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3 June 5, 2008

4 Commissioner Larry Hartig  
5 Department of Environmental Conservation  
6 555 Cordova Street  
7 Anchorage, AK. 99501

8  
9 **Hand Delivered to the Anchorage Office of the Commissioner, E-mailed, Faxed and**  
10 **Mailed to the Juneau Office of the Commissioner on 6/5/08**

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12 RE: Request for an Adjudicatory Hearing on DEC's Unlawful Approval of the 2007 TAPS  
13 Tanker C-plan Permits and Unfair Informal Review.

14  
15 Dear Commissioner Hartig;

16 Would you please accept and grant this Request for Hearing pursuant to 18 AAC 15.200 et. seq.  
17 as an appeal of the 2007 DEC approval of the TAPS Tanker C-plan Permits and subsequent  
18 Informal Review? I am providing the information required by 18 AAC 15.200 as follows:

19  
20 (a) The instant request is submitted 30 days after the decision of Director Dietrick in the  
21 Informal Review was issued on 5/6/08 as indicated by the dated postmark on the envelope in  
22 which the decision was received by Requestor.

23  
24 (1) My name, address, and telephone number appear at the top of this page.

25  
26 (2) I file this request on my own behalf as an affected person, but it is abundantly clear that all  
27 natural resource users in the regions of operation where TAPS Tankers are permitted to operate  
28 have had their right to reasonable concurrent use of resources and right to statutory and  
29 regulatory protections violated. Indeed, all Alaskan citizens are adversely affected where DEC  
30 persists in a pattern of illegal issuances of permits. I do not have the names and addresses of  
31 these affected persons, but most may be obtained from the records of the EVOS litigation.

32  
33 (3) (A) I am a long standing resident of Alaska who has exercised, and intends to exercise in the  
34 future, reasonable concurrent uses of the natural resources in the affected coastal areas of  
35 Southcentral Alaska, specifically PWS and Cook Inlet, including: subsistence hunting, fishing  
36 and gathering; commercial fishing; recreation; employment in the tourism industry. These uses  
37 were adversely affected by the EVOS and the C Plan is required by law to prevent a  
38 reoccurrence of the damages as documented in the report of the Alaska Oil Spill Commission  
39 and other State and Federal reports describing natural resource damages proximately caused by  
40 the EVOS. Documentation of the damages I sustained are contained in the case files of A89-140  
41 CV and A92-321 CV as consolidated In re; Exxon Valdez. A spill from TAPS Tanker  
42 operations has the potential to cause long term damage to the species that I plan to harvest and

1 the ecosystem that supports them, thereby infringing upon my constitutional right to sustained  
2 yield and reasonable concurrent use of Alaska's natural resources. These potential oil spills can  
3 also impair my access to, and enjoyment of marine and coastal resources in Cook Inlet and  
4 PWS. The approval of the C-plan has allowed the operation of an ultra-hazardous industry  
5 without the protections of law mandated in AS 46.04 et. seq. with its associated regulations. The  
6 failure of DEC to perform these mandated duties will allow permittee to use substandard  
7 methods to prevent, contain, control and recover oil spills, thereby causing damage that would  
8 otherwise be abated in conformance with law. DEC has deliberately issued this permit in  
9 contravention of these promulgated statutes and regulations intended to prevent damage to my  
10 protected reasonable concurrent use and interests, and the interests of innocent third parties from  
11 an oil spill from Permittees' facilities. TAPS Tankers' concurrent uses of Alaskan natural  
12 resources cannot be deemed reasonable unless and until DEC conducts the mandated  
13 examination of spill prevention and response technologies, especially those required as the  
14 "best" technologies and "breakthrough technologies" to be utilized by permittees in their C-  
15 plans for oil spill prevention and response. Damages are also sustained by stagnation of  
16 technological advancement of technologies defined in 18 AAC 75.445(k)(1), (2) and (3) and as  
17 required in 18 AAC 75.447 et seq that should have been available in formulation and review of  
18 all contingency plan permits to be issued by DEC. Several of these permits are presently under  
19 review by DEC and they also affect my uses of resources. The failure of DEC to fairly consider  
20 my comments, conduct the mandated technology reviews in accordance with law, and apply the  
21 mandated approval criteria violates my constitutional right to fair treatment in an executive  
22 investigation and right to due process by conducting a permit review with an incomplete or  
23 otherwise corrupted record. This unlawful suppression of a complete and accurate record during  
24 the public comment period was extended through the Informal Review denying requestor and  
25 the public their right to a fair evaluation of the C-plans and subsequent arguments made in  
26 support of the approval in Informal Review. DEC has, and continues to engage in permitting  
27 negotiations with third parties in secret, unrecorded meetings in violation of laws requiring  
28 retention of public documents and open meetings. This unfair treatment constitutes an  
29 intolerable corruption of government officials who are unlawfully subsidizing permittees and  
30 state coffers at the expense of the constitutional rights and right to statutory protections of  
31 natural resource users. I am also sustaining damages in the form of expenditure of time,  
32 monetary expenditures and suffering sustained in correcting the deliberate illegal permitting by  
33 DEC complained of herein.

34  
35 (3)(B)(i) and (ii) The clear and concise genuine factual issues for consideration are provided  
36 below with the attempt to retain the same formatting as used in public comments and the  
37 Informal Review as much as possible. The relevance to the permit decision of each matter  
38 presented is contained in each of the extended statements of the issue to provide more clarity of  
39 the issue and elicit a better understanding of its relationship to the decision.

#### 40 **Issue 1: Geographic Scope**

41 **Statement of Issue:** The requestor argues that plan holders have not submitted plans showing  
42 their ability to respond to an oil spill throughout each of the regions of operation where tankers  
43 sail as defined in 18 AAC 75.495; 18 AAC 75.990(156)(A); AS 46.06.030(r)(4), and; AS

1 46.04.210(a). DEC has deliberately misrepresented its duty to require Permittees to submit C-  
2 plans for the entire Region(s)<sup>1</sup> of Operation, ROO as defined and required by regulation:

3  
4 .990(156) “region of operation” means, with respect to (A) an oil discharge prevention  
5 and contingency plan other than a nontank vessel plan, a region established under 18  
6 AAC 75.495;

7 .495 (2) Prince William Sound Region: that area south of 63E30' N. latitude, west of the  
8 region described in (1) of this subsection, and east of the region described in (3) of this  
9 subsection, including adjacent shorelines and state waters, and having as its seaward  
10 boundary a line drawn in such a manner that each point on it is 200 nautical miles from  
11 the baseline from which the territorial sea is measured;

12  
13 These two regulations unambiguously establish that the geographic scope of C-plan and  
14 compliance with all approval criteria must apply throughout the entire Region of Operation. It  
15 would be the responsibility of Permittee and DEC to otherwise definitively show a valid  
16 justification for why full compliance throughout the entire ROO was not required. DEC instead  
17 only offered the definition of state waters as an apparent excuse for not enforcing its regulatory  
18 duty throughout the ROO as defined in the cited regulations. DEC deliberately evaded  
19 addressing Permittees’ obligation to plan to respond in compliance with approval criteria in the  
20 state waters<sup>2</sup> outside of the Alyeska Pipeline Service Company, APSC region of responsibility,  
21 (i.e. West of the Hinchinbrook line and North of Cape Clear pursuant to AS 46.04.030(q)), but  
22 within the PWS ROO, (i.e. in the Gulf of Alaska, GOA, East of Montague Island and South of  
23 the Gulf coast to Icy Bay). Requestor explicitly listed state waters within the PWS ROO outside  
24 of the APSC region of responsibility, and other Regions which Permittees transit, but DEC  
25 refused to apply any approval criteria to Permittees’ response in these state waters. DEC even  
26 admits that Permittees “...are required to respond to any spill threatening state waters and are  
27 required by A[S] 46.04.020 and 18 AAC 75.315 - .320 to immediately contain and cleanup any  
28 discharge in state waters”, (at p. 19 of the Informal Review Decision”, but fails to explain why it  
29 will not require Permittees to plan for these events throughout the ROO in conformance with  
30 approval criteria. Permittees do plan a conditioned response in the GOA but it clearly cannot  
31 meet the approval criteria because it limits response to conditions well below those required to  
32 meet the RPS within the APSC region of responsibility. Apart from the fact that response assets  
33 would have to transit for much longer times to reach the distal state waters within the PWS  
34 ROO, and thus not have the skimming time to meet the RPS, Permittees recognize that their  
35 vessels are not qualified to continuously work in the more extreme GOA sea states by limiting  
36 response operations to weather windows of 6-foot seas for 10 to 12 hours, again precluding  
37 meeting the RPS skimming time given the same RPS scenario outside of Hinchinbrook

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<sup>1</sup> ConocoPhillips clearly stated it was transiting the SE AK Region within 100 nm of shore and to the extent that it had even contracted spill response within that Region. Tesoro has made no provision for response on the outer Kenai coast nor has it contracted for response along the course Westward past Kodiak Island and through the Aleutians for the Zaliv America.

<sup>2</sup> Requestor only addresses response in state waters because the state Response Planning Standards, RPS, is far more stringent than the federal response standard and meeting the RPS in distal state waters will likely allow compliance with the federal standard far beyond the seaward limit of state waters. This also eliminates the need to argue over state jurisdiction in federal waters.

1 Entrance. This conditioned response is an unambiguous admission that the permitted response  
2 assets are not reliable or appropriate for the more exposed areas of the PWS ROO. Permittees  
3 and DEC, with full knowledge of the inappropriateness of the spill prevention and response  
4 equipment for continuous deployment in the GOA, do not even attempt to characterize the  
5 environmental conditions in the state waters outside of Hinchinbrook Entrance as required by  
6 regulation. These actions are clearly a deliberate attempt to generate a fraudulently lower  
7 standard of "...environmental limitations that may be reasonably expected to occur..."  
8 specifically designed to relieve Permittees of their obligation to prevent and respond to spills in  
9 accordance with 18 AAC 75.425(e)(1)(F), .445(d) and .445(f). In effect, DEC and Permittees  
10 conspired to unlawfully exclude consideration of environmental conditions across the vast  
11 majority of the area of the PWS ROO for the explicit purpose of approving substandard spill  
12 prevention and response assets in quantities far below that needed to meet the RPS at distal  
13 locations within the ROO(s). The fact that tankers travel through federal waters through most of  
14 the GOA is irrelevant to the issue of planning for timely and appropriate response in those state  
15 waters that are adjacent to tanker course tracks or could otherwise be affected by spills in federal  
16 waters as is required by the cited regulations. Indeed a spill could even originate in the state  
17 waters surrounding Seal Rocks, which is outside of the APSC region of responsibility, and  
18 migrate hundreds of miles through state waters in the GOA and there has been neither study of  
19 the conditions nor evaluation of equipment appropriate for an RPS response in the state waters  
20 of the GOA where Permittees refuse to respond unless they have a 10 to 12 hour window of 6-  
21 foot seas or less. Indeed, where Permittees refuse to disclose their course tracks and reserve the  
22 right to transit in all waters outside of Hinchinbrook Entrance, it should be assumed that laden  
23 tankers transit to the outer boundaries of the ROO(s) entirely in state waters and that the RPS  
24 requirement applies equally throughout the ROO(s) defined in regulation. If it is later revealed  
25 that there are distinct traffic patterns in federal waters and surface currents along those routes  
26 show predictable patterns of potential spill migration, the time it would take for oil to migrate  
27 from the specified limited course tracks to state waters could be legitimately added to the 72-  
28 hour RPS requirement.

