring and reporting activities related to the operational readiness of oil spill response personnel, equipment, and organization of the trans-Alaskan pipeline shipping industry. This program monitors oil spill incidents within Prince William Sound and evaluates response readiness. It is also responsible for writing and implementing the council's Incident Response Plan.

We find such programs would be critically important undertakings for a Lake Michigan RCAC as both functioned to strengthen the industry's SPCC Plans by shifting the plans from name-plate capacity paper exercises to response plans that actually were operational in the field; i.e., that did what the industry claimed it could do.

C. A Lake Michigan Area Committee

Under the Oil Pollution Act of 1990, Congress established Area Committees comprised of local agencies to address community needs and practical response to man-made disasters, similar to the roles and responsibilities of local governments to natural disasters under SARA (Superfund Amendments and Reauthorization Act) Title III.

Instead of establishing Area Committees throughout the country for technological disasters as per the Congressional mandate through OPA 90—similar to what occurred after passage of SARA Title III with establishment of Local Emergency Planning Committees for natural disasters, EPA left the structure of oil spill response planning essentially unchanged as the responsibility of state and federal agencies—that basically defer to industry for site-specific response plans; i.e., Spill Prevention, Control, and Containment (SPCC) Plans.

We find this unacceptable for two primary reasons. First, as recognized by Congress, local governments are in the best possible position to plan for and protect communities and the environment in the event of fires, explosions, spills, chronic pollution, and related incidents that result from large industrial facilities that handle oil and hazardous and noxious substances (HNS). Yet daily activities and increases in volume of oil and HNS handled at the BP Whiting refinery such as the recent Facility expansion and “modernization” project have occurred – as evidenced by the Track Record – without adequate consideration for the risks to local communities. The risks from incidents such as fires; explosions; spills; petcoke production, storage, and disposal; and chronic air and water emissions; among other things, have the potential to cause significant impacts to health and safety of citizens, first responders and the environment. The risks require the involvement of local governments to minimize the consequences to their communities. However, local governments have not been adequately integrated into this process of risk assessment and response planning for man-made disasters, including all impacts and consequences on local communities and governments, as they have for natural disasters.

Second, local government has a duty to protect public health, safety and wellbeing; industry has a duty is to maximize profits for its shareholders. These duties inherently conflict as industry profits often come at the expense of human safety and health and the environment – as shown in the Track Record. Therefore, it is critical that local governments are involved in risk assessment and response planning carried out by industry and other tiers of government environment. To do this, local governments need sufficient funding, staff, authority, and independence – pretty much the same structural attributes necessary for effective and constructive citizen oversight, as mentioned above.

Given Congress' intent of establishing a third tier in the national oil and chemical disaster response structure specifically to address practical concerns and local knowledge and the EPA's failure to follow the law, we request, as a condition of this settlement, establishment of a Lake Michigan Area Committee comprised of local, state, and federal agencies, as mandated under the Oil Pollution Act of 1990.

D. An independent environmental monitoring program for the WWTP

We are concerned that the WWTP was not designed to handle the current volume. The wastewater treatment plant at the Alyeska tanker terminal in Prince William Sound, Alaska, discharged 9,000,000 gallons of ballast water per day into Port Valdez during peak operations. Independent studies found that at an average flow rate of 9 MGD (million gallons per day), the residence time of the ballast water in the Dissolved Air Floatation cells was estimated to be about 4 hours.¹⁵ We incorporate by reference the paper by Payne et al., 2005, "From Tankers to Tissues."

The WWTP at the much larger BP Whiting facility discharges up to nearly ten times the volume of the Alyeska WWTP, or 55 to 85 MGD, but the residence time is only 50 to 90 minutes, as stated in para. 26. Operating with ten times as much volume and 75 to 85 percent less residence time seems very ineffective in terms of removing pollutants from the effluent—to say the least. The real proof of whether the WWTP is working properly lies in the sediments near the WWTP outfalls.

The type of independent environmental monitoring in place at the Port Valdez Alyeska tanker terminal will reveal if the BP Whiting refinery WWTP is functioning to remove pollutants and sufficient quantities of pollutants to fulfill permit requirements – and necessary to protect the receiving waters of Lake Michigan.

