

FACT SHEET FOR NPDES PERMIT WA 002290-0

BP CHERRY POINT REFINERY

PERMIT MODIFICATION PUBLIC NOTICE DATE – SEPTEMBER 4, 2013

The Department of Ecology issued a NPDES permit to the BP Cherry Point Refinery on February 14, 2012. The permit became effective on March 1, 2012. On March 14, 2012, Puget Soundkeeper Alliance, RE Sources for Sustainable Communities, and Friends of the Earth appealed the permit to the Pollution Control Hearings Board. BP also appealed the NPDES permit on March 14, 2012. Both appellants filed Motions for Summary Judgment on several issues. The Board heard oral argument on the motions on March 21, 2013.

Settlement discussions were held with both parties. The scheduled hearing before the Board was not held. A settlement agreement between Ecology, BP, and the environmental groups was finalized on July 26, 2013. The Board also issued their final ruling on the motions for summary judgment on July 26, 2013.

As a result of the settlement agreement and the Board's decision on the motions for summary judgment, several permit conditions were changed in the proposed permit modification. The proposed changes are discussed in this fact sheet.

PROPOSED PERMIT CHANGES

1. *Monitoring Frequencies at Outfall 001*

Permit Condition S1.A. was revised to change the monitoring frequencies for TSS and oil and grease from "7/wk" to "daily". This change was made to clarify the intent of the monitoring requirement.

2. *Monitoring at Stormwater Outfalls 002, 003, 004, 005, and 007*

TSS monitoring was removed from Permit Condition S1.C.3. Turbidity monitoring is still required to assess the levels of suspended solids in stormwater discharged from the site.

3. *Notification of Untreated Wastewater*

The wording in Permit Condition S3.E.2.(e) was changed to: "Any wastewater that is not treated in accordance with the Ecology approved engineering report whether or not such wastewater endangers health or the environment or exceeds any effluent limitation in the permit." This modification was made to clarify the intent of the notification requirement.

4. *Notification of Material Change in Influent*

A new provision was added as Permit Condition S3.F.(d): “The Permittee must, as soon as possible, but no later than thirty (30) days prior to the proposed changes, give notice to Ecology of a process modification which will result in the installation of new process units or new equipment in existing process units that could cause material change in the quantity or composition of the influent processed by the wastewater treatment system.”

5. *Submittal of WET Test Results*

The submittal requirement in Permit Condition S7.C. was changed from “within sixty (60) days after each sample date” to “within sixty (60) days after completion of the test”.

6. *WET Test Failure that is a Permit Violation*

Permit Condition S7.D. was revised to identify when a WET test failure is a permit violation. The new wording states: “If any toxicity test conducted under subsection D.1. shows a statistically significant difference in response between the ACEC and the control, using the statistical test described in subsection B, then the test result is a violation of the acute limit.”

7. *Electronic Reporting*

Permit Conditions S3.A., S7.E.1., and S8.B.1. were revised to require electronic reporting of monitoring results and WET test results.

8. *Herring Toxicity Study*

The herring toxicity study, Permit Condition S.9, was removed from the permit. Instead, Ecology and BP signed an agreed order requiring BP to conduct a herring chronic toxicity study. A number of changes from the permit language were agreed to in the herring order: no acute testing, no submittal of a Toxicity Implementation Plan, number of tests reduced to six, a study completion date of March 1, 2017, no comparisons to ACEC or CCEC, and comparisons to two additional EPA tests for the larval survival and growth test.

9. *Sediment Recharacterization at the North Pier*

Permit Condition S11. was revised to: “The Permittee must recharacterize sediment toxicity at the North Pier if Ecology determines that significant spills or accumulation of spills have occurred since the 2006 baseline sediment characterization.” This change was made to clarify the intent of the monitoring requirement.

10. *Pollution Prevention Plan*

Redundant language was deleted from the first paragraph of Permit Condition S11.D. and other wording from this subsection was moved to Permit Condition S11.B.

11. *General Conditions*

General Conditions G14. and G19. were revised to align with language in the federal regulations (40 CFR).

