

Docket No. CWA 05–2016–0014
Regional Hearing Clerk
U.S. EPA Region 5
Mail Code E-19J
77 W. Jackson Blvd
Chicago, IL 60604

July 11, 2016

Via email: whitehead.ladawn@epa.gov

Re: Public Notice: CWA 05–2016–0014 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 & ASKS

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. Asks

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.

Table 1. continued

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 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.

Table 1. continued

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 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

The proposed civil penalty of \$74,212 in this CAFO occurred as a result of findings from a 5-day site visit and inspection of the BP Whiting refinery during May 5 to 9, 2014.

The proposed civil penalty is based on nine alleged types of violations of the Clean Water Act. Each of these violations is addressed separately, along with requests for additional information.

1–6. Violations of NPDES Permit Effluent Limits

EPA lists a total of six (6) types of NPDES permit effluent violations that occurred in 2010 and 2011, as detailed in Table 1 (para. 25). Specifically, these are violations of the daily maximum for TSS during July 2010 and April 2011 (2 violations); the monthly average for TSS during July 2010 (1 violation); the daily maximum for BOD in April 2011 (1 violation); the daily maximum for oil and grease in April 2011 (1 violation); and the daily maximum for phosphorus in November 2011 (1 violation), for a total of 6 violations.

These violations could have occurred for at least three reasons, gleaned from EPA's description of the OTCW system's interface with Six Separator within the WWTP and subsequent discharges to Outfall 002 (para. 26). The three reasons are:

- 1) the 50- to 90-minute residence time may be too short for the 55 to 85MGD (million gallon per day) throughput to allow sufficient separation of oil and grease and TSS; and/or
- 2) sediment buildup in Six Separator and resulting impaired function to remove pollutants from the wastewater; or
- 3) an Incident that occurred in April 2011.

Note that of these three reasons, only the last one stems from an isolated incident. The other two reasons reflect more systemic problems such as a WWTP that is either not operating as designed or was not designed to handle the current volume, and that is clearly not being properly maintained or safely managed. More information is needed to ascertain the reason for the violations, in order to identify proper solutions.

→ Does each outfall have its own separator?

If so, then the reasons for the noted violations at Outfalls 001 and 005 could be that the 50 to 90-minute residence time may be too short to allow sufficient separation of oil and grease and TSS. This problem might be exacerbated by nonconventional oil.

→ If each outfall does not have its own separator, then is the effluent that was discharged from the Outfalls 001 and 005 first treated in Six Separator?

If so, then the 50 to 90-minute residence time may be too short to allow sufficient separation of oil and grease and TSS and/or the sludge-compromised functioning of Six Separator may either or both be factors contributing to the effluent limit violations.

→ Was there an Incident (system upset) that occurred in April 2011?

If so, this could also have contributed to the daily and monthly violations of TSS limits. However, incident and action reports should have been filed. Were any?

→ Have there been any independent environmental monitoring studies to determine if the WWTP is functioning as intended—or simply flushing hydrocarbons and other pollutants through the system?

Sloppy operations, poor maintenance, and not following As-Built designs and specifications are all long-standing and seemingly entrenched behaviors of BP, as discussed in the next Section and as the Track Record illustrates overall and, more specifically, in the other violations under this CAFO.

7. Failure to properly maintain & efficiently operate Six Separator

EPA inspectors also observed “sediment accumulation in Six Separator that was approximately two feet below the water’s surface in several locations” (para. 28). EPA states this is critical for proper functioning of the wastewater treatment system and is required as necessary for achieving compliance with the terms and conditions of the NPDES permit (para. 26–27, 29–30). EPA counts failure to do so as one violation. But there is more to this story.

Failure to properly operate and maintain the WWTP, specifically by allowing accumulation of sediment in the separators constitutes negligent behavior, because, quite simply, BP knows better. So does the EPA.

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 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.¹

Based on EPA’s observations, 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.

Gradually, the issues at the mostly BP-owned Alyeska terminal in Port Valdez were addressed and the air and water quality improved – due primarily to persistence of concerned residents, other informed citizens, and industry whistleblowers, despite the service company’s long-standing practice of harassment and intimidation of critics – state and federal employees,

¹ 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.

internal whistleblowers, and private citizens, referred to in the Track Record in 1976, the 1980s, 1991 November, 1993, and 1995.

