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December 18, 2009

Commissioner Larry Hartig
Department of Environmental Conservation
555 Cordova Street
Anchorage, AK. 99501

RE: Request for an Adjudicatory Hearing on DEC's Unlawful Approval of the BP Oil Shipping Company, USA Tank Vessel Operations Oil Discharge Prevention and Contingency Plan

Dear Commissioner Hartig;

Would you please accept and grant this Request for Hearing pursuant to 18 AAC 15.200 et. seq. as an appeal of the 11/19/09 DEC approval of the BP Oil Shipping Company, USA, (BPOSC), Tank Vessel Operations Oil Discharge Prevention and Contingency Plan, (C-plan), permit? I am providing the information required by 18 AAC 15.200 as follows:

(a) The instant request is submitted less than 30 days after the above titled permit approval on 11/19/09.

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

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

(3) (A) I am a long standing resident of Alaska who has exercised, and intends to exercise in the future, reasonable concurrent uses of the natural resources in the affected coastal areas of Southcentral Alaska, specifically PWS and Cook Inlet, including: subsistence hunting, fishing and gathering; commercial fishing; recreation; employment in the tourism industry. These uses were adversely affected by the EVOS and the C-plan is required by law to prevent a reoccurrence of the damages as documented in the report of the Alaska Oil Spill Commission and other State and Federal reports describing natural resource damages proximately caused by the EVOS. Documentation of the damages I sustained are contained in the case files of A89-140 CV and A92-321 CV as consolidated In re; Exxon Valdez. A spill from BPOSC Tanker operations has the potential to cause long term damage to the species that I plan to harvest and the ecosystem that supports them, thereby infringing upon my constitutional right to sustained yield and reasonable concurrent use of Alaska's natural

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

(3)(B)(i) and (ii) The clear and concise genuine factual issues for consideration are provided below with the attempt to retain the same formatting as used in the long-pending Request for Hearing on the 2007 TAPS Tanker C-plan Approvals as much as possible to allow efficient consolidation of the two appeals. The issues from the prior appeal were incorporated as comments for the instant C-plan review in their entirety and are presented and supplemented as appropriate to the development of the issues in the instant review. The relevance to the permit decision of each matter presented is contained in each of the extended statements of the issue to provide more clarity of the issue and elicit a better understanding of its relationship to the decision. As stated above, the underlying relevance of each issue to requestor's interest is that DEC's failure to require full conformance to regulatory requirements can have devastating adverse effect upon his reasonable concurrent uses of

natural resources. Requestor is also entitled to full expression of concerns regarding the requirements of compliance and due process in a fair investigation of those concerns.

Issue 1: Geographic Scope

Statement of Issue: The requestor argues that plan holder has not submitted plans showing their ability to respond to an oil spill throughout each of the regions of operation where tankers sail as defined in 18 AAC 75.495; 18 AAC 75.990(156)(A); AS 46.06.030(r)(4), and; AS 46.04.210(a). DEC has deliberately misrepresented its duty to require Permittees to submit C-plans for the entire Region(s)[1] of Operation, ROO as defined and required by regulation:

> .990(156) "region of operation" means, with respect to (A) an oil discharge prevention and contingency plan other than a nontank vessel plan, a region established under 18 AAC 75.495;
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> .495(a)(2) Prince William Sound Region: that area south of 63E30' N. latitude, west of the region described in (1) of this subsection, and east of the region described in (3) of this subsection, including adjacent shorelines and state waters, and having as its seaward boundary a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured;
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> .495(b) If the department finds that a discharge that could occur in an area beyond the territorial sea would not have a significant adverse impact on the resources of the state or on other interests of the state, the department will, in its discretion, adjust the seaward boundary of a region established in (a) of this section to exclude that area.

These regulations unambiguously establish that the geographic scope of C-plan and compliance with all approval criteria must apply throughout the entire Region of Operation, particularly where DEC has not issued any finding showing of a lack of adverse impact pursuant to 495(b). It would be the responsibility of Permittee and DEC to otherwise definitively show a valid justification for why full compliance throughout the entire ROO was not required. DEC instead only offered the definition of state waters as an apparent excuse for not enforcing it regulatory duty throughout the ROO as defined in the cited regulations. DEC has otherwise recognized its duty to require response planning by permittees in the greater ROO in its findings related to the Shell Camden Bay ODPCP and in RFAIs to Tesoro related to transiting of Unimak Pass. DEC deliberately evaded addressing Permittee's obligation to plan to respond in compliance with approval criteria in the state waters[2] outside of the Alyeska Pipeline Service Company, APSC region of responsibility, (i.e. West of the Hinchinbrook line and North of Cape Cleare pursuant to AS 46.04.030(q)), but within the PWS ROO, (i.e. in the Gulf of Alaska, GOA, East of Montague Island and

[1] 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.

[2] 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, such as Kayak Island, Wessel's Reef and Middleton Island, 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.