PUBLIC INVOLVEMENT INFORMATION

The Department of Ecology has tentatively determined to modify the NPDES permit for the BP Cherry Point Refinery. The Department will publish a Public Notice of Draft (PNOD) on September 4, 2013 in the *Ferndale Record* to inform the public that a draft permit modification and fact sheet are available for review.

Interested persons are invited to submit written comments regarding the draft permit modification. The draft permit modification, fact sheet, and related documents are available for inspection and copying between the hours of 8:00 a.m. and 5:00 p.m. weekdays, by appointment, at the Ecology offices listed below.

Department of Ecology
Industrial Section
300 Desmond Drive
Lacey, WA 98503

Written comments should be mailed to:

Liem Nguyen
Department of Ecology
Industrial Section
P.O. Box 47600
Olympia, WA 98504-7600

Comments should reference specific text followed by the requested change or concern when possible. **Ecology will only consider comments that pertain to the permit conditions we are proposing to modify.**

The Department will consider all comments received within thirty (30) days from the date of public notice of the draft indicated above, in formulating a final determination to modify the permit. The Department's response to all significant comments is available upon request and will be mailed directly to people expressing an interest in this permit.

Fact Sheet Supplement for NPDES Permit No. WA 002290-0
September 4, 2013

Further information may be obtained from the Department by telephone at (360) 407-6955 or by writing to the address listed above.

**WASHINGTON STATE DEPARTMENT OF ECOLOGY
RESPONSE TO PUBLIC COMMENTS**

**BP Cherry Point Refinery
1560A Marble Valley Road
Blaine, Washington 99101**

**NPDES Permit No. WA0022900
December 2, 2013**

Ecology published notice of an opportunity to comment on proposed modifications to NPDES Permit No. WA 002290-0, in the Ferndale Record on September 4, 2013. The proposed modifications are in response to an agreement settling appeals of the BP permit and rulings from the Pollution Control Hearings Board (PCHB). In the notice, Ecology invited public review of the proposed modifications and provided a 30-day public comment period. The deadline for submittal of written comments was October 7, 2013. Ecology received written comments from two entities.

Comments were received from: Beth Ginsberg, Stoel Rives, on behalf of BP
Richard Smith, Smith & Lowney, on behalf of
Puget Soundkeeper Alliance, RE Sources, and Friends of the
Earth (collectively "Soundkeeper")

We included all of the comments received in this document. The comments were summarized where appropriate, to save time and space. The original comments comprise part of the legal record for this permit. The record is available for public review at Ecology's Industrial Section office in Lacey, WA. Anyone interested in reading the full text of the comments or in obtaining a copy of a particular comment should call or e-mail Liem Nguyen in Lacey at (360) 407-6955 or liem.nguyen@ecy.wa.gov.

Comments appear in regular text, followed by Ecology's response in italicized text. Ecology will send a copy of this response to comments to each individual who provided comments.

Comments from Beth Ginsberg (1.-2.)

1. Ecology has agreed to remove TSS monitoring from the stormwater outfall 002, 003, 004, 005, and 006. Ecology has done so in Condition S1.C.3. BP notes that TSS stormwater monitoring for outfall 003 is still required in Condition S1.E. BP requests that the requirement for TSS stormwater monitoring for outfall 003 be removed from the final modified permit in Condition S1.E. This modification will be consistent with Condition S1.C.3.

Ecology agreed to remove TSS monitoring at stormwater outfalls 002, 003, 004, 005, and 007 in Condition S1.C.3 but did not agree to remove TSS monitoring at outfalls 003 or 006 in Condition S1.E. Condition S1.E. refers to different sources of stormwater and discharge conditions.

2. Condition S11.D on page 37 refers to Condition S12.A. and should refer to S11.A. instead.

The reference to Condition S12.A. was changed to S11.A.

Comment from Richard Smith (3.)

3. Ecology proposes to modify the acute WET provision of the permit, Condition S7, by the addition of a single sentence at the end of S7.D. Soundkeeper submits that this proposed modification is inadequate to comport with either the provisions of state law or the terms of the PCHB's order.