## 30 **Issue 2: Prevention Escort System - Intended Purpose**

31 **Statement of Issue:** Neither Permittees C-plans nor DEC documents have demonstrated that  
32 escorts can meet the performance standard and intended purpose of preventing groundings and  
33 collisions at the speeds and under the waterway, sea, wind, current and traffic conditions that the  
34 tankers experience in Prince William Sound. The Approval Criteria in 18 AAC 75.445(m)  
35 explicitly requires this proof in that it states: "The plan must demonstrate that the applicant  
36 meets all applicable requirements of 18 AAC 75.005 -18 AAC 75.085 and 18 AAC  
37 75.425(e)(2).", *emphasis added*. The escort performance standard is promulgated in 18 AAC  
38 75.027(e) which states: "A tank vessel under escort by another vessel must, at all times, be  
39 operated in a manner that permits the escort vessel to be available immediately to provide the  
40 intended assistance to the tank vessel". Neither DEC statutes nor regulations define the phrase  
41 "intended assistance" but federal regulations do define escort purpose and performance  
42 standards:  
43

1 “**33 CFR § 168.01 Purpose.** (a) ...The escort vessels will be immediately available to  
2 influence the tankers' speed and course in the event of a steering or propulsion equipment  
3 failure, thereby reducing the possibility of groundings or collisions.

4 **33 CFR § 168.50 Performance and operational requirements.** (a) Except as provided  
5 in paragraph (c) of §168.10, at all times during the escort transit each tanker to which this  
6 part applies:

7 (3) Must not exceed a speed beyond which the escort vessels can reasonably be expected  
8 to safely bring the tanker under control within the navigational limits of the waterway,  
9 taking into consideration ambient sea and weather conditions, surrounding vessel traffic,  
10 hazards, and other factors that may reduce the available sea room.”, *emphasis added*.

11  
12 When the approval criteria and performance standards are taken together they necessarily  
13 require that the C-plans demonstrate that all possible escort combinations used with all regulated  
14 tankers must be capable of timely generating the necessary forces “to safely bring the tanker  
15 under control” as intended by federal law. The mere statement that there are escorts available in  
16 several possible combinations and that they will attempt to provide assistance to tankers using  
17 specific maneuvers does not demonstrate that any set of escorts performing those maneuvers  
18 could, in fact, safely bring the tanker under control given all potential grounding or collision  
19 scenarios. DEC has unequivocally refused to apply 18 AAC 75.445(m) in its Informal Review  
20 Decision at page 10 where it states: “Regulations do not require that “proof” of escort  
21 capabilities be provided in the plan.” DEC instead insists that such proof is only part of a non-  
22 reviewable, non-public exercise function where it states: “Escort capabilities are verified by the  
23 Department through evaluation of training and exercises.” While DEC may make any  
24 evaluations it chooses in exercises, it may not approve Permittees’ C-plans unless and until  
25 Permittees demonstrate that they comply with the cited performance standard in “The plan...”  
26 as required by the approval criteria. If DEC contends that the exercises are proof of  
27 performance standard compliance, it must require that proof in the C-plans and otherwise  
28 produce all relevant documents pursuant to requestor’s public documents requests and as part of  
29 the requested C-plan review record. The fact that DEC chose not to require any proof of escort  
30 performance in the C-plan and has not produced any exercise data pursuant to public document  
31 requests is prima facie evidence that DEC intended to unlawfully exempt Permittees from  
32 compliance with the performance standard in 18 AAC 75.027(e) when it approved the instant  
33 contested C-plans in violation of 18 AAC 75.445(m). Although this total lack of escort  
34 performance evaluation in any C-plan review documents shows DEC intent to evade application  
35 of approval criteria, the total lack of any analysis to date of escort performance to prevent  
36 collisions is particularly egregious. DEC’s contention that “Escort capabilities are verified by  
37 the Department through evaluation of training and exercises” unlawfully suggests that DEC can  
38 divorce compliance with performance standards from the public C-plan review in direct  
39 contravention of 18 AAC 75.445(m), the public review procedure in 18 AAC 75.445 and the  
40 Public Documents Act.

41  
42 **Issue 3: Prevention Escort System - Operation of Tankers within the Limits of Escort**  
43 **Capabilities**

1 **Statement of Issue:** The requestor argues that the contingency plans do not ensure that plan  
2 holders' tankers will operate within the limits of their escorts as stipulated in State of Alaska  
3 regulations. The requestor argues that plan holders must provide a comprehensive parametric  
4 analysis of escort capability under worst case environmental conditions given the stated tanker  
5 and escort operating procedures and taking into account any cross channel currents or eddies as  
6 well as newly discovered faster currents and barrier jets in Hinchinbrook Entrance that may  
7 affect tanker momentum towards shore that were not previously considered or were improperly  
8 discounted in formulating escort selection and tanker/escort transit and assistance procedures.  
9 This issue is an expansion of the prior issue in that it seeks to address specific defects in  
10 formulation of the escort selection, escort assistance procedures and restrictions on tanker  
11 speeds and course tracks beyond the fact that demonstration of escort compliance with  
12 performance standards was absent from the C-plan review documents. The DEC response to this  
13 issue in its Informal Review Decision, at pp. 10-11, suggests that it has worked with Permittees  
14 for years to evaluate escort performance "...by reviewing training procedures and exercises and  
15 designing operational drills". Although neither DEC nor Permittees have ever produced a single  
16 drill document in any C-plan review to date, requestor has reviewed escort drill reports prepared  
17 by the PWS Regional Citizens Advisory Council, PWS RCAC, and has reviewed the Disabled  
18 Tanker Towing Study, DTTS, as produced in prior C-plan reviews as supposed proof of  
19 performance standard compliance. The instant C-plan, as well as prior iterations, failed to  
20 properly restrict tanker course tracks and speeds to prevent powered groundings from the  
21 Western Half of the outbound traffic lane in Valdez Arm as shown in the simulations performed  
22 in the DTTS parametric study. This study, as well as all escort drills, failed to measure or  
23 account for the effect of cross currents or eddies in any area studied, thus excluding a critical  
24 factor necessary to a proper evaluation of escort performance. Moreover, the DTTS used the  
25 prior Coast Pilot current value of 1 knot parallel to shore in its Hinchinbrook Entrance  
26 simulations where the Pilot has been recently updated to show currents of 2.5 knots and other  
27 data collection has shown the presence of high cross currents, thereby invalidating DTTS  
28 assumptions and substantially increasing the need for higher escort performance capability.  
29 Neither the DTTS nor any escort drill analysis to date shows the escort capability needed to  
30 safely prevent a collision with any of the large, high-speed vessels that concurrently transit the  
31 region with laden tankers. Although these defects in parametric study and drills would be  
32 sufficient to require a re-evaluation of escort performance needs, the presence of unrecorded  
33 barrier jets in the Entrance revealed by the SeaBulk Pride incident in December, shows that the  
34 assumptions of closure conditions as the worst case conditions in determining escort  
35 performance needs was grossly underestimating worst case conditions due to the lack of  
36 properly positioned weather collection facilities necessary to warn tankers of impending severe  
37 conditions. The presence of barrier jet effects in this area is not a new, freak occurrence and the  
38 reporting of its long-term presence has been unlawfully suppressed by Permittees and its  
39 response contractors to evade costs associated with required escort performance. None of the  
40 drills conducted to date have been fully performed at night or in worst case conditions and no  
41 extrapolations of drill results have been provided to show that escort drill performance would in  
42 fact allow for bringing the tanker safely under control in more severe conditions regularly  
43 experienced during tanker transits. Indeed some drill reports produced by the PWS RCAC

1 suggest that tanker arrest may be unsuccessful in conditions well below worst case conditions at  
2 particularly problematic locations. In short, there are numerous defects in the escort studies and  
3 drills performed to date that preclude a valid determination of the needs for escort capability  
4 under worst case conditions, but not withstanding this absence of a reliable and fair  
5 investigation, both studies and drills indicate that the approved restrictions on tanker speeds and  
6 course tracks are insufficient to prevent powered groundings in Valdez Arm, particularly near  
7 Buoy #9 with the planned tanker arrest procedures that are distinctly less capable, albeit safer,  
8 than those envisioned in the DTTS<sup>3</sup>. There has been no attempt to offset the need for safer  
9 tanker arrest procedures with more stringent restrictions on tanker speeds and course tracks that  
10 were too lax in the first instance.

11  
12 **Issue 4: Prevention Escort System - Best Available Technology (BAT) Analysis and**  
13 **Sufficiency of Escort Inventory**

14 **Statement of Issue:** To meet BAT regulatory requirements, a comparative analysis of tug  
15 technologies must be provided for each of three distinct escort categories, (primary, secondary  
16 and Hinchinbrook Entrance), to determine the best tugs to fill escort system roles. The  
17 designated “best” escorts for each distinct escort category must be available in sufficient  
18 quantities to consistently provide the required escort service taking into account planned  
19 maintenance outages of the escorts and the maximum tanker traffic that must be served,  
20 particularly during long weather closures of Hinchinbrook Entrance. DEC has adopted a BAT  
21 review policy for escorts utilizing a system based approach in direct contravention of the  
22 findings of the Alaska Supreme Court that clearly recognized the individualized technology  
23 analysis required by 18 AAC 75.445(k)(3):

24  
25 “The third tier of the definition, set out in 18 AAC 75.445(k)(3), covers remaining  
26 technology not subject to either the response planning standards or the prevention  
27 performance standards; in this tier, DEC determines whether the best available  
28 technology requirement has been met by undertaking a case-by-case evaluation based on  
29 specified criteria. Thus, the challenged regulation uses individualized analysis to  
30 determine compliance with the best available technology requirement only for those  
31 residual classes of technology included in the third tier of the definition...He argues that  
32 the legislature intended to require a state of the art quality of response equipment that  
33 necessarily requires a comparative analysis of available technologies an individualized  
34 analysis like one prescribed for third-tier technology in 18 AAC 75.445(k)(3)... Hence  
35 DEC urges us to recognize that, given the discretion delegated to it by the legislature,  
36 either a standards-based test like those specified in the first two tiers of the challenged  
37 regulation or an individualized analysis like the one set out in the third tier can be used to

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<sup>3</sup> The DTTS showed that both escorts were consistently needed to actively prevent a powered grounding of large tankers in the outbound traffic lane within Valdez Arm, with the most effective maneuvers requiring the secondary escort to push on the aft port quarter while the primary tug steered the tanker away from shore on a tether. The secondary tug maneuver is very dangerous at speed and in high seas and could endanger the lives of the tanker and tug crew as well as cause significant damage to both the tug and the tanker. Even when using both of the best tugs modeled, there were still multiple scenarios that showed failures in preventing tanker groundings at an initial tanker speed of 6 knots near Buoy #9, which is lower than the 8 knots presently allowed.