South of the Gulf coast to Icy Bay). Requestor explicitly listed state waters within the PWS ROO outside of the APSC region of responsibility, and other Regions which Permittee transits, but DEC refused to apply any approval criteria to Permittees' response in these state waters. DEC even admits that Permittees "…are required to respond to any spill threatening state waters and are required by A[S] 46.04.020 and 18 AAC 75.315 - .320 to immediately contain and cleanup any discharge in state waters", (at p. 19 of the Informal Review Decision", but fails to explain why it will not require Permittees to plan for these events throughout the ROO in conformance with approval criteria. Permittee does plan a conditioned response in the GOA but it clearly cannot meet the approval criteria because it limits response to conditions well below those required to meet the RPS within the APSC region of responsibility. Apart from the fact that response assets would have to transit for much longer times to reach the distal state waters within the PWS ROO, and thus not have the skimming time to meet the RPS, Permittees recognize that their vessels are not qualified to continuously work in the more extreme GOA sea states by limiting response operations to weather windows of 6-foot seas for 10 to 12 hours, again precluding meeting the RPS skimming time given the same RPS scenario outside of Hinchinbrook Entrance. This conditioned response is an unambiguous admission that the permitted response assets are not reliable or appropriate for the more exposed areas of the PWS ROO. Permittees and DEC, with full knowledge of the inappropriateness of the spill prevention and response equipment for continuous deployment in the GOA, do not even attempt to characterize the environmental conditions in the state waters outside of Hinchinbrook Entrance as required by regulation. These actions are clearly a deliberate attempt to generate a fraudulently lower standard of "…environmental limitations that may be reasonably expected to occur…" specifically designed to relieve Permittees of their obligation to prevent and respond to spills in accordance with 18 AAC 75.425(e)(1)(F), .445(d) and .445(f). In effect, DEC and Permittees conspired to unlawfully exclude consideration of environmental conditions across the vast majority of the area of the PWS ROO for the explicit purpose of approving substandard spill prevention and response assets in quantities far below that needed to meet the RPS at distal locations within the ROO(s). The fact that tankers travel through federal waters through most of the GOA is irrelevant to the issue of planning for timely and appropriate response in those state waters that are adjacent to tanker course tracks or could otherwise be affected by spills in federal waters as is required by the cited regulations. Indeed a spill could even originate in the state waters surrounding Seal Rocks, which is outside of the APSC region of responsibility, and migrate hundreds of miles through state waters in the GOA and there has been neither study of the conditions nor evaluation of equipment appropriate for an RPS response in the state waters of the GOA where Permittee refuses to respond unless they have a 10 to 12 hour window of 6-foot seas or less. Indeed, where Permittee refuses to disclose their course tracks and reserve the right to transit in all waters outside of Hinchinbrook Entrance, it should be assumed that laden tankers transit to the outer boundaries of the ROO(s) entirely in state waters and that the RPS requirement applies equally throughout the ROO(s) defined in regulation. If it is later revealed that there are distinct traffic patterns in federal waters and surface currents along those routes show predictable patterns of potential spill migration, the time it would take for the tanker or its spilled oil to migrate from the specified limited course tracks to state waters could be legitimately added to the 72-hour RPS requirement.

Issue 2: Prevention Escort System - Intended Purpose

Statement of Issue: Neither Permittee's C-plan nor DEC documents have demonstrated that escorts can meet the performance standard and intended purpose of preventing groundings and collisions at the speeds and under the waterway, sea, wind, current and traffic conditions that the tankers experience in Prince William Sound. The Approval Criteria in 18 AAC 75.445(m) explicitly requires this proof in that it states: "**The plan** must demonstrate that the applicant meets all applicable requirements of 18 AAC 75.005 -18 AAC 75.085 and 18 AAC 75.425(e)(2).", *emphasis added.* 18 AAC 75.007(b) specifically requires "A vessel…subject to the applicable requirements of this chapter must be equipped and operated in accordance with this chapter and other state and federal law applicable to the prevention of an oil discharge." The escort performance standard is promulgated in 18 AAC 75.027(e) which states: "A tank vessel under escort by another vessel must, at all times, be operated in a manner that permits the escort vessel to be available immediately to provide the intended assistance to the tank vessel". Neither DEC statutes nor regulations define the phrase "intended assistance" but federal regulations do define escort purpose and performance standards:

> "**33 CFR § 168.01 Purpose.** (a) …The escort vessels will be immediately available to influence the tankers' speed and course in the event of a steering or propulsion equipment failure, thereby reducing the possibility of groundings or collisions.
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> **33 CFR § 168.50 Performance and operational requirements.** (a) Except as provided in paragraph (c) of §168.10, at all times during the escort transit each tanker to which this part applies:
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> (3) Must not exceed a speed beyond which the escort vessels can reasonably be expected ***to safely bring the tanker under control*** within the navigational limits of the waterway, taking into consideration ambient sea and weather conditions, surrounding vessel traffic, hazards, and other factors that may reduce the available sea room.", *emphasis added.*

When the approval criteria and performance standards are taken together they necessarily require that the C-plans demonstrate that all possible escort combinations used with all regulated tankers must be capable of timely generating the necessary forces "***to safely bring the tanker under control***" as intended by federal law. The mere statement that there are escorts available in several possible combinations and that they will attempt to provide assistance to tankers using specific maneuvers does not demonstrate that any set of escorts performing those maneuvers could, in fact, safely bring the tanker under control given all potential grounding or collision scenarios. DEC has unequivocally refused to apply 18 AAC 75.445(m) in its Informal Review Decision at page 10 where it states: "Regulations do not require that "proof' of escort capabilities be provided in the plan." DEC instead insists that such proof is only part of a non-reviewable, non-public exercise function where it states: "Escort capabilities are verified by the Department through evaluation of training and exercises." While DEC may make any evaluations it chooses in exercises, it may not approve Permittees' C-plans unless and until Permittees demonstrate that they comply with the cited performance standard in "**The plan**…" as required by the approval criteria. If DEC contends

that the exercises are proof of performance standard compliance, it must require that proof in the C-plan and otherwise produce all relevant documents pursuant to requestor's public documents requests and as part of the requested C-plan review record. The fact that DEC chose not to require any proof of escort performance in the C-plan and has not produced any exercise data pursuant to public document requests is prima facie evidence that DEC intended to unlawfully exempt Permittee from compliance with the performance standard in 18 AAC 75.027(e) when it approved the instant contested C-plans in violation of 18 AAC 75.445(m). Although this total lack of escort performance evaluation in any C-plan review documents shows DEC intent to evade application of approval criteria, the total lack of any analysis to date of escort performance to prevent collisions is particularly egregious. DEC's contention that "Escort capabilities are verified by the Department through evaluation of training and exercises" unlawfully suggests that DEC can divorce compliance with performance standards from the public C-plan review in direct contravention of 18 AAC 75.445(m), the public review procedure in 18 AAC 75.445 and the Public Documents Act.