First, despite the PCHB's order, Soundkeeper maintains that the permit may not authorize a discharge that fails the compliance test for acute WET, thus violating the effluent limit for acute toxicity. Washington's water quality standards prohibit the discharge of toxic substances that cause acute toxicity in the receiving waters. WAC 173-201A-240. This narrative reflects a prohibition in state statute: "In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria." RCW 90.48.520. The purpose of WET testing under WAC 173-205 is to determine whether a discharge is toxic and subject to the prohibition. It describes the statistical analysis constituting the compliance test for acute toxicity, and states that this compliance test "shall be considered to be a maximum daily discharge permit limitation." WAC 173-205-070(1)(d).

This means that the test for compliance with the permit must be the same as the compliance test for acute toxicity, as defined by the regulation. This means that the permit may not authorize a toxic discharge, which is one that fails the acute toxicity compliance test. S7.D. already provides a procedure for BP to demonstrate that a failing WET test is an anomaly to invalidate it. There is no legal, practical, or rational basis for interpretation of these state laws and regulations that would allow authorization of any discharge that fails a WET compliance test. S7 should be rewritten to effect the

prohibition on toxic discharges by equating any failure of the compliance test with violation of the acute WET effluent limitation and the permit.

Second, even accepting the PCHB's faulty interpretation of state law on WET effluent limitations, this proposed modified condition is problematical. The proposed modification would make violation of the permit contingent on the failure of a follow-up WET test for each regularly scheduled acute WET compliance test failure. In other words, no failure of a regularly scheduled acute WET test can constitute a permit violation unless there is also a failure of one of the follow-up tests. It is unlikely that the PCHB would deem this acceptable since repeated failures of regularly scheduled WET tests also indicate an ongoing pattern of toxicity. S7 should clarify that any failure of any acute WET test following the first failure recorded during the permit term constitutes a permit violation.

In addition, the effect of the sentence proposed for insertion at the end of S7.D is unclear. Its final clause, "then the test result is a violation of the acute limit," is not adequate to clarify that this means "violation of the permit" given the sloppy use of terminology in the modified condition. S7.A purports to define "the effluent limit for acute toxicity." S7.B purports to define "compliance with the effluent limit for acute toxicity." However, failure of an acute WET test constituting a violation of this "effluent limit" does not mean there is a permit violation. Does the statement proposed to be added to S7.d., "then the test result is a failure of the acute limit," mean that there is a permit violation?

Soundkeeper points to the WET limit language that Ecology's Northwest Regional Office recently incorporated into NPDES Permit No. WA0031968 for Seattle Iron and Metals Corporation as a more appropriate permit drafting response to the PCHB's order on WET limitations.

Condition S7.D. was revised to read "If any toxicity test conducted under subsection D.1. shows a statistically significant difference in response between the ACEC and the control, using the statistical test described in subsection B, then the test result is a violation of the permit. The Permittee must submit a Toxicity Identification/Reduction Evaluation (TI/RE) plan to Ecology within sixty (60) days after the sample date [WAC 173-205-100(2)]."

This change is consistent with the PCHB's decision on exceedances of WET limitations. The Board deferred to Ecology's determination that a single WET limit exceedance does not indicate a pattern of toxicity. Instead, it triggers additional testing aimed at

determining if there is continued toxicity and a violation of the toxicity standard of the permit. If any of the subsequent tests fail the WET limit, that test failure is a violation of the permit.

Determining if there is ongoing toxicity versus transient toxicity is different than an anomalous WET test. The issue is not about the anomalous test language. It is about calling that first noncompliance with the WET limit a violation. The language in the Seattle Iron and Metals Corporation NPDES permit is not consistent with the PCHB's decision.

Note: Two additional changes were made to the BP permit. Footnote i in Condition S1.A. was revised to refer only to the priority pollutants listed in Appendix B and Appendix B was replaced with an updated version that more clearly identifies the list of priority pollutants.