1 determine what is best available technology...Correspondingly, under 18 AAC  
2 75.445(k)(2), all oil pollution prevention technology that is not expressly made subject  
3 to individualized best available technology review is automatically deemed best as long  
4 as it can satisfy that is, comply with the oil pollution prevention performance standards  
5 specified in 18 AAC 75.005 - .080.”, *Lakosh v. Alaska Department of Environmental*  
6 *Conservation et. al.* 49 P.3<sup>rd</sup> 1111 (Alaska 2002)

7  
8 DEC has long practiced individual tug and tug type BAT comparative analyses in prior  
9 approvals of: conventional tugs vs. ERVs as close escorts; Theriot Class vs. Sea Swift Class for  
10 primary escort; the *Protector* vs. Theriot Class for primary escort, *ETT* vs. Theriot Class for  
11 primary escort, *Gulf Service* vs. Theriot Class for Hinchinbrook Entrance escort and *PRT* vs.  
12 *Gulf Service* for Hinchinbrook Entrance escort but has chosen to unlawfully abandon this  
13 universally understood individualized analysis required by section .445(k)(3) for the  
14 unprecedented, unsupported and internally inconsistent justification for an escort system  
15 comparison applied in this C-plan review. DEC’s disregard and abandonment of its own  
16 longstanding practice, its own arguments in BAT litigation and before the legislature and the  
17 findings of the Supreme Court demonstrate a blatantly deliberate course of action to deceitfully  
18 delay justice in this matter in collusion with Permittees who also participated at every step of  
19 these proceedings and therefore also know better than to submit a comparative escort system  
20 analysis. Although DEC has conducted individualized escort analyses in the past, there have  
21 been defects in the methodology that must be corrected on remand for a proper comparative  
22 analysis. The clear commonly understood meaning of “best” requires the selection of the  
23 superlative escort for any given escorting purpose where there are critical parameters of that  
24 function that are distinct from other escort functions. This determination of the superlative escort  
25 must necessarily follow a thorough examination and determination of the performance standard  
26 for each escort function in the escort system. Once the performance standard is determined, the  
27 “best” tug out of all qualifying escorts<sup>4</sup> must be selected as the exclusive tug qualified for that  
28 particular escort service. Although there were defects in the DTTS analyses, the study clearly  
29 determined that disabled tanker steering at high speed was the most effective tanker arrest  
30 maneuver and, as such, the primary escort role must be assigned to the tug that can best perform  
31 indirect mode arrest at speeds over 7 knots to generate very high dynamic steering forces. All  
32 parametric analyses and drill results show that the Voith Schneider Propulsion system is the  
33 preferred technology for this critical function that would be shown as even more critical when  
34 the noticeably absent analyses of averting high speed collisions with cruise ships and ferries is  
35 conducted pursuant to the performance standard requirements in 18 AAC 75.027(e) and 33 CFR  
36 §§ 168.01(a) and .50(a)(3). The requirement that escorts be “...immediately available...”  
37 necessarily requires that the “best” VSP escort be continuously tethered throughout PWS  
38 because the threat of collision is continuous and there has never been any legitimate argument  
39 proffered for not maintaining the tether. The performance capability requirements of secondary  
40 escorts has been shown to vary with location in PWS with the critical factor being the ability to

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<sup>4</sup> The number and type of escorts qualified to meet the performance standard can well be expanded by creating more stringent restrictions upon tanker speed and course tracks or to relieve hazards from conflicting traffic to establish lower requirements defined by a comprehensive and definitive establishment of disabled tanker behavior and required arrest capabilities.

1 generate very high direct towing forces at low speed, particularly in Hinchinbrook Entrance, HE,  
2 and the GOA where the more severe wind, wave and current conditions demand higher bollard  
3 pull capability. Although the Theriot Class tugs were previously disqualified for the HE escort  
4 duty in favor of the Gulf Service and the Gulf Service later disqualified in favor of the PRT, the  
5 Theriot Class was still unlawfully permitted to perform this duty and was assigned to this duty  
6 47% of the days in 2006 violating both performance standards and BAT requirements. This  
7 same type of subversion of BAT requirements has occurred for secondary escort in the rest of  
8 PWS where the PRT has been definitively determined to be more qualified for the task in the  
9 HE tug evaluations. Both the PWS RCAC and Requestor suggested consideration of tug designs  
10 that were actually built and operating vessels performing functions equivalent to the salvage  
11 towing role assigned to the HE Tug. Lakosh additionally suggested that the salvage towing  
12 function and the primary escort role could be combined in a 15,000 hp TractorPlus tug design, a  
13 tug type designed by Glosten Associates and built/operated by Foss Maritime, albeit as a smaller  
14 5,000 hp tug. Glosten even provided a proposal to prepare the same type of design concept  
15 drawings as were considered for the ETT and PRT to specifications that demonstrated  
16 capabilities superior to the ETT or PRT and likely more effective for salvage towing as the  
17 larger salvage tug designs presented for consideration given the need to perform towline  
18 connections in severe barrier jet conditions with a highly maneuverable tug. Moreover,  
19 Permittees materially omitted one of the two PRT designs that Crowley submitted for  
20 consideration and DEC suppressed one of the two ETT designs that Glosten submitted, both  
21 more powerful than the designs submitted and approved. DEC's and Permittee suppression of  
22 valid designs and the new arbitrary definition of the phrase "available technology" as used to  
23 disqualify proven escort concept designs of the type previously considered and approved, along  
24 with the capricious dismissal of working salvage vessel designs shows a clear intent to  
25 unlawfully restrict the comparative analyses and unlawfully approve escorts that do not meet the  
26 mandatory BAT requirement. These subversions of DEC's lawful duty were exacerbated by its  
27 failure to fairly consider the need for an additional HE tug to prevent the need to regularly  
28 require the service of the disqualified Theriot Class tug during regular maintenance outages of  
29 PRTs. The need for additional primary escorts will also arise to compensate for the maintenance  
30 outages of the only truly qualified primary tug class, the ETT.

31  
32 **Issue 5: Prevention Escort System and SERVS Equipment List - Sufficiency of Escorts and**  
33 **Sentinel Tugs to Concurrently Serve Maximum Tanker Traffic, RPS Response Duties,**  
34 **Firefighting and Docking Duties Given that they are Multiple Mutually Exclusive Tug**  
35 **Duties**

36 **Statement of Issue:** The requestor argued that the contingency plans must demonstrate that the  
37 eleven tug fleet is able to satisfy all the tug needs of the prevention section, the RPS response  
38 scenario and the VMT C-Plan. Plan holders are required to individually meet the conditions of  
39 any and all applicable plans in their area of operation. The Valdez Marine Terminal Oil  
40 Discharge Prevention and Contingency

41 Plan is an additional applicable C-plan in that execution of the RPS response scenario in the  
42 Tanker C-plans necessitates utilizing the VMT facilities to timely deploy the Tanker(s) of  
43 Opportunity, TOO, (i.e. the required TOO(s) must either deballast and be dispatched from the

1 VMT to the spill response or must dock, deballast and then be dispatched if it is not already  
2 docked at the time of the incident). Whenever there is a tanker at the VMT, its C-plan requires a  
3 fire tug to be available and this tug could not be transferred to a tanker spill response because **it**  
4 **is a safety and spill prevention asset** that is no more transferrable to spill response than the  
5 escorts in the Tanker C-plans at question. Even if a deballasted Moreover, once a TOO has  
6 deballasted at the VMT, a minimum of two docking tugs are required by the VMT C-plan to  
7 undock tankers and these tugs are again **safety and spill prevention assets** that **are not**  
8 **transferrable to spill response** pursuant to 18 AAC 75.470. DEC has to date unlawfully  
9 considered these VMT spill prevention assets transferrable during a tanker spill response  
10 because they are **the same tugs listed in both sets of C-plans**. Even if a deballasted could  
11 legally<sup>5</sup> be made timely available without having to dock at, or undock from the VMT, DEC  
12 would still have to explicitly prohibit tankers from docking at the VMT if four tugs were  
13 concurrently occupied performing close escort and/or sentinel escort duty to prevent the  
14 concurrent demand for the fire tug during a spill response. Moreover, DEC and Permittees have  
15 colluded<sup>6</sup> to ignore the fact that the need for sentinel tug(s) often create additional non-  
16 transferable tug demands during long weather closures when multiple tankers tend to  
17 accumulate at Knolls Head requiring one or more tugs in that vicinity as well as a sentinel(s) in  
18 other parts of PWS where unladen tankers may also be in transit concurrent with laden tanker(s)  
19 in transit. Tanker traffic logs must be thoroughly examined to determine maximum tug demand  
20 to either require additional tugs or appropriately restrict tanker traffic within the limits of tug  
21 availability. DEC cannot evade its duty to insure proper planning for the necessary amount of  
22 tugs available by simply deferring the decision and an enforcement issue only to be considered  
23 between approvals, particularly where DEC has been shown to not enforce C-plan violations and  
24 evade the issue when notified, (see fn 6).

## 25 26 **Issue 6: BAT Analysis and Equipment Listing for Stopping a Spill at its Source and** 27 **Preventing its Further Spread**

28 **Statement of Issue:** The requestor claimed that the plan holders' BAT analysis for technologies  
29 specifically designed to control the source of a spill and prevent its further spread and lighter a  
30 stricken tanker did not meet the regulatory requirements of 18 AAC 75.445(k)(3);  
31 75.425(e)(4)(A)(i); 75.425(e)(2)(E); and 75.445(d)(4) due to DEC's failure to fairly consider all  
32 viable means of controlling the spill source and preventing the further spread of spills and then  
33 require Permittees to implement the proper use of the best technologies available. The most  
34 egregious example of DEC's dereliction of duty in this matter is related to the use of boom to  
35 prevent the spread of the spill from the vicinity of the tanker. DEC initially recognized the  
36 validity of Lakosh's RFAI on this matter by submitting it to Permittees but when they refused to  
37 provide the required BAT analysis giving the specious and unsubstantiated argument that

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<sup>5</sup> Tankers are prohibited from deballasting segregated ballast water in regulated state and federal waters due to invasive species regulations. Some tankers still use un-segregated ballast tanks that contain oil and deballasting those contaminated ballast waters is additionally prohibited in international waters as well. The timely availability of a TOO could only be assured if a single hull tanker decommissioned by OPA '90 rules was continually anchored in PWS.

<sup>6</sup> DEC deliberately evaded this question in its 2002 C-plan Findings by asserting that the reported three and even four laden tankers concurrently transiting PWS were properly escorted and refused to address, in a fraud by omission, the concomitant lack of available tugs to meet the RPS.

1 booming leaking tankers is not industry practice, DEC simply abandoned its duty to fully  
2 investigate the use of boom for this purpose and select the best boom and practice for use with  
3 PWS tankers. Not only was the Exxon Valdez boomed, but Permittees still maintain the practice  
4 booming their tankers at every visit to the VMT. If there were, in fact, a valid justification for  
5 not booming tankers it was DEC's duty to further investigate the basis for that justification  
6 given the continuing practice of booming tankers at VMT berths. DEC's failure to further  
7 investigate the practice and/or amend the practice of booming tankers at the VMT to contain  
8 spills demonstrates that DEC intended to arbitrarily abandon the mandated investigation in  
9 collusion with Permittees efforts to gain an unlawful subsidy of its illegal operations. All  
10 responsible government agencies and Exxon itself knew that booming the leaking tanker could  
11 substantially impede the spread of that spill but because DEC has abandoned its duty to evaluate  
12 containment booming in accordance with the cited applicable regulations, we will have no  
13 containment at the next spill instead of merely weak/small boom with insufficient anchoring.  
14 The de facto conclusion derived from DEC's abandonment of this issue is that DEC has  
15 concluded that no boom available is capable of controlling or preventing the spread of a spill. In  
16 that case Permittees could not meet the RPS requirement, because oil could not be contained for  
17 skimmer to recover, nor could boom exclude oil from sensitive areas, both of which are  
18 prerequisites to permit approval. Put simply, if no boom can control the spread of oil, then no  
19 laden tankers may transit Alaskan waters. If however, boom can control the spread of oil, DEC  
20 is mandated to require Permittees to: comparatively analyze all available boom and supporting  
21 equipment appropriate for use in severe ocean conditions; select the best boom and supporting  
22 equipment for worst case conditions; develop the most effective deployment tactics under  
23 RMROL conditions of the most capable deployment vessels, and; clearly delineate the  
24 deployment vessels, boom, supporting equipment and tactics in the C-plans so that responders  
25 can timely implement the booming plan without hesitation when needed. If DEC is concerned  
26 that a fire hazard may develop in low wind conditions, it could/must require any combination of  
27 several different measures to abate that hazard such as: applying AFFF; maintaining a fire watch  
28 with ABS classed fire tugs; using wind generators or fire monitors to disperse vapors; limiting  
29 ignition sources; creating a large enough boomed area to keep vapors away from potential  
30 ignition sources; moving a large volume of contained oil away from the tanker and  
31 reestablishing a new containment boom. Given these safety measures, which must be  
32 implemented to some extent in any event, deployment and maintenance of containment boom is  
33 no more impractical that deployment of deflection boom at sensitive areas. DEC was similarly  
34 derelict in its duty to fairly assess and require BAT for lightering, and more generally all  
35 relevant salvage measures<sup>7</sup>. DEC's response to this issue in its Informal Review Decision fails  
36 to recognize that lightering is listed as the primary source control measure in the C-plans, thus  
37 subjecting all technology critical to the lightering effort, whether it be onboard the tanker or part

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<sup>7</sup> The term "salvage" applies to "the rescue of a ship, its crew, or its cargo from fire or shipwreck", *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 03 Jun. 2008. In the context of the cited regulations could well include several source control measures such as lightering, hull patching pipe patching; removing the tanker from a hazardous location; preventing the sinking of the ship; extinguishing a fire; refloating the ship; restoring propulsion or navigation capability. Any and all of these salvage measures, and more, could prevent the oil from entering the sea and spreading.