Where section .007(b) requires compliance with all federal spill prevention measures, it was incumbent upon DEC to insure compliance with the new USCG salvage, firefighting and lightering regulations or require amendment of the C-plan in a timely manner prior to the effective date of the regulations in 2011. Although DEC did recognize the pending regulatory requirement, it failed to recognize the fact that the duration of the permit necessarily required proof of compliance with new regulations during its pendency to retain certification, which would necessitate either a limited permit duration or timely amendment subject to public review of compliance with USCG spill prevention requirements. DEC's failure to conditionally approve the permit with either of these constraints shows a blatant disregard of section .007(b). Without any description of the tankers and their critical components, a comprehensive analysis of the ability of the tugs to safely bring the tanker under control cannot be performed and the permit is invalid. In this and all subsequent all instances where specific tanker information is required to conduct a proper investigation of compliance, DEC must require Permittee to submit that material information for public review and a complete mandated analysis of compliance must be performed by DEC prior to permit approval. DEC must otherwise condition approval in such a manner as to insure that compliance would not be exceeded[3].

Issue 3: Prevention Escort System - Operation of Tankers within the Limits of Escort Capabilities

Statement of Issue: The requestor argues that the contingency plan does not ensure that plan holder's tankers will operate within the limits of their escorts as stipulated in State of Alaska regulations. The requestor argues that the plan holder must provide a comprehensive parametric analysis of escort capability under worst case environmental conditions given the stated tanker and escort operating procedures and taking into account any cross channel currents or eddies as well as newly discovered faster currents and barrier jets in

[3] DEC could potentially specify tanker parameters, (e.g. maximum allowable resistance to towing), and critical components, (e.g. minimum allowable bollard and chock breaking strength for specific size tankers), that would not exceed the ability of specific tug combinations to bring the tanker safely under control given worst case tanker disablement circumstances. DEC has suggested this type of statement of prequalified compliance regarding maximum cargo capacity from Tesoro in its attempt to certify unspecified tankers for permitting.

Hinchinbrook Entrance that may affect tanker momentum towards shore that were not previously considered or were improperly discounted in formulating escort selection and tanker/escort transit and assistance procedures. This issue is an expansion of the prior issue in that it seeks to address specific defects in formulation of the escort selection, escort assistance procedures and restrictions on tanker speeds and course tracks beyond the fact that demonstration of escort compliance with performance standards was absent from the C-plan review documents. The DEC response to this issue in its Informal Review Decision, at pp. 10-11, suggests that it has worked with Permittees for years to evaluate escort performance "…by reviewing training procedures and exercises and designing operational drills". Although neither DEC nor Permittees have ever produced a single drill document in any C-plan review to date, requestor has reviewed escort drill reports prepared by the PWS Regional Citizens Advisory Council, PWS RCAC, and has reviewed the Disabled Tanker Towing Study, DTTS, as produced in prior C-plan reviews as supposed proof of performance standard compliance. The instant C-plan, as well as prior iterations, failed to properly restrict tanker course tracks and speeds to prevent powered groundings from the Western Half of the outbound traffic lane in Valdez Arm as shown in the simulations performed in the DTTS parametric study. This study, as well as all escort drills, failed to measure or account for the effect of cross currents or eddies in any area studied, thus excluding a critical factor necessary to a proper evaluation of escort performance. Moreover, the DTTS used the prior Coast Pilot current value of 1 knot parallel to shore in its Hinchinbrook Entrance simulations where the Pilot has been recently updated to show currents of 2.5 knots and other data collection has shown the presence of high cross currents, thereby invalidating DTTS assumptions and substantially increasing the need for higher escort performance capability. Neither the DTTS nor any escort drill analysis to date shows the escort capability needed to safely prevent a collision with any of the large, high-speed vessels that concurrently transit the region with laden tankers. Although these defects in parametric study and drills would be sufficient to require a re-evaluation of escort performance needs, the presence of unrecorded barrier jets in the Entrance revealed by the SeaBulk Pride incident, shows that the assumptions of closure conditions as the worst case conditions in determining escort performance needs was grossly underestimating worst case conditions due to the lack of properly positioned weather collection facilities necessary to warn tankers of impending severe conditions. The presence of barrier jet effects in this area is not a new, freak occurrence and the reporting of its long-term presence has been unlawfully suppressed by Permittee and its response contractors to evade costs associated with required escort performance. None of the drills conducted to date have been fully performed at night or in worst case conditions and no extrapolations of drill results have been provided to show that escort drill performance would in fact allow for bringing the tanker safely under control in more severe conditions regularly experienced during tanker transits. Indeed some drill reports produced by the PWS RCAC suggest that tanker arrest may be unsuccessful in conditions well below worst case conditions at particularly problematic locations. In short, there are numerous defects in the escort studies and drills performed to date that preclude a valid determination of the needs for escort capability under worst case conditions, but not withstanding this absence of a reliable and fair investigation, both studies and drills indicate that the approved restrictions on tanker speeds and course tracks are insufficient to prevent powered groundings in Valdez Arm, particularly near Buoy

#9 with the planned tanker arrest procedures that are distinctly less capable, albeit safer, than those envisioned in the DTTS[4]. There has been no attempt to offset the need for safer tanker arrest procedures with more stringent restrictions on tanker speeds and course tracks that were too lax in the first instance. Without any description of the tankers and their critical components, a comprehensive analysis of the ability of the tugs to safely bring the tanker under control cannot be performed and the permit is invalid.

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

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

> "The third tier of the definition, set out in 18 AAC 75.445(k)(3), covers remaining technology not subject to either the response planning standards or the prevention performance standards; in this tier, DEC determines whether the best available technology requirement has been met by undertaking a case-by-case evaluation based on specified criteria. Thus, the challenged regulation uses individualized analysis to determine compliance with the best available technology requirement only for those residual classes of technology included in the third tier of the definition…He argues that the legislature intended to require a state of the art quality of response equipment that necessarily requires a comparative analysis of available technologies an individualized analysis like one prescribed for third-tier technology in 18 AAC 75.445(k)(3)… Hence DEC urges us to recognize that, given the discretion delegated to it by the legislature, either a standards-based test like those specified in the first two tiers of the challenged regulation or an individualized analysis like the one set out in the third tier can be used to determine what is best available technology…Correspondingly, under 18 AAC 75.445(k)(2), all oil pollution prevention technology that is not expressly made subject to individualized best available technology review is automatically deemed best as long as it can satisfy that is, comply with the oil pollution prevention performance standards specified in 18

[4] 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.