→ Is there, or was there ever supposed to be, a sludge incinerator at the BP Whiting refinery that was part of the WWTP? Are there records that indicate when sludge was removed and WWTP tanks, including and such as Six Separator, cleaned? How often has EPA reviewed these records? If there is no sludge incinerator, how is the sludge disposed of and are there records? What happens to the sludge?

In CAFO-05-2016-0015, which deals with similar issues, EPA states: “On August of 2015, [BP] completed the removal of the sediment accumulated in Six Separator.” This means that the BP Whiting refinery was operating for one year and five months with a severely compromised WWTP – and it is very likely that there were daily and monthly violations of NPDES permit effluent limits for various parameters during this entire time. Further since the sediment did not accumulate overnight when EPA inspectors first observed it, this also means that the BP Whiting refinery was operating for some time prior to the May 2014 inspection dates with a severely compromised WWTP – and that it is also very likely that there were daily and month violations of the NPDES permit effluent limits during this entire time.

→ Were the DMRs in 2012, 2013, 2014, and 2015 reviewed for potential NPDES permit violations? If not, why not? If so, the record and CAFO does not reflect this work and is incomplete.

Finally, 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, since the BP Whiting refinery was “modernized” to process Canadian tar sands crude oil during 2009–2014.

→ Has EPA considered the effects of heavier oil and tar sands oil on function of the WWTP? Are there independent and/or industry studies to show that the WWTP is capable of handling this increased load from unconventional oils? How does this effect residence time and throughput?

8. Violation of NPDES Permit & CWA, 33 USC §1311(a)

EPA inspectors observed “a discharge from the Facility to... the City of East Chicago’s storm sewer [that ultimately] discharges into the Lake George Canal.” Further, they observed that “the discharge was orange/brown in color and had an oily sheen, and the area smelled strongly of oil and hydrocarbons” (para. 31). Since discharges to storm sewers are not authorized under the Facility permit, EPA counts this incident as one violation.

This is not an isolated incident in the bigger picture of BP operations in the United States. The Track Record shows a pervasive pattern of disregard for human health and safety and the environment, and similar discharges of pollutants from BP facilities into waterbodies of the United States in 2011 November and April, 2008, 2007, 2005 March, and 1991.

9. Violation of NPDES Permit, the SWPPP, & CWA, 33 USC §1311(a)

EPA inspectors observed “large piles of excavated dirt and other materials... stored in a manner that allowed contact with storm water and a subsequent discharge through erosional pathways to the Lake George Canal... [Further,] storm water controls surrounding the piles included silt fencing that was dilapidated and allowed storm water to bypass the controls” in violation of Structural Best Management Practices (para. 33). Since discharges from Facility dirt piles to Lake George Canal and Lake Michigan are not authorized under the Storm Water Pollution Prevention Plan or the NPDES permit, EPA counts as one violation.

Again as discussed above, this should not be viewed as an isolated incident in the bigger picture of BP operations in the United States. The Track Record shows a pervasive pattern of deeply-entrenched, managerial disregard for environmental regulations and human health and safety.

10. Violations of NPDES Permit Effluent Limits

In addition to the nine types of violations that EPA has recorded in this CAFO, we found at least one more in para. 28. EPA inspectors “observed oil sheen throughout Six Separator on each day of the inspection, including sheen in the final cell prior to discharge to Lake Michigan” (emphasis added). Visible oil and grease very likely exceeds the permissible daily maximum effluent limit of 2,600 pounds per day.

Visible oil and grease sheens equate to about 15 mg/L.² An average flow of 55 to 85 million gallons per day (MGD) and an average Total Recoverable Oil and Grease (TROG) loading of 15 mg/L imply a discharge of approximately 6,875 to 10,625 pounds of oil per day—over 3 to 5 tons. We request that EPA counts this as one additional type of violation.

→ Why were these Incidents not recorded by EPA as violations?

→ Why is the permissible daily maximum for oil and grease so high in the first place? The daily maximum of 2,600 pounds per day is over a ton of oil and grease per day. It seems these parameter limits could be much lower, given state-of-art equipment and best management practices.

Further, there are likely many more violations just on this parameter alone, given the fact that visible oil and grease were observed during 100 percent of the 5-day inspection; the observed lack of maintenance in Six Separator as evidenced by sediment accumulation (discussed below); and previous history of (known) violations of NPDES permit limits, as evidenced in the Track Record for effluent limit violations in April and July 2011, 2010, October 2006, 2005 (mentioned in previous Record), 2004, 2002–2003 (at least 4 violations).