1 of the lightering task force, to the individualized analyses required by 445(k)(3). There was  
2 absolutely no attempt in the C-plan BAT section to describe the capabilities or RMROL of the  
3 lightering vessels and equipment, nor were any of the other 445(k)(3) criteria disclosed and  
4 applied in a critical comparison to any other of the numerous vessels and equipment available  
5 for such purposes. DEC's decision was therefore a clear obstruction of justice in that it  
6 materially misrepresented the source control function of lightering and falsely denied the  
7 applicability of .445(k)(3). Other source control procedures employed by salvage contractors  
8 worldwide were similarly ignored. DEC's arbitrary exclusion of effective source control and  
9 spill containment measures from the mandated BAT comparative analyses shows a clear intent  
10 to unlawfully subsidize Permittees' illegal operations by allowing operation with substandard  
11 equipment subsequent to an unfair investigation.

### 12 13 **Issue 7: BAT Analyses for Leak Detection and Spill Tracking**

14 **Statement of Issue:** The requestor represented that the plan holders' BAT analysis for  
15 technologies specifically designed to detect a discharge and track/forecast a spill's trajectory did  
16 not meet the regulatory requirements of 18 AAC 75.027(d); .425(e)(1)(F)(iv); 75.425(e)(2)(E);  
17 75.425(e)(4)(A)(iii); 75.445(d)(3) and 75.445(k)(3). Requestor argues that DEC failed to fairly  
18 investigate and require the proper equipment in three related but distinct categories of  
19 technology: spill detection; trajectory forecasting and real-time spill surveillance and tracking on  
20 water. The first two categories are subject to an individualized BAT analysis and approval.  
21 There was not sufficient description regarding the sensitivity, accuracy or capability of the  
22 technologies referenced in the C-plan or their alternatives and no definitive findings were issued  
23 by DEC to establish which of the multiple technologies were deemed "best" for detecting leaks  
24 from tankers or trajectory forecasting of the spill thereafter. DEC's categorical acceptance of a  
25 conglomeration of ill-defined technologies demonstrates an arbitrary and capricious approval of  
26 the C-plan where any legitimate investigation and approval would necessarily have to analyze  
27 parameters critical to the functionality of each technology relative efficacy of any competing  
28 technology. Although real-time on water surveillance of spills is arguably not subject to a full,  
29 individualized BAT analysis, the specified equipment must minimally be available, appropriate  
30 and reliable for the task. This surveillance must be continuously conducted at night under  
31 Instrument Rated weather conditions for up to several hundred miles<sup>8</sup> from Valdez. The  
32 specified helicopter with one IR camera is clearly not reliable or appropriate to perform this duty  
33 due to a lack of instrument rating and limited flight range and the IR camera has not been  
34 verified as a reliable oil spill detector/tracker as subject to approval criteria in 18 AAC  
35 75.445(d)(3). There are numerous aircraft with dedicated sensor packages that are used  
36 worldwide for this specific ocean surveillance but DEC refused consider and require these  
37 proven options in an unlawful deference to Permittees' insufficient proffering.

38  
39 **Issue 8: (Prior issue withdrawn and replaced) Unfair Investigation and Denial of Due Process**  
40 **Statement of Issue:** DEC has refused to produce multiple documents during the C-plans' public  
41 review and Informal Review that multiple parties have asserted are material to, and reviewed by

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<sup>8</sup> The EVOS migrated well past Kodiak Island covering hundreds of square miles of ocean .

1 DEC for approval of the Permits constituting an unfair investigation and denial of requestor's  
2 rights due process. The first category of documents that all parties have unequivocally agreed  
3 are material to the contested C-plans is documents associated with spill prevention and response  
4 drills. The 2/15/08 comments of the Response Planning Group repeatedly asserts that the  
5 regulatory compliance of the instant contested C-plan decision was verified by DEC through  
6 drills and exercises: "The ODPCP meets all regulatory requirements and the agency has verified  
7 compliance through information provided in the ODPCP, training, drills, exercises, and review  
8 of actual events.", RPG COMMENTS at p. 7. Indeed, the RPG COMMENTS is replete with  
9 references to the importance of drills to determining the efficacy of its C-plans:

10 "Plan holders demonstrate their ability to carry out the commitments of the ODPCP as  
11 required by AS 46.04.030(e) through training programs; prevention and response drills  
12 and exercises; and verifying inventories of equipment, supplies and other resources s.et  
13 out in the approved plan, (at p. 1),...Plan holders continuously assess means of improving  
14 the ODPCP, and periodically submit applications to DEC to amend the plan to reflect  
15 these improvements. These changes may result from, among other things, findings  
16 associated with internal assessments, training, drills and exercises conducted by plan  
17 holders or SERVS, and those initiated by DEC, (at p. 2),...In addition to drills and  
18 exercises conducted by plan holders, DEC is specifically authorized to, among other  
19 things, conduct its own drills and exercises to verify that the plan holder is capable of  
20 carrying out the plan, (at p. 7),...Vessel crews conduct training, drills and exercises  
21 periodically to test crew and vessel performance. DEC has determined that the PWS  
22 Escort System as currently configured is BAT, (at p. 9),...Instead of demonstrating how  
23 the plans do not comply with the regulations, he argues only that the drill reports are not  
24 in the plan review documents. The regulations, however, only require a description of  
25 prevention measures in place that demonstrate compliance with the regulations. The  
26 agency is separately authorized to verify capability through drills, exercises, etc. There is  
27 no requirement that all of the drill reports, or any other information relating to the  
28 agency's compliance efforts, be in the plan, (at p. 10),...Although these obligations have  
29 since been satisfied; protection of ESAs and areas of public concern will be a continued  
30 focus of plan holders during the current plan period in planning, drills and exercises, and  
31 in actually testing geographic response strategies that have already been identified and  
32 developed", (at p. 23).

33  
34 These numerous statements by the RPG unambiguously establish the materiality of drills and  
35 exercises to their defense of the DEC decision to issue permits to their members and establishes  
36 that Mr. Lakosh was, in fact, complaining of the total lack of drill documents in the  
37 administrative record. If this weren't enough to establish the materiality of drill documents and  
38 the requirement of their disclosure in the administrative record, DEC's own Findings Document  
39 also repeatedly emphasizes the relevance and use of drills in their decision making:

40 "The Department does not make its decision to approve a plan based solely on plan  
41 holder verification of every element in the plan. Rather, the Department's decision is  
42 made based upon the reasonableness of assertions and evidence that certain essential  
43 resources and practices are securely in place. The Department and industry complete

1 many follow-up field tasks while a plan is in effect and being utilized. Field tasks are  
2 completed to ensure that response and prevention personnel are trained and ready and to  
3 verify the adequacy of the plan and the personnel that carry out the plan and include, but  
4 are not limited to: planned and unannounced inspections; planned and unannounced oil  
5 spill response drills; regular evaluation of field equipment deployment exercises; and  
6 verification of equipment maintenance and training records. The Department may require  
7 any of the above to occur and may evaluate similar activities initiated by industry.

8 Compliance with the contingency plans and any amendments to the contingency plans,  
9 including spot charter amendments, is based on the contents of the plans and the  
10 Department's compliance verification activities as described above, (at p. 5),... In addition  
11 to training carried out in Prince William Sound, contracted fishing vessels are annually  
12 trained in spill response tactics in and near downstream communities. Additional drills  
13 and exercises have been, and will continue to be, conducted in downstream communities  
14 to test the plan holders' ability to respond to oil entering those areas, (at p. 9),... Drills  
15 have been conducted to test the ability of plan holders to respond to a spill in darkness,  
16 using both open water and near shore response tactics. Most recently, in September 2007,  
17 the Department initiated a drill that focused, in part, on the ability of SERVS and a full  
18 task force of 27 contracted fishing vessels to carry out near shore oil recovery and  
19 shoreline protection tactics into after-dark hours. Information on oil movements was  
20 gathered from, among other means, simulated over flights, tracking buoy data and  
21 projected trajectories. The Group Supervisor and Task Force Leader were then able to use  
22 this information to predict oil movements after nightfall and successfully position  
23 resources to facilitate continued oil recovery and resource protection tactics safely. Given  
24 that the first near shore task forces are not required to be operational until hour 24 of a  
25 spill response, the data provided to the drill leadership team is predictive of that which  
26 would be available to them during a real response, (at p. 12),... Additionally, the  
27 Department will continue to work with plan holders to ensure that open water and near  
28 shore response operations during hours of darkness will continue to be a focus of future  
29 drills and exercises, (at pp. 12-13),... Drills and exercises are conducted on a routine basis  
30 to test the ability of escort tugs to effect a save of a stricken tanker, including under  
31 RMROL conditions at Hinchinbrook Entrance. The Department is satisfied with the  
32 ability of the escort system to effect a save throughout Prince William Sound, including  
33 at Hinchinbrook Entrance, (at p. 16),... As noted throughout this findings document and in  
34 the letter of approval for this plan, there are many topics that have been identified for  
35 verification through drills and exercises, (at p. 18),... A segment of the above training  
36 includes many drills and exercises in which the escort vessels demonstrate their ability to  
37 control a laden tanker in the event of a steering or propulsion failure. This ability was  
38 proven in 2001 when there was a real-time incident in which a tethered primary tug was  
39 able to prevent an accident by stopping a laden tanker underway in Valdez Narrows  
40 before it collided with a fishing vessel's deployed net, (at p. 20),... The Department  
41 intends to validate the overall appropriateness of the wildlife response program by  
42 incorporating wildlife-specific objectives into future drills and exercises, (at p. 21),... For  
43 a few topics, such as those described below, the plan met regulatory requirements for oil

1 discharge prevention and contingency planning, but verification of the plan's contents  
2 will be conducted by the Department through routine inspections, drills and exercises, (at  
3 pp. 22-23),... Department intends to verify the plan holders' ability to carry out the small  
4 vessel decontamination procedures outlined in the SERVS Technical Manual through  
5 drills and exercises, (at p. 23),...However, the Department intends to emphasize waste  
6 management objectives in future drills and exercises, (at p. 23),...Finally, the Department  
7 routinely examines the overall response capabilities through drills and exercises”, (at p.  
8 23).  
9

10 These statements by DEC unequivocally establish that it not only based its approval decision  
11 upon training, drills, exercises and actual events but that it intends to conduct future drills to  
12 verify its premature decision of approval. Request clearly sought to have all material documents  
13 produced on numerous occasions:

14 “DEC has voiced its intent to consider documents beyond those provided for public  
15 review in its permit approval process and I hereby request that all documents that are  
16 material to the approval decision be specified and publically available for review. If DEC  
17 will not make these documents freely available as an essential element of the public  
18 review process, I hereby request all material information be made available for inspection  
19 and copying pursuant to the Public Documents Act and that such information be made  
20 available with sufficient time for review prior to the end of the public comment period.”,  
21 Lakosh public comments on 9/21/07. “DEC has voiced its intent to consider documents  
22 beyond those provided for public review in its permit approval process and I my prior  
23 request that all documents that are material to the approval decision be specified and  
24 publically available for review has been ignored. Consideration of additional documents  
25 by DEC, other than those publically available with the C-plans at regional repositories  
26 would likewise constitute unfair treatment and trial by surprise should these  
27 secret/unavailable documents appear in the certified administrative record.”, Lakosh  
28 public comments on 10/15/07. “I looked for such proof in the C-plans, the accompanying  
29 documents or any other documents that DEC might consider by submitting my request  
30 for such documentation under the Public Documents Act but none was found or  
31 proffered.”, Request for Informal Review at p. 5-6. “DEC tries to infer compliance by  
32 stating: “...drills and exercises in which the escort vessels demonstrate their ability to  
33 control a laden tanker in the event of a steering or propulsion failure”, but the Plan  
34 contains no drill or exercise reports and none were proffered pursuant to my Public  
35 Documents Act request. DEC then tries to assert proof of compliance by merely  
36 referencing an incident in 2001 that did not appear in any part of applicants’ submission  
37 or in any proffered document stating: “This ability was proven in 2001 when there was a  
38 real-time incident in which a tethered primary tug was able to prevent an accident by  
39 stopping a laden tanker underway in Valdez Narrows before it collided with a fishing  
40 vessel's deployed net”. This bald assertion is wholly unsubstantiated, without any  
41 description of the tug, tanker, currents, wind, waves or distance needed to stop, and is  
42 absurd on its face where the speed limit is 6 knots in Valdez Narrows, the tug would be  
43 tethered and the net was stationary whereas the closing speed between a tanker and cruise

1 ship in the Central Sound could exceed 37 knots and the primary tug would not be  
2 tethered. DEC's attempt to use this undocumented and barely described incident to assert  
3 compliance under all conditions was clearly "grasping at straws" in a desperate attempt to  
4 explain away the total lack of reliable data in the C-plans upon which to assess  
5 compliance with the performance standard.", Request for Informal Review at p. 6.  
6 "Documents pertinent to the Informal Review would necessarily include the entire  
7 administrative record that is solely in the possession of DEC. The review of the entire  
8 record is required where I claim that the necessary information is not in the record and  
9 reference to documents made in DEC Findings were not provided even subsequent to my  
10 Public Documents Act request in my 10/15/07 comments:

11 "DEC has voiced its intent to consider documents beyond those provided for  
12 public review in its permit approval process and I my prior request that all  
13 documents that are material to the approval decision be specified and publically  
14 available for review has been ignored. Consideration of additional documents by  
15 DEC, other than those publically available with the C-plans at regional  
16 repositories would likewise constitute unfair treatment and trial by surprise should  
17 these secret/unavailable documents appear in the certified administrative record.  
18 DEC should additionally require applicants to remove superfluous sections of their  
19 vessel plans and resubmit them where it would be, and has been, an undue burden  
20 to review and copy these superfluous sections that do not address the applicants'  
21 compliance with the applicable regulations. I again request all material  
22 information be made available for inspection and copying pursuant to the Public  
23 Documents Act and that such information be made available with sufficient time  
24 for review prior to the end of the public comment period, which would require, at  
25 this point in time, a comment period extension and conditional extension of the  
26 existing permit."", Request for Informal Review at p. 30-31.

27 "Your prior communications were not very specific on where we go from here, so I'm  
28 submitting this request to review the record of the contested C-plan, (access to documents  
29 reviewed by DEC beyond those placed in the local public depository will do), and  
30 scheduling of a responsive brief to the comments received from parties to the proceeding  
31 and interested stakeholders. This reply brief schedule should allow for sufficient time for  
32 me to fully review the comments and record developed to date with appropriate  
33 accommodation of my disability and volume of the documents to be reviewed. Access to  
34 record documents and Reply briefing was clearly an essential requirement of due process  
35 in prior formal administrative reviews, and although this review is informal, the essential  
36 elements of due process may not be abandoned at this stage of the review.", 2/14/08  
37 email to Larry Dietrick.

38  
39 It is the response to this last request for access to the administrative record that establishes a  
40 clear bias against Requestor where the Director knew from the DEC Findings, Request for  
41 Informal Review, RPG COMMENTS and the 2/14/08 email that documents associated with  
42 drills and events were a matter of factual contention between the indispensable parties, yet the  
43 director decided to withhold these documents and other record documents in order to

1 disadvantage Requestor relative to DEC and the Permittees who participated in the drills and  
2 have access to all drill documents: “The only additional information being considered for the  
3 informal review are the comments submitted by the interested parties (enclosed) and whatever  
4 responsive brief you may submit.”, 2/21/08 letter of Director Dietrick. The DEC Informal  
5 Review Decision shows a continuing effort to deny requestor a fair investigation and due  
6 process with the specious argument that drills are a separate regulatory function that are not  
7 required to be included in the C-plans:  
8

9 *“Regulations Regarding Discharge Exercises*

10 The regulations for oil discharge prevention and contingency plans do not require plan  
11 holder verification of every element in the plan. The broader regulatory framework  
12 provides that, separately from the plan review and approval process, the Department may  
13 conduct announced and unannounced discharge exercises to assure that an oil discharge  
14 prevention and contingency plan is adequate in content and execution. Execution of a  
15 plan during a discharge exercise is considered inadequate if the readiness for response  
16 and response performance stated in the plan are significantly deficient. The Department  
17 may take various corrective actions if the discharge exercise shows the plan to be  
18 deficient including amending the plan or taking other necessary actions. The regulations  
19 at 18 AAC 75.485 provide the means to immediately seek corrective actions to the plan  
20 as a separate administrative action. The exercises conducted under 18 AAC 75.485 are  
21 conducted independent of the plan renewal process. The regulations do not require that  
22 information and findings generated from discharge exercises be included in the  
23 application for renewal of an oil discharge prevention and contingency plan. Action to  
24 correct a deficiency identified in a discharge exercise for plan content or execution can be  
25 acted upon immediately by the department independently of renewal cycles. Discharge  
26 exercises are a stand alone regulatory activity for validating plan content and execution  
27 separate from the plan renewal and approval process.

28 *Regulations Regarding Inspections*

29 Similarly, the Department has separate independent regulatory authority for conducting  
30 announced and unannounced inspections of vessels or other operations required to have  
31 an oil discharge prevention and contingency plan per 18 AAC 75.480. The regulations do  
32 not require that information and findings generated from inspections be included in the  
33 application for renewal of an oil discharge prevention and contingency plan. The  
34 inspections conducted under 18 AAC 75.480 are conducted independent of the plan  
35 renewal process and, based on the results of the inspection, can be acted upon  
36 immediately by the Department. Inspections are a stand alone regulatory activity for  
37 validating plan content separate from the plan renewal and approval  
38 process.”, Decision at pp. 6-7.  
39

40 These statements show a clear intent to obstruct justice, deny due process and conduct an unfair  
41 investigation because it is a carefully crafted evasion of requestors Public Document Request  
42 and request to disclose the administrative record of documents DEC considered in its approval  
43 and not what was required in the C-plan itself. There is no doubt that documents used and

1 generated in drills or inspections are part of a separate regulatory function but when those  
2 documents are considered in an approval process, they are then subject to disclosure in the  
3 administrative record or any Public Documents Request seeking disclosure of that record.  
4 Director Dietrick's Decision continues to assert that those events and their associated documents  
5 were, in fact, used in DEC's decision making process for its Permit approvals:  
6

7 "The Department regularly examines tanker operations under escort and verifies the  
8 escort system's ability to meet its intended purpose as defined in the plan by reviewing  
9 training procedures and exercises and designing operational drills... 18 AAC  
10 75.425(e)(4)(A) requires that escort vessels be evaluated for BAT under the criteria  
11 outlined in 18 AAC 75.445(k)(3). The Department clearly defined its approach to the  
12 application of BAT regulations to the escort system in the August 1995 Findings and  
13 Response to Comments: "the Department will work with the various Prince William  
14 Sound stakeholders to define various criteria that will form the basis for selecting or  
15 designing an escort system to meet the requirement of BAT. Once these criteria are  
16 established, the alternative equipment and escort systems that can meet these criteria  
17 would constitute BAT. Specific equipment provides only part of the system's capability.  
18 The equipment's use, training, drills, experience, and allowances for margins of safety are  
19 the factors in system performance delivery. In essence, BAT for escorts becomes a  
20 system comprised of all these elements." This finding with regard to the escort system  
21 was not challenged following approval of the 1995 plan. However, in conjunction with  
22 response equipment, use of a system approach in conducting a BAT technology  
23 evaluation for the 1995 plan was challenged. In his 1998 final decision on the 1995 plan  
24 adjudicatory hearing, Hearing Officer Johnson upheld the Department's BAT evaluation  
25 of response equipment as a complete system. In addition to the 2007 plan renewal, the  
26 approach of reviewing escorts as a system was used during the 1999 and 2002 plan  
27 renewals. During each renewal this approach for reviewing escort BAT was considered,  
28 refined and subjected to a public review. Each time the BAT review has been improved  
29 and approved. This topic was fully discussed in the 2007 Findings Document... To meet  
30 the requirements of 18 AAC 75.445(d)(5), the Department and stakeholders decided  
31 during development of the Anvil Study that "average" Prince William Sound conditions  
32 would be used in the worst case discharge scenario. Average conditions were determined  
33 to be 1.7 meter sea height and 18 knot winds for open water recovery. The requestor's  
34 arguments on this point were rejected by Hearing Officer Johnson in the adjudication of  
35 the 1995 Prince William Sound tanker contingency plans... This decision was supported  
36 by Hearing Officer Johnson in his 1998 adjudicatory hearing decision on the 1995 Core  
37 Plan in which he was clear that the Department "had a reasonable basis to conclude that  
38 the response strategies in the plans adequately demonstrate" the requirements of 18 AAC  
39 75.445(d)(4)... The Department continuously examines available prevention and  
40 response technologies in the course of reviewing best available technology assessments  
41 for all regulated facilities in Alaska and through participating in studies, inquiries,  
42 workshops and research being carried out for spill prevention and response. The expertise  
43 acquired is used in the review and approval of contingency plans. The Department

1 completed technology conferences in 2002 and 2007, thus meeting the five year  
2 regulatory requirement.”  
3

4 These statements reinforce the prior statements that numerous documents were considered by  
5 DEC in the C-plan approval process and/or the Informal Review that were suppressed despite  
6 repeated requests that they be disclosed. Most interesting is the reference to a 2007 BAT  
7 Conference that requestor has no knowledge of whatsoever despite his intimate involvement in  
8 PWS RCAC meetings, conversations with DEC personnel on the subject and repeated document  
9 requests. These repeated suppressions of these documents that DEC itself deemed material to its  
10 decisions invalidate the C-plan approvals as unfair and capricious investigations, denied  
11 requestor due process in the invalid Informal Review and precluded an informed construction of  
12 the instant Request for an Adjudicatory Hearing. Moreover, DEC’s refusal to prepare and  
13 disclose the administrative record in for the cited prior requests will no doubt delay, and  
14 potentially further deny, due process in the instant proceedings. This is a clear continuing denial  
15 of due process that, by itself, requires remand of the C-plan approvals for a fair public review  
16 and investigation.  
17