AAC 75.005 - .080.", *Lakosh v. Alaska Department of Environmental Conservation et. al.* 49 P.3rd 1111 (Alaska 2002)

DEC has long practiced individual tug and tug type BAT comparative analyses in prior approvals of: conventional tugs vs. ERVs as close escorts; Theriot Class vs. Sea Swift Class for primary escort; the *Protector vs.* Theriot Class for primary escort, *ETT* vs. Theriot Class for primary escort, *Gulf Service* vs. Theriot Class for Hinchinbrook Entrance escort and *PRT* vs. Gulf Service for Hinchinbrook Entrance escort but has chosen to unlawfully abandon this universally understood individualized analysis required by section .445(k)(3) for the unprecedented, unsupported and internally inconsistent justification for an escort system comparison applied in this C-plan review. DEC's disregard and abandonment of its own longstanding practice, its own arguments in BAT litigation and before the legislature and the findings of the Supreme Court demonstrate a blatantly deliberate course of action to deceitfully delay justice in this matter in collusion with Permittees who also participated at every step of these proceedings and therefore also know better than to submit a comparative escort system analysis. Although DEC has conducted individualized escort analyses in the past, there have been defects in the methodology that must be corrected on remand for a proper comparative analysis. The clear commonly understood meaning of "best" requires the selection of the superlative escort for any given escorting purpose where there are critical parameters of that function that are distinct from other escort functions. This determination of the superlative escort must necessarily follow a thorough examination and determination of the performance standard for each escort function in the escort system. Once the performance standard is determined, the "best" tug out of all qualifying escorts[5] must be selected as the exclusive tug qualified for that particular escort service. Although there were defects in the DTTS analyses, the study clearly determined that disabled tanker steering at high speed was the most effective tanker arrest maneuver and, as such, the primary escort role must be assigned to the tug that can best perform indirect mode arrest at speeds over 7 knots to generate very high dynamic steering forces. All parametric analyses and drill results show that the Voith Schneider Propulsion system is the preferred technology for this critical function that would be shown as even more critical when the noticeably absent analyses of averting high speed collisions with cruise ships and ferries is conducted pursuant to the performance standard requirements in 18 AAC 75.027(e) and 33 CFR §§ 168.01(a) and .50(a)(3). The requirement that escorts be "…immediately available…" necessarily requires that the "best" VSP escort be continuously tethered throughout PWS because the threat of collision is continuous and there has never been any legitimate argument proffered for not maintaining the tether. The performance capability requirements of secondary escorts has been shown to vary with location in PWS with the critical factor being the ability to generate very high direct towing forces at low speed, particularly in Hinchinbrook Entrance, HE, and the GOA where the more severe wind, wave and current conditions demand higher bollard pull capability. Although the Theriot Class tugs were previously disqualified for the HE escort duty in favor of the Gulf Service and the Gulf Service later disqualified in favor of the

[5] 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.

PRT, the Theriot Class was still unlawfully permitted to perform this duty and was assigned to this duty 47% of the days in 2006 violating both performance standards and BAT requirements. This same type of subversion of BAT requirements has occurred for secondary escort in the rest of PWS where the PRT has been definitively determined to be more qualified for the task in the HE tug evaluations. Both the PWS RCAC and Requestor suggested consideration of tug designs that were actually built and operating vessels performing functions equivalent to the salvage towing role assigned to the HE Tug. Lakosh additionally suggested that the salvage towing function and the primary escort role could be combined in a 15,000 hp TractorPlus tug design, a tug type designed by Glosten Associates and built/operated by Foss Maritime, albeit as a smaller 5,000 hp tug. Glosten even provided a proposal to prepare the same type of design concept drawings as were considered for the ETT and PRT to specifications that demonstrated capabilities superior to the ETT or PRT and likely more effective for salvage towing as the larger salvage tug designs presented for consideration given the need to perform towline connections in severe barrier jet conditions with a highly maneuverable tug. Moreover, Permittees materially omitted one of the two PRT designs that Crowley submitted for consideration and DEC suppressed one of the two ETT designs that Glosten submitted, both more powerful than the designs submitted and approved. DEC's and Permittee suppression of valid designs and the new arbitrary definition of the phrase "available technology" as used to disqualify proven escort concept designs of the type previously considered and approved, along with the capricious dismissal of working salvage vessel designs shows a clear intent to unlawfully restrict the comparative analyses and unlawfully approve escorts that do not meet the mandatory BAT requirement. These subversions of DEC's lawful duty were exacerbated by its failure to fairly consider the need for an additional HE tug to prevent the need to regularly require the service of the disqualified Theriot Class tug during regular maintenance outages of PRTs and to otherwise satisfy the new salvage and emergency towing requirement in pending USCG regulations. As stated above, the fact that tug use in lightering and firefighting are federal spill prevention measures regulated under section .007(b) also subjects tugs to a comparative "best technology" analysis pursuant to 18 AAC 75.445(k)(3). Without any description of the tankers and their critical components, a comprehensive BAT analysis cannot be performed and the permit is invalid.

Issue 5: Prevention Escort System and SERVS Equipment List - Sufficiency of Escorts and Sentinel Tugs to Concurrently Serve Maximum Tanker Escorting, Salvage, Lightering, RPS Response Duties, Firefighting and Docking Duties Given that they are Multiple Mutually Exclusive Tug Duties

Statement of Issue: The requestor argued that the contingency plans must demonstrate that the eleven tug fleet is able to satisfy all the tug needs of the prevention section, the RPS response scenario and the VMT C-Plan. Plan holders are required to individually meet the conditions of any and all applicable plans in their area of operation. The Valdez Marine Terminal Oil Discharge Prevention and Contingency Plan is an additional applicable C-plan in that execution of the RPS response scenario in the Tanker C-plans necessitates utilizing the VMT facilities to timely deploy the Tanker(s) of Opportunity, TOO, (i.e. the required TOO(s) must either deballast and be dispatched from the VMT to the spill response or must dock, deballast and then be dispatched if it is not already docked at the time of the incident.