→ Did EPA review the DMRs for all outfalls for violations of NPDES permit effluent limits from December 2011 through May 2016, the date of this CAFO? If not, why not? If so, there were surely other violations—the most obvious being on March 24, 2014, and the daily visible oil and grease sheens during the EPA inspection: Why are these not listed and part of this CAFO?

² Wisconsin Dept. of Natural Resources, 2009, “Fact Sheet: Wastewater from the outside washing of vehicles, equipment and other objects,” WPDES Permit Number WI-0059153-3, March. http://dnr.wi.gov/topic/wastewater/documents/59153_fs.pdf

Further, the Track Record notes in 2009 that, between 2003 and 2008, BP was cited for Clean Air Act violations for emitting 16 times the allowable limit of benzene at its wastewater treatment plant. Removing hazardous pollutants from one medium—water—and dumping them into another—air—is certainly not acceptable. It also indicates that the WWTP might be releasing significant amounts of benzene and other VOCs and oil particulates directly into the air, instead of capturing these pollutants and incinerating them. CAFO-0015 states that Six Separator is “open to ambient air” (para. 35).

→ Are there daily air quality monitoring records specific to the wastewater treatment plant? If so, what pollutants are monitored? What action, if any, was taken to correct the benzene problem, noted above, in years 2003–2008? For example, the most obvious solution is a vapor recovery system similar to what BP and the other Trans-Alaska Pipeline System (TAPS) owners installed at the Alyeska tanker terminal WWTP during the 1990s—after concerned residents and investigative journalists became informed and engaged in the public process. Are there records to justify why WWTP emissions from the BP Whiting refinery are not captured and incinerated?

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.

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.

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

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/>

Table 2. continued

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.

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.

Table 2. continued

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.

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.

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

Table 2. continued

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.

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.

Table 2. continued

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 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

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/afcr/rowhist/afcr/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/afcr/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.

Table 2. continued

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.

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

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.

Table 2. continued

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” 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 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

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.

1. Legal justification for penalty recalculation

Paragraph 16 of the CAFO states that the maximum civil penalty “for CWA violations” is \$177,500 for violations that occurred after January 12, 2009, through December 6, 2013. As it is phrased, this statement could be misinterpreted as stating that \$177,500 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 [\$177,500]” (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).)

The CAFO identifies nine (9) separate violations:

1-6. Six (6) discharge monitoring effluent limit violations over a period seventeen (17) months in 2010 and 2011, described in para. 25 of the CAFO; and

7-9. Three (3) violations observed during the inspection conducted in May 2014:

7. Failure to properly maintain and efficiently operate Six Separator in good working order;

8. Discharge into East Chicago storm sewer on Indianapolis Blvd., described in para. 31 of the CAFO; and

9. Piles of excavated dirt in contact with storm water discharge into Lake George Canal, described in para. 33 of CAFO.

10. In addition, we have identified one more type of violation.

10. The oil sheen through Six Separator observed on all five days of inspection, described in para. 28 of the CAFO and discussed above.

Each of these violations is distinct and triggers a separate maximum penalty under Section 309(g)(2)(B) of the 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 \$177,500 is assessed in this case for each of the nine (9) violations that occurred before December 7, 2013, for a subtotal penalty of \$1,597,500. In addition, we request the maximum fine of \$187,500 for violating the maximum daily limit for oil and grease during May 5 to 9, 2014. In all, we request a total penalty of \$1,785,000 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-Share

III. ADDITIONAL CONDITIONS UNDER THIS SETTLEMENT AGREEMENT

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.

A. Justification for commenters' requests

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_the_council/Role%20Of%20Citizen%20Oversight%20In%20The%20Safe%20Management%20Of%20Oil%20Transportation%20Operations%20And%20Facilities%20In%20Prince%20William%20Sound%20-%20February%202012.pdf

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.

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

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_PAPERS_DISCUSSION_10.pdf

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

¹⁵ Payne, James, William Driskell, Joan Braddock and Justin Bailey, Jeffrey Short, Lisa Ka’ahue, 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.pwsrca.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

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.

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 independent, third-party fiduciary such as the National Fish and Wildlife Foundation, with 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

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.

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.

I. 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 penalty of \$177,500 for each of nine (9) types of violations and maximum penalty of \$187,500 for one type of violation that occurred after December 6, 2013, a total of \$1,785,000;
- 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, Director
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**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