#### 18 **Issue 9: Response Planning Standard - Sufficiency of Vessels, Skimmers and Boom**

19 **Statement of Issue:** The requestor contends that the boom and other equipment used by each  
20 response system task force, particularly the open water task forces, cannot encounter enough oil  
21 to allow the skimmers to meet the recovery rates predicted in the Anvil Study and Permittees  
22 therefore could not meet the RPS requirement of 18 AAC 75.438. The DEC approval therefore  
23 contravened its mandates under 18 AAC 75.445(g)(1)-(6) requiring it to ensure that there was  
24 sufficient quality and quantity of boom, skimmers pumps, vessels, storage and anchors for the  
25 environmental conditions experienced at the operation, for the type of oil discharged and within  
26 the time frames required. None of the data, calculations or other documents produced to date  
27 considered the area covered by the spilled oil in an RPS sized spill and therefore could not  
28 calculate the amount of boom and associated boom towing vessels needed to concentrate the oil  
29 for recovery by skimmers. Whether or not calculation of encounter rates is explicitly required by  
30 the regulations, a comprehensive evaluation of total equipment needs simply cannot be  
31 definitively conducted without determining the spreading rate of the oil and the rate at which the  
32 oil could thereafter be concentrated for recovery by skimmers. DEC attempts to speciously  
33 evade this elemental limitation to oil recovery by stating in its Informal Review Decision that  
34 the derating of equipment in the Anvil study meets the regulatory requirement but the pumping  
35 capacity of the skimmers is not reflective of the oil recovered if the oil encounter rate is lower  
36 than the pumping rate assumed. DEC must first evaluate whether the task force configurations  
37 shown in the C-plans can, in fact, concentrate the widely dispersed oil at the skimmer fast  
38 enough to meet even the derated pumping capacity of the skimmer. All DEC and Permittee  
39 evaluations to date have excluded this prerequisite encounter rate calculation despite the fact  
40 that the equation for this very calculation is shown in the C-plan and requestor’s undisputed  
41 application of the equation using broadly accepted spill thickness figures and generous skimmer

1 advancing rates shows that about half<sup>9</sup> of the 300,000 bbl RPS amount could be recovered  
2 within the 72-hour time limit. The Anvil Study does not calculate the encounter rates of the  
3 skimming systems and would produce the same result if there were no boom or boom towing  
4 vessels in the response inventory. DEC has therefore falsely used the Anvil Study to verify the  
5 ability of Permittees to meet the RPS requirements, particularly with respect to the sufficiency  
6 of vessels or boom as required by section .445(g)(3) and (4). DEC's assertion that new  
7 generation skimmers and boom is specious as well because it still omits any encounter rate  
8 analysis, the amount of boom used by all skimming task forces is substantially less than that  
9 utilized when the Anvil Study was conducted, the high-speed boom added is only associated  
10 with nearshore task forces that recover about 16% of the RPS amount and if there are "new  
11 generation skimmers"<sup>10</sup> in use, they're not in the C-plan. These multiple subterfuges designed to  
12 totally discount the fundamental limitations imposed by encounter rates constitutes deliberate  
13 fraud by trying to give credit for oil recovered to huge pumps that would be continually starved  
14 for oil to pump, even at derated values, due to the inability of the booming systems to  
15 concentrate enough oil for recovery. Further fraudulent intent may be implied by the lack of  
16 effect upon recovery rates alleged in the RPS scenario that assumed initial delays in response  
17 deployment due to weather exceeding RMROL conditions for the first day of the incident. Any  
18 hope of encountering thick layers of oil immediately after the spill would surely be dashed by  
19 the broad dispersal of oil and thinning of the oil layer by severe weather during the first day of  
20 the spill, yet Permittees and DEC record no decrease in recovery rates and the commensurate  
21 increase in skimming time needed to encounter the same amount of oil from a much more sparse  
22 oil slick. This is a knowing deception because APSC had previously attempted to show  
23 decreasing recovery rates in prior VMT C-plans by progressively increasing the derating of  
24 skimmers over time due to the dispersal of the oil lowering the encounter rate. 18 AAC  
25 75.445(f) specifically requires:

26  
27 "In designing a spill response, severe weather and environmental limitations that might  
28 be reasonably expected to occur during a discharge event must be identified. The plan  
29 must use **realistic efficiency rates** for the specified response methods to **account for the**  
30 **reduction of control or removal rates** under those severe weather or other  
31 environmental limitations that might reasonably be expected to occur. The department  
32 may require the plan holder to take specific temporary prevention or response measures  
33 until environmental conditions improve to reduce the risk or magnitude of an oil  
34 discharge during periods when planned mechanical spill response options are rendered  
35 ineffective by environmental limitations."

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<sup>9</sup> Although requestor did not calculate nearshore task force encounter rates, these task forces were grossly over-rated as well and were assumed to only recover about 16% of the total under the best of circumstances. It must be noted that these calculations were overly optimistic in assuming that all oil encountered would actually be recovered because a significant portion of the oil encountered would actually be lost from the boom before the skimmer could pump it to storage.

<sup>10</sup> DEC may be misrepresenting Current Busters/Harbor Busters as skimmers where they are in fact just high speed boom using the same old skimmers. Although these booms do allow for high speed skimming, the encounter rate has actually decreased for the skimming system as a whole because the amount of boom used per skimmer was greatly reduced. There may be some increase in skimmer efficiency with these booms but that has yet to be definitively determined and that would not affect the amount of oil recovered given the encounter rate limitation.

1  
2 DEC knew that Permittees were required to utilize "...realistic efficiency rates..." and that they  
3 must "...account for the reduction of control or removal rates..." but knowingly allowed  
4 Permittees to proffer this fraudulent scenario in a corrupted public review that subsequently  
5 resulted in issuance of an illegal permit in furtherance of an unlawful subsidy to Permittees  
6 operations. The overstating of Permittees' ability to meet the RPS due to their failure to  
7 calculate encounter rates necessary to reflect realistic efficiency/removal rates is compounded  
8 by Permittees failure to properly report environmental limitations as argued in Issue #1 and their  
9 overstatement of response capability as argued in issues to follow.  
10

### 11 **Issue 10: Realistic Maximum Response Operating Limitation - Specific Task Force and** 12 **Equipment Limitations, Geographic Constraints**

13 **Statement of Issue:** The requestor made six related arguments with regards to this issue:

14 1) The contingency plan does not show the limitations of "each item of oil recovery equipment"  
15 listed as required by 18 AAC 75.425(e)(3)(F)(iii).

16 2) The most recent information on environmental conditions for the Prince William Sound ROO  
17 was not provided in the Core Plan pursuant to 18 AAC 75.425(e)(3)(D).

18 3) The contingency plan has no comparative analysis of all response equipment based on these  
19 limitations to definitively determine which equipment is most appropriate and reliable, as  
20 required by 18 AAC 75.445(k)(1), for each operation and geographic specific area as required  
21 by 18 AAC 75.447.

22 4) The C-plan scenarios overstated the RMROL for essential components thereby invalidating  
23 RPS compliance.

24 5) DEC's discretion to substitute alternative prevention measures when RMROL is exceeded  
25 pursuant to 18 AAC 75.445(f) is dependent upon Permittees' full utilization of breakthrough  
26 response technologies deemed appropriate and reliable for specific geographic locations and/or  
27 operations and decision making on this issue was compromised by DEC's failure to fully  
28 evaluate breakthrough technologies and Permittees' failure to fully and accurately disclose  
29 equipment RMROL.

30 6) DEC's failure to diligently enforce its mandates enumerated above: precludes its ability to  
31 satisfy 18 AAC 75.445(b), (c), (d)(1), (d)(3)-(7), (f), (g)(1)-(6), (h), and (k)(1)-(3); invalidates  
32 the permits, and; violates requestor's constitutional right to reasonable concurrent use of  
33 affected resources.

34 The RMROL approval criteria in section 445(f) is designed to provide an alternative compliance  
35 mechanism beyond the strict application of the statutory RPS requirement, which does not allow  
36 any waivers, on the basis that permittees who have fully analyzed and properly planned for  
37 response under the problematic constraints expected in its operating area may substitute  
38 additional spill prevention and/or response measures during challenging conditions that would  
39 otherwise not allow full compliance with the RPS requirement. Restated in other terms, DEC  
40 understood when drafting regulations that problematic conditions at most Alaskan locations  
41 would preclude strict compliance with the statutory RPS requirement given the  
42 contemporaneous state of the art in spill response technology and so designed a mechanism to  
43 allow for extraordinary prevention and/or response measures to offset risk and/or mitigated

1 damages during the periods when compliance with the law was impossible. Requestor alleges  
2 that DEC did not: require Permittees to fully analyze and publish the capability and operational  
3 limits of “...**each item of oil recovery equipment...**” as required by 18 AAC  
4 75.425(e)(3)(F)(iii); require Permittees to fully report environmental conditions throughout the  
5 ROO(s) pursuant to 18 AAC 75.425(e)(3)(D); require Permittees to design a response plan for  
6 “...severe weather and environmental limitations that might be reasonably expected to occur  
7 during a discharge...” pursuant to section 445(f); require permittees to design its response plan  
8 to “...**realistic efficiency rates for the specified response methods to account for the**  
9 **reduction of control or removal rates under those severe weather or other environmental**  
10 **limitations that might reasonably be expected to occur**”; and could not therefore definitively  
11 determine Permittees compliance with sections: .445(b), (c), (d)(1), (d)(3)-(7); .445(f);  
12 .445(g)(1)-(6), .445(h), and; 445(k)(1)-(3). This failure to provide sufficient information for  
13 “...**each item of oil recovery equipment...**” to allow a definitive determination of the C-plan  
14 conformance with approval criteria is compounded by the fact that DEC did not perform its  
15 independent duty under 18 AAC 75.447 to comparatively analyze spill response equipment to  
16 identify more effective equipment and then determine which breakthrough technologies would  
17 be most appropriate for specific “physical environments”, “geographic locations” or  
18 “operations”. If DEC had performed this duty, the deficiencies in Permittees’ application would  
19 have been blatant because DEC would have had all necessary information on the relevant  
20 technologies and physical environments to expose those deficiencies. DEC through the Attorney  
21 General had told the Alaska Supreme Court that this was, in fact, the primary purpose of the  
22 BAT Conference regulation:

23  
24 “DEC further points to 18 AAC 75.447, which requires DEC to identify and evaluate  
25 “breakthrough” technologies by sponsoring a technology conference at least once every  
26 five years and to “engag[e] in studies, inquiries, surveys, or analyses [that DEC] believes  
27 appropriate to the consideration of new technologies.” DEC argues that its reliance on a  
28 technology’s appropriateness and reliability to comply with performance standards will  
29 be rendered more meaningful as a test of best available technology because DEC will  
30 have this “breakthrough technology” information at hand when evaluating whether  
31 prevention and contingency plans use best available technology.” FN 26 in *Lakosh v.*  
32 *Alaska Department of Environmental Conservation et. al.* 49 P.3<sup>rd</sup> 1111 (Alaska 2002)

33  
34 DEC’s instant insistence to apply a revisionist history on this matter is a clear effort to evade its  
35 mandated duties, obstruct justice and unlawfully subsidize Permittees’ illegal operations at the  
36 expense of requestor’s right to reasonable concurrent uses of the natural resources that would  
37 otherwise be protected in accordance with law from a catastrophic oil spill. DEC’s abrogation of  
38 duties cited above portends for a failure of protection of resources during a spill under  
39 reasonably expected adverse conditions and subverts its mandate to regulate spill response  
40 pursuant to 18 AAC 75.320. One specific example of this predicament arises in consideration of  
41 the efficacy of the Open Water Fast Response Task Force. A recent drill of this Task Force  
42 revealed that the use of the smaller but faster boom towing vessels disabled the entire Task  
43 Force in sea states under 3 feet. Nowhere in the C-plans is this limitation listed but the RPS

1 scenario and subsequent approval relies on these limited vessels in multiple Open Water Task  
2 Forces in sea states over 6 feet. The RPS calculations rely on the full operability of TransRec  
3 Barges shortly after their arrival on scene but these barges cannot recover oil at their rated  
4 capacities without the full operability of the boom towing vessels. It is this same limiting effect  
5 of boom towing vessels that is magnified and precludes Permittees from meeting the RPS  
6 requirements if the spill migrates into, or originates in the GOA. This is but one example among  
7 many instances where a single piece of equipment constitutes a “weak link” that can disable far  
8 more capable equipment critical to effective response. The RMROL regulation is clearly  
9 designed to ensure that all “weak links” are ferreted out so that the response system as a whole  
10 can be assessed as appropriate and reliable for the expected environmental conditions. In effect,  
11 this regulation is the “lynch pin” to ensuring compliance with all other response oriented  
12 regulations, thereby demanding strict enforcement as a prerequisite to assessment of compliance  
13 for all associated regulations. The material omission of the RMROL of these vessels and other  
14 equipment allowed Permittees to obtain their permits illegally and would preclude a safe and  
15 effective spill response where DEC would be faced with the quandary of sending responders out  
16 into conditions where both safety and effectiveness would be compromised or allowing the spill  
17 to further devastate natural resources.