Whenever there is a tanker at the VMT, its C-plan requires a fire tug to be available and this tug could not be transferred to a tanker spill response because **it is a safety and spill prevention asset** that is no more transferrable to spill response than the escorts in the Tanker C-plans at question. Moreover, once a TOO has deballasted at the VMT, a minimum of two docking tugs are required by the VMT C-plan to undock tankers and these tugs are again **safety and spill prevention assets** that **are not transferrable to spill response** pursuant to 18 AAC 75.470. DEC has to date unlawfully considered these VMT spill prevention assets transferrable during a tanker spill response despite the fact they are **the same tugs listed in both sets of C-plans**. Even if a deballasted TOO could legally[6] be made timely available without having to dock at, or undock from the VMT, DEC would still have to explicitly prohibit tankers from docking at the VMT if four tugs were concurrently occupied performing close escort and/or sentinel escort duty to prevent the concurrent demand for the fire tug during a spill response. DEC and Permittee have additionally colluded[7] to ignore the fact that the need for sentinel tug(s) often create additional non-transferable tug demands during long weather closures when multiple tankers tend to accumulate at Knolls Head requiring one or more tugs in that vicinity as well as a sentinel(s) in other parts of PWS where unladen tankers may also be in transit concurrent with laden tanker(s) in transit. Tanker traffic logs must be thoroughly examined to determine maximum tug demand to either require additional tugs or appropriately restrict tanker traffic within the limits of tug availability. DEC cannot evade its duty to insure proper planning for the necessary amount of tugs available by simply deferring the decision and an enforcement issue only to be considered between approvals, particularly where DEC has been shown to not enforce C-plan violations and evade the issue when notified, (see fn 6). Ultimately, the question of satisfying tug quantity must be performed after the comparative BAT analyses referenced above establishes the quality of tug needed for each distinct category of operation so that there are enough tugs to suit both BAT and generic categories without conflict and with acceptable replacement tugs available in each category for planned maintenance outages.

Issue 6: BAT Analysis and Equipment Listing for Stopping a Spill at its Source and Preventing its Further Spread

Statement of Issue: The requestor claimed that the plan holder's BAT analysis for technologies specifically designed to control the source of a spill and prevent its further spread and lighter a stricken tanker did not meet the regulatory requirements of 18 AAC 75.445(k)(3); 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 viable means of controlling the spill source and preventing the further spread of spills and then require Permittee to implement the proper use of the best technologies available. The most egregious example of DEC's dereliction of duty in this matter is related to the use of boom to prevent the spread of the spill from the vicinity of the tanker. DEC initially recognized the validity of Lakosh's prior RFAI on this matter by

[6] 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.

[7] 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.

submitting it to Permittees but when they refused to provide the required BAT analysis giving the specious and unsubstantiated argument that booming leaking tankers is not industry practice, DEC simply abandoned its duty to fully investigate the use of boom for this purpose and select the best boom and practice for use with PWS tankers. Not only was the Exxon Valdez boomed, but Permittees still maintain the practice booming their tankers at every visit to the VMT. If there were, in fact, a valid justification for not booming tankers it was DEC's duty to further investigate the basis for that justification given the continuing practice of booming tankers at VMT berths. DEC's failure to further investigate the practice and/or amend the practice of booming tankers at the VMT to contain spills demonstrates that DEC intended to arbitrarily abandon the mandated investigation in collusion with Permittees efforts to gain an unlawful subsidy of its illegal operations. All responsible government agencies and Exxon itself knew that booming the leaking tanker could substantially impede the spread of that spill but because DEC has abandoned its duty to evaluate containment booming in accordance with the cited applicable regulations, we will have no containment at the next spill instead of merely weak/small boom with insufficient anchoring as was the case win the EVOS. The de facto conclusion derived from DEC's abandonment of this issue is that DEC has concluded that no boom available is capable of controlling or preventing the spread of a spill. In that case Permittees could not meet the RPS requirement, because oil could not be contained for skimmer to recover, nor could boom exclude oil from sensitive areas, both of which are prerequisites to permit approval. Put simply, if no boom can control the spread of oil, which should preclude laden tankers from transiting Alaskan waters. If however, boom can control the spread of oil, DEC is mandated to require Permittee to: comparatively analyze all available boom and supporting equipment appropriate for use in severe ocean conditions; select the best boom and supporting equipment for worst case conditions; develop the most effective deployment tactics under RMROL conditions of the most capable deployment vessels, and; clearly delineate the deployment vessels, boom, supporting equipment and tactics in the C-plan so that responders can timely implement the booming plan without hesitation when needed to prevent the further spreading of the spill from the tanker source. If DEC is concerned that a fire hazard may develop in low wind conditions, it could/must require any combination of several different measures to abate that hazard such as: applying AFFF; maintaining a fire watch with ABS classed fire tugs; using wind generators or fire monitors to disperse vapors; limiting ignition sources; creating a large enough boomed area to keep vapors away from potential ignition sources; move a large volume of contained oil away from the tanker and reestablishing a new containment boom or otherwise release the oil when vapors accumulate to hazardous levels. Given these safety measures, which must be implemented to some extent in any event, deployment and maintenance of containment boom is no more impractical that deployment of deflection boom at sensitive areas. DEC was similarly derelict in its duty to fairly assess and require BAT for lightering, and more generally all relevant salvage measures[8]. DEC's response to this issue in its Informal Review Decision fails to recognize that lightering is listed as the

[8] 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.

primary source control measure in the C-plan and is otherwise required as a federal spill prevention measure, thus subjecting all technology critical to the lightering effort, whether it be onboard the tanker or part of the lightering task force, to the individualized analyses required by 445(k)(3). There was absolutely no attempt in the C-plan BAT section to describe the capabilities or RMROL of the lightering vessels and equipment, nor were any of the other 445(k)(3) criteria disclosed and applied in a critical comparison to any other of the numerous vessels and equipment available for such purposes. DEC's decision was therefore a clear obstruction of justice in that it materially misrepresented the source control function of lightering and falsely denied the applicability of .445(k)(3). Other source control procedures employed by salvage contractors worldwide were similarly ignored. DEC's arbitrary exclusion of effective source control and spill containment measures from the mandated BAT comparative analyses shows a clear intent to unlawfully subsidize Permittee's illegal operations by allowing operation with substandard equipment subsequent to an unfair investigation.