¹⁵ Payne, James, William Driskell, Joan Braddock and Justin Bailey, Jeffrey Short, Lisa Ka'aihue, and Thomas Kuckertz, 2005, "From Tankers to Tissues – Tracking the Degradation and Fate of Oil Discharges in Port Valdez, Alaska, prepared for the Prince William Sound Regional Citizens' Advisory Council, Anchorage, Alaska.
http://www.pwsrccac.org/wp-content/uploads/filebase/programs/terminal_operations/From%20Tankers%20to%20Tissues%20-%20Tracking%20the%20Degradation%20and%20Fate%20of%20Oil%20Discharges%20in%20Port%20Valdez.%20Alaska.pdf

Therefore, we request, as a condition of this settlement, establishment of an independent environmental monitoring program for the BP Whiting refinery WWTP, modeled after the environmental monitoring program conducted by the Prince William Sound RCAC for the Alyeska tanker terminal.

E. Funding for additional conditions

As conditions of this settlement, we request \$10 million *annually* for a Lake Michigan Area Committee and \$10 million *annually* for a Lake Michigan RCAC. An estimate of annual operating expenses were calculated based on a conversation with the Prince William Sound Regional Citizens' Advisory Committee, with allowances for increased program complexity and management, and modest compensation for board and committee members for meeting participation, in addition to travel expenses. EPA should consider this \$20 million request as the best investment in spill prevention under this—or any other settlement – with BP. Unlike previous settlements and conditions, these conditions have the potential to change business-as-usual practices at the BP Whiting refinery.

In addition and as a condition of this settlement agreement, we request \$250,000 for initial study design for an independent environmental monitoring program for the BP Whiting refinery. We also request \$250,000 annually, inflation-proofed, thereafter for program implementation. Our budget for the environmental monitoring program was determined based on conversations with the Prince William Sound Regional Citizens' Advisory Council.

The start up cost for these three programs is \$20.5MN. *The conditions cost is 11.5 times greater than the total maximum fine of \$1,785,000 that we have requested. This conditions cost ratio is well within the range of 1.8 to 74 times greater than criminal and/or civil fines and penalties for previous settlements.* These annual, inflation-proofed, payments of \$20.25Mn to implement these three programs should be considered as costs of doing business, similar to the other long-term programs established as settlement conditions. Further, BP should consider this a small price to pay for the annual privilege to operate in the community and on the shores of Lake Michigan.

IV. REQUEST FOR A NEUTRAL THIRD-PARTY FIDUCIARY RECIPIENT

A. Justification for commenters' request

The Whiting refinery is BP's largest refinery and the sixth largest refinery in the United States. The parent company BP America and its subsidiaries have had a long time to do things right, yet its overall track record reveals much wrong, with changes or improvements made only after various subsidiary companies are caught violating the law. BP Products North America Inc. is no different, and it can well afford – and it well deserves to pay – substantial penalties for its repeated pattern of neglect and carelessness that harms people and the environment. For these reasons, we do not trust BP to handle or direct any funds from this CAFO.¹⁶

B. Request: Redirecting penalty funds

To do the most possible good, all penalties resulting from this settlement should be directed into the hands of those who have the most to gain by minimizing risk of oil spills and improving air and water quality during daily Facility operations – area residents. To do this, we request that all penalties and fines resulting from this settlement agreement, including all annual payments to support ongoing citizen involvement in improving the safety record of this refinery, should be directed to the an independent, third-party fiduciary such as the National Fish and Wildlife Foundation that has a proven track record for receiving and responsibly managing settlement funds and penalties – and for supporting projects in communities directly harmed by the activities that led to the settlement or penalties. Most recently, NFWF was entrusted to receive \$2.4 billion from the BP Deepwater Horizon disaster.

Funds would be used for any and/or all of the following explicit purposes:

a) funding an independent review and analysis of data and information received from our July 11, 2016, FOIA to EPA for documents relating to operations and maintenance of the BP Whiting refinery wastewater treatment plant; and each of (b) through (d) below, specifically.

b) funding design and implementation of an independent, annual environmental monitoring program for the BP Whiting refinery WWTP;

c) startup funding to initiate the process of establishing an independent Lake Michigan Area Committee with key municipal stakeholders and an independent Lake Michigan Regional Citizens' Advisory Council with key stakeholder groups;

d) funding to support annual operations of an independent Lake Michigan Area Committee and an independent Lake Michigan Regional Citizens' Advisory Council; or

¹⁶ A Supplemental Environmental Project (SEP) is not included as part of this proposed settlement, nor should one be, nor would we want one to be.

e) funding for local and/or regional citizens' advisory projects at the same levels and with the same goals of the organizational structures defined in the conditions set forth in (b) through (d) of this subsection.