#### 18 19 **Issue 11: Scenarios - Most Demanding Conditions, Spill Trajectories**

20 **Statement of Issue:** The requestor contends that the 809 Scenarios are unrealistic with regards  
21 to showing that the plan holders can meet RPS under the worst case conditions as is required by  
22 18 AAC 75.425(e)(3)(F) and 75.445(f). Specifically, the requestor argued that the plan holders  
23 should show the logistics required for deploying equipment from PWS and downstream  
24 communities to work in the Gulf of Alaska and that they cannot meet the RPS under the very  
25 restrictive weather and sea conditions established by the Gulf of Alaska Agreement. This issue  
26 is largely subsumed by the better restatement of the issues presented elsewhere in the instant  
27 Request but some further clarification of the issues to spill trajectory and logistics is warranted.  
28 The intent of section 445(f) is clearly to mandate design of a response plan that stresses the  
29 response capabilities to their limit to allow DEC/public evaluation/formulation of additional  
30 prevention and response measures to be imposed when RMROL is exceeded. The proffered 809  
31 scenarios did not satisfy this intent because it evaded consideration of the high speed coastal  
32 current that would widely disperse oil in a direction away from the entire response inventory in  
33 PWS. Where Permittees could barely meet the RPS given the 809 scenario conditions and  
34 timelines, it is self evident that the RPS would not be met if the spill migrated into/through the  
35 GOA because of the stringent restriction on dispatch of vessels of 6-foot seas for 10-12 hours for  
36 service in the GOA.

#### 37 38 **Issue 12: Protection of Environmentally Sensitive Areas**

39 **Statement of Issue:** The requestor brought together two issues in Issue 12:

40 a) The requestor claimed that the plan holders have not adequately developed sensitive area  
41 protection in a "realistic" RPS scenario because the deployment of specific Geographic  
42 Response Strategies (GRS) is not denoted in the scenario. The requestor asserts that without  
43 identification of specific GRS for each sensitive area, or at least an extrapolated calculation of

1 the equipment needed, it cannot be determined if the plan holders can deploy sufficient  
2 equipment in a timely manner to protect the sensitive areas.

3 b) The requestor argues that without the development of more GRS (10- 15 per year is  
4 suggested) the plan holders cannot determine if they have enough equipment available to protect  
5 "all" sensitive areas that may be impacted by a spill from Permittees' operations.

6 The controlling regulation in this matter is 18 AAC 75,445(d)(4):

7  
8 “(d) Response strategies. The response strategies must take into account the type of  
9 product discharged and must demonstrate that (4) sufficient oil discharge response  
10 equipment, personnel, and other resources are maintained and available for the specific  
11 purpose of preventing discharged oil from entering an environmentally sensitive area or  
12 an area of public concern that would likely be impacted if a discharge occurs, and that  
13 this equipment and personnel will be deployed and maintained on a time schedule that  
14 will protect those areas before oil reaches them according to the predicted oil trajectories  
15 for an oil discharge of the volumes established under 18 AAC 75.430 - 18 AAC 75.442;  
16 areas identified in the plan must include areas added by the department as a condition of  
17 plan approval;”

18  
19 The 809 scenarios are clearly the referenced “response strategies” for the RPS volume spill but  
20 they do not show, in any measure, the maximum amount of resources that may be required to  
21 exclude oil from sensitive areas and did not show timely exclusion of oil from the most  
22 ecologically valuable sensitive areas in PWS, the Zaikof Bay and Rocky Bay herring spawning  
23 grounds. These scenarios were clearly manipulated to generate a fictional trajectory that  
24 produced the least possible shoreline impact as the trajectory totally discounted tidal flows in  
25 HE and Montague Strait<sup>11</sup>. It is abundantly obvious that there was no attempt to quantify  
26 resource needs for sensitive area protection as required by section .445(d)(4) and DEC has never  
27 produced any data or calculations showing that it independently conducted such an analysis to  
28 satisfy this approval criteria. It is equally obvious that the most accurate assessment would  
29 include calculations of the accumulated needs for a complete set of GRSs deemed to be the  
30 maximum that may be affected in the path of an RPS sized spill, but there was not even an  
31 attempt to determine the maximum number of sites that may be affected, much less an attempt  
32 to quantify the total resource needs as could be easily calculated by establishing the average site  
33 protection needs among sites with GRSs and extrapolating to the larger set of potentially  
34 affected sites that would no doubt include many sensitive areas without GRSs. DEC failed to  
35 apply this approval criteria to the permit applications and the subsequent approval was therefore  
36 arbitrary and capricious. It is DEC’s obligation to assess the totality of sensitive area protection

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<sup>11</sup> There are vigorous tidal flows in both HE and Montague Strait, particularly during Spring tides that could/should have shown substantial shoreline impact on both sides of Montague Island within three to six tide changes. The coastal current consistently flows Southward along the seaward side of Montague and outbound currents in HE can exceed 2.5 knots so any spill at Zaikof Point would be carried out and along the seaward shore of Montague Is. on the first Ebb tide. Ebb tides typically flow Southward in Montague Strait as well, so one Flood and Ebb cycle would impact the Western shore of Montague Is.

1 needs and, to that end, DEC must continue development of GRSs in order to accurately assess  
2 those needs.

### 3 4 **Issue 13: Response Planning Standard (RPS) - Prevention Credits**

5 **Statement of Issue:** This issue is largely subsumed by Issue # 4 with the understanding that if a  
6 finding is rendered establishing that Permittees do not have a complete complement of BAT  
7 escorts to meet all tanker traffic needs, the 11% prevention credit will be disallowed until full  
8 compliance is implemented.

### 9 10 **Issue 14: BAT Analysis - Towlines**

11 **Statement of Issue:** The requestor contends that the applicants and DEC did not appropriately  
12 apply the

13 BAT regulations to tug towlines, but instead applied "the static standards for the PWS tow  
14 package." DEC argued in the BAT regulation litigation that performance standards in 18 AAC  
15 75.445(k)(2) were not static standards as they would be regularly updated but DEC has not  
16 performed any towline evaluation since the BAT statute was enacted in 1980. The definition of  
17 PWS tow package is therefore invalid as an outdated static standard. Every towline used in  
18 performing the tasks or used on the equipment subject to the 445(k)(1) and (k)(2)BAT  
19 categories, (e.g. response barge towlines), were required to be subject to the individualized  
20 section .445(k)(3) criteria at least twice over the last 10 years and not a single analysis has been  
21 performed even once to determine if there was any "breakthrough technology" appropriate for  
22 reporting despite a reported barge towline failure that has endangered the barge crew and would  
23 have precluded response activities of that barge, thereby rendering response unreliable. The  
24 escorts directly subject to the individualized section .445(k)(3) criteria must necessarily include  
25 an individualized towline analysis because this equipment is indispensable to escort functionality  
26 and it is inconceivable that the "best" escorts should be rendered totally impotent because there  
27 was no quality standard for tug towline systems at all as the RPG argument suggests and the  
28 numerous instances of towline partings has proven. By the RPG reading, one could assert that  
29 the use of fishing line for a main tug towline would not violate any regulation where the intent  
30 of the of the escort inclusion in the (k)(3) BAT category would certainly include thorough  
31 comparative analyses of any technology on the tug in question where that technology could  
32 noticeably reduce the overall escort capability below that of an escort outfitted with all of the  
33 "best" components, with components like surge gear, towlines, pennants, shackles, tow bits and  
34 winches near the top of the list of critical components. Permittees failed to produce, and DEC  
35 failed to require, a complete and competent comparative analyses of escort towline systems  
36 consistent with 18 AAC 75.425(e)(4)(A)(iii) and .445(k)(3) despite repeated escort towline  
37 failures during drills and actual escorting. Each tanker and tug must show the working load and  
38 breaking strength of critical load bearing fixtures on the tanker and tugs to assess the  
39 appropriateness of the associated towline components given the high forces generated during  
40 dynamic towline loading as recorded during tanker arrest drills. Where the required detailed  
41 specifications are provided there are glaring inconsistencies that certain components are  
42 woefully insufficient to carry the load from other in-line components and similar components on  
43 other vessels are of lesser quality and/or strength and therefore cannot be considered BAT when

1 compared to the strengths/quality of the limited selection among the different vessels, much less  
2 when compared to components commercially available.

3  
4 **Issue 15: Scenarios - Lists of Resources**

5 **Statement of Issue:** The requestor represented that the equipment and personnel lists included  
6 in the 809 Scenario are incomplete and do not allow one to determine if the plan holders have  
7 enough resources available to respond to a RPS-size spill. A single, comprehensive set of lists of  
8 all required equipment and personnel was requested, with each list subdivided into discrete  
9 regulatory/approval requirements. DEC's approval of the permits and subsequent denial that  
10 personnel lists are complete is belied by the glaring fact of the associated condition of approval  
11 and ongoing personnel evaluations. DEC's denial of the issue is therefore a blatant obstruction  
12 of justice, unfair investigation and denial of due process where DEC refused to: address the  
13 issue in Informal Review; produce documents considered in the conditioned review, and;  
14 otherwise allow requestor to participate in the ongoing review with the PWS RCAC and the  
15 RPG. The equipment lists are similarly incomplete and these lists must be comprehensive to  
16 allow comparison to the SERVUS Technical Manual listings to make a determination of RPS  
17 compliance. Two prime examples of these deficiencies are Tables 1-13 and 1-14. The first table  
18 doesn't list the GrahamRec Skimmers, provide a sufficient description of the different skimmer  
19 types or the 72 hour totals for the different skimmer types. Moreover, there is neither inclusion  
20 of sensitive area protection resources nor any distinction between equipment dedicated to  
21 meeting the RPS and equipment needed to exclude oil from sensitive areas. The more recent  
22 GRSs developed include skimmers needed to effectively exclude oil from areas with high  
23 currents. These skimming systems may not garner the full credit for meeting RPS requirements  
24 as their dedication to specific sites precludes their active pursuit of migrating oil. DEC did not  
25 and could not therefore produce a credible assessment of the C-plans' satisfaction of the  
26 associated approval criteria.