Issue 7: BAT Analyses for Leak Detection and Spill Tracking

Statement of Issue: The requestor represented that the plan holder's BAT analysis for technologies specifically designed to detect a discharge and track/forecast a spill's trajectory did not meet the regulatory requirements of 18 AAC 75.027(d); .425(e)(1)(F)(iv); 75.425(e)(2)(E); 75.425(e)(4)(A)(iii); 75.445(d)(3) and 75.445(k)(3). Requestor argues that DEC failed to fairly investigate and require the proper equipment in three related but distinct categories of technology: spill detection; trajectory forecasting and real-time spill surveillance and tracking on water. The first two categories are subject to an individualized BAT analysis and approval. There was not sufficient description regarding the sensitivity, accuracy or capability of the technologies referenced in the C-plan or their alternatives and no definitive findings were issued by DEC to establish which of the multiple technologies were deemed "best" for detecting leaks from tankers or trajectory forecasting of the spill thereafter. DEC's categorical acceptance of a conglomeration of ill-defined technologies demonstrates an arbitrary and capricious approval of the C-plan where any legitimate investigation and approval would necessarily have to analyze parameters critical to the functionality of each technology relative efficacy of any competing technology. Although real-time on water surveillance of spills is arguably not subject to a full, individualized BAT analysis, the specified equipment must minimally be available, appropriate and reliable for the task. This real-time spill surveillance must be continuously conducted 24/7 under Instrument Rated weather conditions for up to several hundred miles[9] from Valdez. The specified helicopter with one IR camera is clearly not reliable or appropriate to perform this duty due to a lack of established all weather capability and flight range. The IR camera has not been verified as a reliable oil spill detector/tracker as subject to approval criteria in 18 AAC 75.445(d)(3). There are numerous aircraft with dedicated sensor packages that are used worldwide for this specific ocean surveillance but DEC refused consider and require these proven options in an unlawful deference to Permittee's insufficient proffering. Recent comparisons of trajectory models and drift buoy trajectories have shown broad discrepancies in surface water movements with buoys traveling much faster and the buoys themselves are

[9] The EVOS migrated well past Kodiak Island covering hundreds of square miles of ocean .

known to underestimate actual oil movement and spreading. These developments demonstrate and increased demand and reliance upon a more effective and reliable real-time spill surveillance capability for management of response assets.

Issue 8: Unfair Investigation, Unlawful constraint of Speech, Failure to Provide Equal Protection Under the Law and Denial of Due Process

Statement of Issue: DEC has refused to produce multiple material documents and unlawfully constrained speech during the C-plan's public review necessarily resulting in denial of due process. This is a continuing abuse of process and unfair investigations that extends back 15 years in duration. Suppression of material documents in public reviews, adjudicatory hearings and in courts has been a long-standing illegal practice of DEC but now DEC has taken to construction of arbitrary rules for submission of comments and has actively concealed those new rules to preclude timely submission of amended comment and evidence. Mr. Lakosh submitted his comments on September 25th but DEC only notified Mr. Lakosh of its previously unpublished rules for commenting after the close of the comment period almost two months later in a blatant attempt to unconstitutionally limit his comments. Moreover, DEC's justification for it limits upon speech have no legal validity or rational basis. DEC first claims that it can suppress speech on the basis that the incorporated comment was only relevant to another C-plan: "they related to a different plan in a different operating area which was reliant on a different response system operated by a different primary response action contractor". This is clearly a specious an unfounded argument where the referenced comments are replete with cited regulatory requirements and review methodology that is applicable to all c-plans. DEC's refusal to consider regulations and methodology that require state-wide application shows a clear intent to deny its citizens equal protection under the law. DEC then states that it was not required to search for referenced comments but the comments were all sent to, under active consideration by and in possession of John Kotula so no "search" was necessary. Moreover, if the referenced comments were somehow unlawfully destroyed, it was incumbent upon Mr. Kotula to restore the administrative record by contacting Mr. Lakosh for copies, which would have taken no more than two minutes in an email requesting the documents. Mr. Lakosh and DEC engaged in multiple phone conversations and email correspondence during the comment period after submission of comments and DEC made no mention of any new rules restricting comments or difficulty in finding referenced comments, so the belated complaints can only be viewed as a deliberate and unlawful suppression of speech in order to prevent a fair investigation and equal protection under law. DEC also claimed that incorporated comments were disqualified from consideration because "…comments or RFAIs are specific to the plan under review." This rational for exclusion of comments necessarily implies that the sections of the plan previously commented upon and/or the applicable law changed since the comments were submitted. Neither the applicable law nor the C-plan sections commented upon changed since the 2007 C-plan review. If DEC's arbitrary rule to provide separate comments for each individual plan under review were valid, commenters citing defects in the APSC Core Plan common to all five PWS Permittees would be compelled to file five identical comments addressing the five individual permits and this is sheer nonsense that DEC has correctly never applied until now. The fact that the BPOSC C-plan permit application was filed two years after the others does not alter the fact that they used the same Core Plan that is the

primary subject of both sets of comments and appeals. DEC has not provided any compelling state interest to override Lakosh's free speech rights, provided no cite to published commenting regulations or proffered a rational basis that would allow it to deny fair consideration of the incorporated documents that are clearly still relevant to the instant C-plan. Furthermore, DEC's obligation under the constitution to preserve requestor's rights to free speech engendered an obligation to provide timely notice of previously unpublished restrictions on comments, but DEC did not provide such notice to Lakosh in the 43 days between the submission of comments and the close of the public comment period. If its positions had not changed, DEC could have simply cited its latest positions on the incorporated issues as proffered in the Informal Review and challenge to the pending Request for Hearing but it instead chose to unlawfully curtail Lakosh's speech. The proffered irrational excuse for denial of consideration is therefore completely specious and proffered only to unlawfully deny the material free speech challenges of Mr. Lakosh to the instant C-plan.

The refusal of DEC to fully consider Mr. Lakosh's comments on the instant C-plan requires that he express his grievances on the latest known position of DEC and the Permittee on legal matters as applicable to the unchanged facts of the 2007 and 2009 C-plans that are all still under administrative dispute as presented herein and in the still pending Request for Hearing on the 2007 C-plans.

