

## **Appendix H**

### **BP Cherry Point Dock: Magnuson Amendment Overview**

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## 1.0 INTRODUCTION

On March 4, 2005, the U.S. Court of Appeals for the Ninth Circuit (9th Circuit Court) directed the U.S. Army Corps of Engineers (USACE) to prepare an environmental impact statement (EIS) and reevaluate its prior Department of the Army (DA) permit decision authorizing construction and operation of the North Wing of the BP Cherry Point Marine Terminal (terminal). The primary purpose of the permit reevaluation is to determine whether issuing the North Wing permit complied with the Marine Mammal Protection Act's Magnuson Amendment. Once a compliance determination is made, the USACE will decide whether any further regulatory action is necessary, such as modifying or revoking the subject permit. Although reevaluation of the North Wing permit and preparation of this EIS are separate processes, they are sufficiently related to warrant this Magnuson Amendment overview. The results of the permit reevaluation process, including a Magnuson Amendment compliance determination, will be part of a Record of Decision (ROD) to be issued following publication of the BP Cherry Point Dock Final EIS. The ROD will conclude both the National Environmental Policy Act (NEPA) EIS process and permit reevaluation decision.

## 2.0 PROJECT BACKGROUND

In 1971, the Atlantic Richfield Company (ARCO) completed construction of its Cherry Point Refinery. The new refinery included a marine terminal built in the nearby Strait of Georgia. DA permit number NWS-1968-253, issued by the USACE in 1969, authorized ARCO to construct a marine terminal consisting of two single-berth docks: one dock to unload crude oil tankers and the other to load vessels with refined petroleum products. However, ARCO built only one of the two authorized docks, known today as the South Wing. This dock is connected to shore by a main approach trestle that provides a causeway for vehicles and a foundation for pipelines that transfer crude oil and refined petroleum products between the dock and the refinery's upland storage tanks. Prior to the dock's construction, ARCO revised the design of the South Wing so it could both unload crude oil tankers and load vessels carrying refined petroleum products.

In addition to the refinery's marine terminal, ARCO used the Olympic Pipeline and, to a lesser extent, trains and trucks to export refined petroleum products to its customers.

In 1977, ARCO asked the USACE to reissue the marine terminal permit, which had expired by then, so it could construct the second dock, as originally permitted. ARCO subsequently withdrew its request and, in 1992, applied for a separate, new permit to construct the second dock, to be known as the North Wing. On March 1, 1996, the USACE issued DA permit number NWS-1992-435 authorizing construction and operation of the North Wing.

In April 2000, BP West Coast Products, LLC (BP) purchased ARCO's Cherry Point Refinery, including the refinery's marine terminal. On June 19, 2000, the USACE authorized a one-year extension of the North Wing permit to allow BP to complete construction of the dock, which went into service on September 20, 2001. The North Wing is capable of servicing only vessels carrying refined petroleum products, while the South Wing is capable of servicing both crude oil tankers and vessels carrying refined petroleum products. Figure 2-2 in the Final EIS illustrates the current configuration of the terminal.

In November 2000, Ocean Advocates and other plaintiffs filed suit in U.S. District Court challenging the USACE's North Wing permit decision on a number of procedural grounds, including compliance with the Magnuson Amendment. The Magnuson Amendment (33 U.S. Code Section 476), signed into law on October 18, 1977, is an amendment to the Marine Mammal Protection Act of 1972. Congress's stated purpose in enacting the Magnuson Amendment was to restrict crude oil tanker traffic in order to protect Puget Sound from environmental harm. The Magnuson Amendment contains the following single restriction:

*Notwithstanding any other provision of law, on and after October 18, 1977, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.*

The Magnuson Amendment, when applicable, requires the USACE to determine whether a proposed construction or alteration of an oil-handling facility "will or may result in any increase in the volume of crude oil capable of being handled" at the facility compared to the volume of crude oil the facility was capable of handling as of October 18, 1977. The USACE may not authorize an activity that would violate the Magnuson Amendment.

On October 10, 2001, the U.S. District Court, Western District of Washington, ruled on *Ocean Advocates v. U.S. Army Corps of Engineers* (167 F. Supplement 2d 1200 [W.D. Washington 2001]), finding that NEPA did not require preparation of an EIS in this case and that issuing the North Wing dock permit did not violate the Magnuson Amendment. Ocean Advocates subsequently appealed the District Court's decision to the 9th Circuit Court. In its decision (402 F.3d 846 [9th Circuit 2005]), the 9th Circuit Court disagreed with the District Court and ordered the USACE to (1) prepare an EIS considering the impact of reasonably foreseeable increases in tanker traffic associated with operation of the North Wing dock and (2) reevaluate whether its issuance of the North Wing permit complied with the Magnuson Amendment.

Under federal regulations, the USACE may reevaluate the circumstances and conditions of an issued DA permit and then modify, suspend, or revoke that permit as necessary to protect the public interest (33 Code of Federal Regulations Section 325). In its ruling, the 9th Circuit Court affirmed this authority, stating, "Although construction of the dock extension is now complete, the Corps may impose conditions on the operation of permitted terminals at any time 'to satisfy legal requirements or to otherwise satisfy the public interest.'" The 9th Circuit Court also ordered that, "The district court should direct the Corps to revoke the permit or place conditions on the operation of the dock extension if necessary to ensure compliance with the law."

As discussed in Chapter 3 of this EIS, the USACE is considering three alternative actions in reevaluating its BP Cherry Point North Wing dock permit:

- Reaffirm the original permit decision without further restrictions or conditions.
- Modify the North Wing permit as necessary to ensure that operation of the terminal complies with all legal requirements, including the Magnuson Amendment.
- Revoke the permit if it cannot otherwise be brought into compliance with all legal requirements, including the Magnuson Amendment.