27  
28 **Issue 16 - Failure of the Department to comply with 18 AAC 75.447**

29 **Statement of Issue:** The requestor contends that the Department has not examined new  
30 technologies as required by 18 AAC 75.447. This issue is largely subsumed in issues presented  
31 above. DEC was required by law to conduct two comprehensive BAT conferences since this  
32 regulation was adopted but has only conducted one unlawfully limited conference and  
33 insufficient report from that limited conference but refused to consider that report or produce it  
34 as a review document. DEC's dereliction of duty in this matter has substantially impaired the  
35 ability of: permittees to prepare c-plans; DEC to appropriately review c-plans; the public's right  
36 to competently review c-plans with complete information regarding the efficacy of c-plan  
37 components and their applicability to specific physical environments, geographic locations and  
38 permittee operations. The instant C-plan review was therefore an unfair investigation as are the  
39 subsequent Informal Review and adjudicatory process where requestors and commentators were  
40 denied due process by the unlawful suppression of material evidence. DEC has unequivocally  
41 established these reports as material to c-plan reviews in the BAT litigation, thus establishing  
42 DEC's intent to unlawfully conduct the instant review and impair the ability of affected  
43 appellants to competently challenge its arbitrary approval of the instant contested C-plans. A

1 prime example of DEC's bad faith in these investigations is painfully obvious where they stated  
2 their intent to examine high current booms for the BAT Conference but when presented with  
3 copious information on the OceanBuster booming systems by NOFI at the BAT Conference,  
4 DEC refused to consider the improvements in effectiveness and efficiency of these systems for  
5 response in the higher sea states and high currents in HE and the GOA. If DEC had timely  
6 produced a full report on the OceanBuster, Permittees may have well adopted its use in the 809  
7 scenarios and the public could have had irrefutable evidence to demand its use absent that  
8 adoption.

### 10 **Issue 17: RPS Calculations**

11 **Statement of Issue:** The requestor asserts that the Department did not address the timely  
12 availability of the manning requirements needed for OSRBs and OSRVs to be able to determine  
13 attainment of the response planning standard. This issue is subsumed in issues presented above.

14  
15 (3)(B) (ii) The relevance to the permit decision of each matter identified under (i) of this  
16 subparagraph is contained in each of the extended statements of the issue provided above.

17  
18 (3)(B) (iii) The hearing time estimated to be necessary for the adjudication may extend up to 6  
19 weeks due to the need to elicit testimony from multiple DEC personnel, Permittees and the PWS  
20 RCAC regarding suppressed documents, non-public meetings evaluating C-plan compliance and  
21 the efficacy of C-plan equipment as demonstrated in unreported drills, exercises and events.

22  
23 (3)(C) The hearing request should be granted in the public interest to: substantially advance the  
24 spill prevention and response capability of Permittees and other operations across the state in  
25 compliance with regulatory mandates; to establish and implement a fair investigatory process in  
26 the public c-plan reviews, and; to provide relief to requestor for the violation of his constitution  
27 rights to reasonable concurrent use of Alaska's natural resources, a fair investigation and due  
28 process denied in the public review and Informal Review processes. If the Commissioner fairly  
29 considers the issues presented above and the stark contrast to the positions presented by DEC  
30 and the RPG in the Informal Review, it will become self evident that the Department's  
31 compartmentalization of regulatory compliance issues has subverted the underlying intent of the  
32 applicable laws to require permittees to design their spill response in a manner that provides for  
33 the maximum possible natural resource protection using the most efficient tactics and the most  
34 effective equipment to mitigate spill damage. No one contends that that any permittee could  
35 mitigate all spill damage given Alaska's severe conditions but the constitution, statutes and  
36 regulations all demand that DEC require permittees to employ appropriate and reliable measures  
37 to mitigate spill damage given fair consideration of continuing technological breakthroughs and,  
38 when/where there is still a potential for substantial spill damage that could not be mitigated in  
39 accordance with law, permittees must employ state-of-the-art technology and best procedures to  
40 reduce the risk of spills occurring.

41 Virtually all of the issues presented by requestor are closely aligned with the concerns explicitly  
42 presented to DEC by the PWS RCAC in their public review and Informal Review comments,  
43 thus establishing the broad concern of the affected communities and interests that must be

1 addressed with full provision of due process principles and definitively resolved. Requestor has  
2 extensively researched the technologies at issue and engaged expert sources and equipment  
3 manufacturers for 14 years to discern practical solutions for effective spill prevention and  
4 mitigation in Alaska's problematic conditions. Requestor has also demonstrated his ability to  
5 properly interpret the meaning and intent of applicable law in his successful litigation against  
6 DEC in the Alaska Supreme Court. Requestor is therefore deserving of another opportunity to  
7 resolve these outstanding issues as they stand today, in good faith. Indeed, DEC has already  
8 recognized that these outstanding issues must be addressed in a parallel informal workgroup  
9 process conducted with the RPG and the PWS RCAC, but this process unlawfully precludes:  
10 public participation; accurate record keeping, and; a due process appeal procedure for disputed  
11 issues of fact and law. By law, this ongoing illegitimate informal process must be brought into  
12 the light with full public participation, record keeping, due process rights and timely resolution  
13 of issues immediately incorporated into an amended C-plan.

14  
15 (3)(D) A comprehensive set of alternative terms and conditions needed to meet regulatory  
16 requirements is simply not possible given the incomplete set of data and evaluations that were  
17 required to be produced in the C-plans and otherwise pursuant to law. Full regulatory  
18 compliance necessitates that any decision on satisfaction of the approval criteria be premised  
19 upon a fair and expert consideration of data and analyses that has been excluded from the  
20 review, or at least the public review and pursuant to requestor's public document/administrative  
21 record requests. To that extent, at least, regulatory compliance would require the following data  
22 and analyses as follows:

23  
24 Issue #1: tanker course tracks throughout all Alaskan ROOs that is potentially available from  
25 tanker logs and/or GMDSS tracking data from the Alaska Marine Exchange and possibly the  
26 USCG; all reliable data on environmental conditions in all of the ROOs transited and that may  
27 otherwise be affected by migrating oil that is potentially available from tanker logs and  
28 PRAC/RAC vessels, NOAA facilities, weather/current research papers, etc.; data and studies of  
29 oil migration through Alaskan waters that may be potentially affected by spills.

30 Issue # 2: data on maximum transit speeds and course tracks of all commercial vessels transiting  
31 PWS; data on tanker speeds that may be obtained from USCG VTS; a comprehensive  
32 parametric analysis of the forces that escorts must apply to avert collisions with conflicting  
33 vessel traffic in PWS; all reliable data on environmental condition in PWS along the tanker  
34 traffic routes, particularly data on barrier jets, cross channel winds, currents and eddies near land  
35 prominences that may need to be collected; a comprehensive parametric analysis of the forces  
36 that escorts must apply to avert powered and drift groundings in PWS and drift groundings at  
37 Seal Rocks, Wessel's Reef and Middleton Island, (these latter analyses would be an RMROL  
38 prevention measure in the GOA).

39 Issue # 3: Same as #2 above.

40 Issue # 4: Same as #2 above; data on the amount of concurrent tanker traffic in PWS that may be  
41 obtained from USCG Tanker Transit Logs, tanker logs; alleged DEC C-plan oversight records,  
42 VMT service logs; data on all escorts and salvage tugs as they may operate or be proposed for  
43 construction worldwide; a comprehensive comparative analysis of escort capability with regards

1 to their use as primary, secondary and/or HE tugs taking into account their ability to apply  
2 braking, steering and/or towing forces in the environmental and traffic conditions experienced in  
3 PWS for the expressed purpose of safely bringing the tanker under control in the event of the  
4 worst case grounding and collisions possible.

5 Issue # 5: Same as # 4 above.

6 Issue # 6: data on equipment and tactics used to lighter and otherwise salvage tank vessels and  
7 contain the spill, particularly booming, as practiced worldwide; a comprehensive comparative  
8 analysis of the capabilities of these technologies as they may qualify as the best technologies for  
9 use under worst case conditions as they may occur in each of the ROOs that Permittees transit.

10 Issue # 7: data on equipment used to detect and track oil spills and practices employed  
11 worldwide; a comprehensive comparative analysis of the capabilities of these technologies as  
12 they may qualify as the best technologies for use under worst case conditions as they may occur  
13 in each of the ROOs that Permittees transit.

14 Issue # 8: immediate production of all referenced documents that were not otherwise produced  
15 as documents for the 2007 C-plan in the public depositories.

16 Issue # 9: Same as # 1; produce a comprehensive BAT Conference and report that analyzes the  
17 comparative effectiveness and efficiency of each piece of response equipment in Permittees'  
18 response inventory as it may be used to satisfy 18 AAC 75.438 as compared to other  
19 technologies that may be used for the same or similar purpose worldwide; produce an encounter  
20 rate analysis for each type of skimming task force depicted in the SERVS Technical manual as  
21 used in 809 scenarios under various environmental conditions up to RMROL conditions for the  
22 most susceptible component of each task force; produce a comprehensive evaluation of the  
23 ability of Permittee to meet the 300,000 bbl and 809,000 bbl RPS.

24 Issue # 10: a complete list of the RMROL for each piece of response equipment in Permittees'  
25 response inventory as it may be used to satisfy 18 AAC 75.438; a complete list of potential  
26 compensating spill prevention and response measures that may be employed when RMROL is  
27 exceeded with specificity as to geographic locations and environmental conditions where and  
28 when these compensating measures will be employed.

29 Issue # 11: produce a trajectory analysis and RPS scenario(s) that reflects the concerns raised in  
30 this issue and issue #12.

31 Issue # 12: Same as issue #11 above; generate a list of resources needed to timely exclude oil  
32 from all sensitive areas that may be impacted in the scenario(s).

33 Issue # 13: Same as #4 and # 9.

34 Issue # 14: data for all towlines used on any vessel in Permittees spill prevention and response  
35 inventories; a BAT Conference and report on towlines used for spill response; a comprehensive  
36 comparative analysis of the capabilities of escort towline system components as they may  
37 qualify as the best technologies for use under worst case conditions in PWS or where/when  
38 emergency towing may be needed as an RMROL prevention measure.

39 Issue # 15: produce a comprehensive list of all resources needed to comply with each subsection  
40 of the Approval criteria in section .445; record and disclose all proceedings of the DEC, RPG  
41 and PWS RCAC workshops addressing C-plan resources.

42 Issue # 16: Conduct a comprehensive BAT Conference and report that analyzes the comparative  
43 effectiveness and efficiency of each piece of response equipment as it may be in use by any

1 permittee in Alaska response inventory as it may be subject to 18 AAC 75.445(k)(1) and(2) as  
2 compared to other technologies that may be used for the same or similar purpose worldwide.  
3 Issue # 17: Subsumed above.

4  
5 To the extent that requestor believes he has a “fair handle” on the technologies that would likely  
6 be most capable and cost effective for incorporation in the amended C-plans and has weighed  
7 the equities involved, requestor has already suggested specific equipment and deployment  
8 locations as ALTERNATIVES on pp. 28-30 of his Request for Informal Review as updated in  
9 his email to the Commissioner and SPAR Director on 5/5/08. These ALTERNATIVES as  
10 updated are adopted and incorporated herein as a proposed fair resolution of the instant Request  
11 if their construction and deployment were effected in a timely progression prior to, and  
12 incorporated in, the next C-plan application submission. This settlement offer, as extensive and  
13 costly as it may be, is clearly far below the amount of equipment and cost that would be incurred  
14 if full compliance with all of the regulations were imposed. Full compliance with the RPS  
15 requirements at the distal limits of the PWS ROO alone would likely cost more than the entire  
16 suggested spill prevention and response package spanning an area more than 2,000 nm long and  
17 over 400 nm wide for much of this distance. As stated in his 5/5/08 email, requestor would be  
18 more than happy to work with DEC and liable parties to develop an equitable cost sharing  
19 matrix that would substantially limit costs incurred by the state and Permittees. Please consider  
20 convening a settlement conference including the RPG and PWS RCAC immediately after the  
21 granting of the instant Request.

22 Sincerely;



23 Tom Lakosh  
24