The first category of documents that all parties have unequivocally agreed are material to the contested C-plans is documents associated with spill prevention and response drills. The 2/15/08 comments of the Response Planning Group repeatedly asserts that the regulatory compliance of the instant contested C-plan decision was verified by DEC through drills and exercises: "The ODPCP meets all regulatory requirements and the agency has verified compliance through information provided in the ODPCP, training, drills, exercises, and review of actual events.", RPG COMMENTS at p. 7. Indeed, the RPG COMMENTS is replete with references to the importance of drills to determining the efficacy of its C-plans:

> "Plan holders demonstrate their ability to carry out the commitments of the ODPCP as required by AS 46.04.030(e) through training programs; prevention and response drills and exercises; and verifying inventories of equipment, supplies and other resources s.et out in the approved plan, (at p. 1),…Plan holders continuously assess means of improving the ODPCP, and periodically submit applications to DEC to amend the plan to reflect these improvements. These changes may result from, among other things, findings associated with internal assessments, training, drills and exercises conducted by plan holders or SERVS, and those initiated by DEC, (at p. 2),…In addition to drills and exercises conducted by plan holders, DEC is specifically authorized to, among other things, conduct its own drills and exercises to verify that the plan holder is capable of carrying out the plan, (at p. 7),…Vessel crews conduct training, drills and exercises periodically to test crew and vessel performance. DEC has determined that the PWS Escort System as currently configured is BAT, (at p. 9),…Instead of demonstrating how the plans do not comply with the regulations, he argues only that the drill reports are not in the plan review documents. The regulations, however, only require a description of prevention measures in place that demonstrate compliance with the regulations. The agency is separately authorized to verify capability through drills, exercises, etc. There is no requirement that all of the

drill reports, or any other information relating to the agency's compliance efforts, be in the plan, (at p. 10),…Although these obligations have since been satisfied; protection of ESAs and areas of public concern will be a continued focus of plan holders during the current plan period in planning, drills and exercises, and in actually testing geographic response strategies that have already been identified and developed", (at p. 23).

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

"The Department does not make its decision to approve a plan based solely on plan holder verification of every element in the plan. Rather, the Department's decision is made based upon the reasonableness of assertions and evidence that certain essential resources and practices are securely in place. The Department and industry complete many follow-up field tasks while a plan is in effect and being utilized. Field tasks are completed to ensure that response and prevention personnel are trained and ready and to verify the adequacy of the plan and the personnel that carry out the plan and include, but are not limited to: planned and unannounced inspections; planned and unannounced oil spill response drills; regular evaluation of field equipment deployment exercises; and verification of equipment maintenance and training records. The Department may require any of the above to occur and may evaluate similar activities initiated by industry.

Compliance with the contingency plans and any amendments to the contingency plans, including spot charter amendments, is based on the contents of the plans and the Department's compliance verification activities as described above, (at p. 5),…In addition to training carried out in Prince William Sound, contracted fishing vessels are annually trained in spill response tactics in and near downstream communities. Additional drills and exercises have been, and will continue to be, conducted in downstream communities to test the plan holders' ability to respond to oil entering those areas, (at p. 9),... Drills have been conducted to test the ability of plan holders to respond to a spill in darkness, using both open water and near shore response tactics. Most recently, in September 2007, the Department initiated a drill that focused, in part, on the ability of SERVS and a full task force of 27 contracted fishing vessels to carry out near shore oil recovery and shoreline protection tactics into after-dark hours. Information on oil movements was gathered from, among other means, simulated over flights, tracking buoy data and projected trajectories. The Group Supervisor and Task Force Leader were then able to use this information to predict oil movements after nightfall and successfully position resources to facilitate continued oil recovery and resource protection tactics safely. Given that the first near shore task forces are not required to be operational until hour 24 of a spill response, the data provided to the drill leadership team is predictive of that which would be available to them during

a real response, (at p. 12),... Additionally, the Department will continue to work with plan holders to ensure that open water and near shore response operations during hours of darkness will continue to be a focus of future drills and exercises, (at pp. 12-13),...Drills and exercises are conducted on a routine basis to test the ability of escort tugs to effect a save of a stricken tanker, including under RMROL conditions at Hinchinbrook Entrance. The Department is satisfied with the ability of the escort system to effect a save throughout Prince William Sound, including at Hinchinbrook Entrance, (at p. 16),...As noted throughout this findings document and in the letter of approval for this plan, there are many topics that have been identified for verification through drills and exercises, (at p. 18),...A segment of the above training includes many drills and exercises in which the escort vessels demonstrate their ability to control a laden tanker in the event of a steering or propulsion failure. This ability was proven in 2001 when there was a real-time incident in which a tethered primary tug was able to prevent an accident by stopping a laden tanker underway in Valdez Narrows before it collided with a fishing vessel's deployed net, (at p. 20),...The Department intends to validate the overall appropriateness of the wildlife response program by incorporating wildlife-specific objectives into future drills and exercises, (at p. 21),... For a few topics, such as those described below, the plan met regulatory requirements for oil discharge prevention and contingency planning, but verification of the plan's contents will be conducted by the Department through routine inspections, drills and exercises, (at pp. 22-23),... Department intends to verify the plan holders' ability to carry out the small vessel decontamination procedures outlined in the SERVS Technical Manual through drills and exercises, (at p. 23),...However, the Department intends to emphasize waste management objectives in future drills and exercises, (at p. 23),...Finally, the Department routinely examines the overall response capabilities through drills and exercises", (at p. 23).