Based on the outcome of its permit reevaluation, which will include a Magnuson Amendment compliance determination, the USACE will select the alternative that best upholds its regulatory and public interest responsibilities.

### **3.0 THE NINTH CIRCUIT COURT’S THREE QUESTIONS CONCERNING MAGNUSON AMENDMENT COMPLIANCE**

In *Ocean Advocates v. U.S. Army Corps of Engineers*, the 9th Circuit Court addressed Magnuson Amendment compliance in two general ways: (1) the capability of the North Wing dock itself to handle crude oil and (2) the berthing capacity of the entire marine terminal.

The court asked two specific questions concerning the capability of the North Wing dock to handle crude oil: whether it is physically possible for the dock to handle crude oil currently and whether it is physically possible to modify the dock such that it could handle crude oil without requiring additional permitting. The court concluded that if the answer to the first question is “yes,” then construction of the North Wing dock increased the terminal’s capacity to handle crude oil, and, if the answer to the second question is “yes,” the permit authorizing construction of the North Wing dock “*effectively* permitted an increase in the terminal’s ability to handle crude oil.”

The 9th Circuit Court also concluded that in order to determine whether a permit to construct and operate the North Wing dock increased the volume of crude oil capable of being handled by the marine terminal, the terminal’s berthing capacity must be considered. The court stated, “If the alterations to the terminal authorized by the permit increased the potential berthing capacity for purposes of unloading crude oil, then the permit violated the Magnuson Amendment. In other words, if the permit increased berthing capacity such that more ships carrying crude oil can arrive and leave the terminal in a given day, then, *ceteris paribus*, the permit increased the volume of crude oil capable of being handled at the facility.” The court asked the USACE whether “the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude oil.” The court noted that, “If the answer to this is question is ‘yes,’ then the permit violates the Magnuson Amendment.”

Each of the 9th Circuit Court’s three questions will be fully considered and answered in the USACE’s Magnuson Amendment compliance determination. Here, the USACE briefly introduces each question.

### **3.1 Question 1: Is it physically possible for the new platform to handle crude oil today?**

The North Wing was designed and constructed to service vessels carrying refined petroleum products exclusively. In contrast, the South Wing can service both crude oil tankers and vessels carrying refined petroleum products. This dock is equipped with both crude oil tanker unloading arms and loading arms for vessels carrying refined petroleum products. The South Wing's piping connects to transfer pipelines on the main trestle that then connect either to the refinery's crude oil storage tanks or to its refined petroleum product storage tanks.

In its Magnuson Amendment evaluation, the USACE will determine whether the North Wing's configuration, equipment, facilities, interconnections, and operation make it physically possible for BP to offload, load, or otherwise transfer crude oil at or using the North Wing in its present state.

### **3.2 Question 2: Is it physically possible to modify the new platform such that it could handle crude oil without requiring additional permitting?**

Section 10 of the Rivers and Harbors Act of 1899 prohibits the construction of any structure in or over any navigable water of the United States or any other work affecting the course, location, condition, or capacity of a navigable water of the United States without prior authorization from the Secretary of the Army in the form of a permit. Federal regulations at 33 Code of Federal Regulations Section 322 provide policies and procedures for evaluating and authorizing activities that involve structures or work in or affecting navigable waters of the United States.

Assuming the North Wing is determined to be presently incapable of handling crude oil, the Magnuson Amendment evaluation will assess whether becoming capable of doing so would require modification to the North Wing's configuration, equipment, and/or facilities of a nature and extent that prior authorization from the USACE would be required, including a project-specific Magnuson Amendment compliance determination.

### **3.3 Question 3: Did the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude oil?**

With its third question, the 9th Circuit Court asked whether construction of the North Wing effectively increased the terminal's potential berthing capacity for crude oil tankers.

Practically speaking, berthing capacity is the amount of time available for berthing vessels over a period of time, such as a year. In general, berthing capacity accounts for the time a facility is foreseeably unavailable for berthing due to maintenance and repair, adverse weather, and other circumstances that preclude operation of the facility. Under this definition, the 9th Circuit Court's third question can be addressed by comparing the number of hours the terminal was potentially available to berth crude oil tankers as of October 18, 1977, to the number of hours it was potentially available to berth crude oil tankers once the North Wing became operational in 2001. Since the South Wing is the only dock capable of servicing crude oil tankers, any increase in berthing availability for crude oil tankers at the South Wing dock would, by definition, increase the terminal's potential berthing capacity for crude oil tankers.



The Magnuson Amendment compliance determination will assess whether construction and operation of the North Wing increased the terminal's capacity to berth crude oil tankers.

#### **4.0 MAGNUSON AMENDMENT COMPLIANCE DETERMINATION**

In addition to preparing this EIS, the USACE is reevaluating its 1996 North Wing permit decision, primarily for compliance with the Magnuson Amendment. As such, a Magnuson Amendment compliance determination is being prepared to answer the three questions posed by the 9th Circuit Court, specifically to address the Magnuson Amendment's prohibition on increasing crude oil handling capacity and to determine whether issuance of the North Wing permit complied with the Magnuson Amendment. If the USACE determines that bringing the North Wing into operation increased the terminal's crude oil handling capacity in violation of the Magnuson Amendment, the USACE will decide whether the permit must be modified to bring it into compliance with the Magnuson Amendment or be revoked if it cannot otherwise be brought into compliance with applicable legal requirements. The results of the North Wing permit reevaluation will be incorporated into the ROD to be released following publication of the Final EIS.

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