VI. SUMMARY

In summary, we find that BP Products North America has a track record of negligence regarding operations and maintenance of the BP Whiting refinery wastewater treatment plant, willful safety and environmental violations, and an utter managerial disregard – bordering on contempt – for environmental and safety regulations. For these reasons, and as discussed in our comments, we ask for:

- 1) Maximum penalties of \$187,500 for each of eight (8) types of violations for a total civil penalty of \$1,500,000;
- 2) Three additional conditions under this settlement including:
 - a) Establishment of, and \$10Mn annually, inflation-proofed, for implementation of, an independent Lake Michigan Regional Citizens' Advisory Council (RCAC), modeled after the Prince William Sound RCAC established under the Oil Pollution Act of 1990;
 - b) Establishment of, and \$10Mn annually, inflation-proofed, for implementation of, an independent Lake Michigan Area Committee, as mandated under the Oil Pollution Act of 1990; and
 - c) Establishment of an independent environmental monitoring program for the BP Whiting refinery WWTP, modeled after the environmental monitoring program conducted by the Prince William Sound RCAC for the Alyeska tanker terminal and consisting of \$250,000 to design the program; and \$250,000 annually, inflation-proofed, to implement the program; and
- 3) A neutral third-party fiduciary recipient – such as the National Fish and Wildlife Foundation – of all penalties and funds resulting from this CAFO and settlement agreement for any of the following explicit purposes:
 - a) Funding an independent review and analysis of data and information received from our July 11, 2016, Freedom of Information Act request to EPA, relating to operations and maintenance of the BP Whiting refinery wastewater treatment plant from December 2011 to June 2016; and
 - b) Funding any or all of the three additional conditions in subparagraph 2; or
 - c) Funding for local and/or regional citizens' advisory projects at the same levels and with the same goals of the organizational structures defined in the conditions set forth in Section III.

Thank you for the opportunity to comment.

SIGNATORIES

Riki Ott, PhD, Director
ALERT, a project of Earth Island Institute
Berkeley, CA

Peggy Salazar
Southeast Environmental Task Force
Chicago, Illinois

Dunelands Environmental Justice

Southeast Side Coalition

Sandra Davis and Dave Davis
350Kishwaukee

Break Free Midwest Response Network
100 Grannies for a Livable Future
350 Chicago
350 Louisville
350 Milwaukee
BIG: Blacks in Green
Bold Nebraska
CARS, Citizens Acting for Rail Safety
Center for Biological Diversity
Chicago Area Peace Action (CAPA)
Chicagoland Oil By Rail
Climate First!
Community Power
Concerned Citizens of Cheboygan and Emmet County
Conserve Our Rural Ecosystem (CORE)
DuneCATS
Earthseed
Earth Circle
Elgin Green Groups 350
Energy Action Coalition
First Unitarian Church of Hobart, Faith-in- Action Committee
Forest City 350
Fox Valley Citizens for Peace & Justice
Frack Free IL
Green Parent Chicago
Honor the Earth
IL Climate Activists
Illinois South Solutions

IOWA 350

SIGNATORIES continued

*Justice and Witness Ministries of the United Church of Christ
Lake Street Church of Evanston, Peace and Justice Committee*

Minnesota Interfaith Power & Light

Minnesota Public Interest Research Group (MPIRG)

MN350

Native Lives Matter / Native Lives Matter Coalition

Pilsen Alliance

Science and Env Health Network (SEHN)

Shawnee Forest Sentinels

Sierra Club - Blackhawk Group

Southern Illinoisans Against Fracturing Our Environment (SAFE)

*The People's Lobby Education Institute (formerly IIRON - Illinois-Indiana
Regional Organizing Network)*

Women's Congress for Future Generations

Vote-Climate.org