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

"DEC has voiced its intent to consider documents beyond those provided for public review in its permit approval process and I hereby request that all documents that are material to the approval decision be specified and publically available for review. If DEC will not make these documents freely available as an essential element of the public review process, I hereby request all material information be made available for inspection and copying pursuant to the Public Documents Act and that such information be made available with sufficient time for review prior to the end of the public comment period.", Lakosh public comments on 9/21/07. "DEC has voiced its intent to consider documents beyond those provided for public review in its permit approval process and I my prior request that all documents that are material to the approval decision be specified and publically available for review has been ignored. Consideration of additional documents by DEC, other than those publically available with the C-plans at regional repositories would likewise constitute unfair treatment and trial by surprise should these secret/unavailable documents appear in the certified

administrative record.", Lakosh public comments on 10/15/07. "I looked for such proof in the C-plans, the accompanying documents or any other documents that DEC might consider by submitting my request for such documentation under the Public Documents Act but none was found or proffered.", Request for Informal Review at p. 5-6. "DEC tries to infer compliance by stating: "…drills and exercises in which the escort vessels demonstrate their ability to control a laden tanker in the event of a steering or propulsion failure", but the Plan contains no drill or exercise reports and none were proffered pursuant to my Public Documents Act request. DEC then tries to assert proof of compliance by merely referencing an incident in 2001 that did not appear in any part of applicants' submission or in any proffered document stating: "This ability was proven in 2001 when there was a real-time incident in which a tethered primary tug was able to prevent an accident by stopping a laden tanker underway in Valdez Narrows before it collided with a fishing vessel's deployed net". This bald assertion is wholly unsubstantiated, without any description of the tug, tanker, currents, wind, waves or distance needed to stop, and is absurd on its face where the speed limit is 6 knots in Valdez Narrows, the tug would be tethered and the net was stationary whereas the closing speed between a tanker and cruise ship in the Central Sound could exceed 37 knots and the primary tug would not be tethered. DEC's attempt to use this undocumented and barely described incident to assert compliance under all conditions was clearly "grasping at straws" in a desperate attempt to explain away the total lack of reliable data in the C-plans upon which to assess compliance with the performance standard.", Request for Informal Review at p. 6. "Documents pertinent to the Informal Review would necessarily include the entire administrative record that is solely in the possession of DEC. The review of the entire record is required where I claim that the necessary information is not in the record and reference to documents made in DEC Findings were not provided even subsequent to my Public Documents Act request in my 10/15/07, 8/10/09 or 9/25/09 comments/requests:

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

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

It is the response to this last request for access to the administrative record that establishes a clear bias against Requestor where the Director knew from the DEC Findings, Request for Informal Review, RPG COMMENTS and the 2/14/08 email that documents associated with drills and events were a matter of factual contention between the indispensable parties, yet the director decided to withhold these documents and other record documents in order to disadvantage Requestor relative to DEC and the Permittees who participated in the drills and have access to all drill documents: "The only additional information being considered for the informal review are the comments submitted by the interested parties (enclosed) and whatever responsive brief you may submit.", 2/21/08 letter of Director Dietrick. The DEC Informal Review Decision shows a continuing effort to deny requestor a fair investigation and due process with the specious argument that drills are a separate regulatory function that are not required to be included in the C-plans:

"Regulations Regarding Discharge Exercises

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

Regulations Regarding Inspections

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

These statements show a clear intent to obstruct justice, deny due process and conduct an unfair investigation because it is a carefully crafted evasion of requestors Public Document Request and request to disclose the administrative record of documents DEC considered in its approval and not what was required in the C-plan itself. There is no doubt that documents used and generated in drills or inspections are part of a separate regulatory function but when those documents are considered in an approval process, they are then subject to disclosure in the administrative record or any Public Documents Request seeking disclosure of that record. Director Dietrick's Decision continues to assert that those events and their associated documents were, in fact, used in DEC's decision making process for its Permit approvals:

"The Department regularly examines tanker operations under escort and verifies the escort system's ability to meet its intended purpose as defined in the plan by reviewing training procedures and exercises and designing operational drills… 18 AAC 75.425(e)(4)(A) requires that escort vessels be evaluated for BAT under the criteria outlined in 18 AAC 75.445(k)(3). The Department clearly defined its approach to the application of BAT regulations to the escort system in the August 1995 Findings and Response to Comments: "the Department will work with the various Prince William Sound stakeholders to define various criteria that will form the basis for selecting or designing an escort system to meet the requirement of BAT. Once these criteria are established, the alternative equipment and escort systems that can meet these criteria would constitute BAT. Specific equipment provides only part of the system's capability. The equipment's use, training, drills, experience, and allowances for margins of safety are the factors in system performance delivery. In essence, BAT for escorts becomes a system comprised of all these elements." This finding with regard to the escort system was not challenged following approval of the 1995 plan. However, in conjunction with response equipment, use of a system approach in conducting a BAT technology evaluation for the 1995 plan was challenged. In his 1998 final decision on the 1995 plan adjudicatory hearing, Hearing Officer Johnson upheld the Department's BAT evaluation of response equipment as a complete system. In addition to the 2007 plan renewal, the approach of reviewing escorts as a system was used during the 1999 and 2002 plan renewals. During each renewal this approach for reviewing escort BAT was considered, refined and

> subjected to a public review. Each time the BAT review has been improved and approved. This topic was fully discussed in the 2007 Findings Document… To meet the requirements of 18 AAC 75.445(d)(5), the Department and stakeholders decided during development of the Anvil Study that "average" Prince William Sound conditions would be used in the worst case discharge scenario. Average conditions were determined to be 1.7 meter sea height and 18 knot winds for open water recovery. The requestor's arguments on this point were rejected by Hearing Officer Johnson in the adjudication of the 1995 Prince William Sound tanker contingency plans… This decision was supported by Hearing Officer Johnson in his 1998 adjudicatory hearing decision on the 1995 Core Plan in which he was clear that the Department "had a reasonable basis to conclude that the response strategies in the plans adequately demonstrate" the requirements of 18 AAC 75.445(d)(4)… The Department continuously examines available prevention and response technologies in the course of reviewing best available technology assessments for all regulated facilities in Alaska and through participating in studies, inquiries, workshops and research being carried out for spill prevention and response. The expertise acquired is used in the review and approval of contingency plans. The Department completed technology conferences in 2002 and 2007, thus meeting the five year regulatory requirement."

DEC, in the instant Findings, has reiterated its reliance upon the Anvil study to determine compliance with approval criteria but has failed to respond repeated requests to produce the document and its associated application to the response resources and tactics that have substantially changed since the Study was first produced 15 years ago. These statements reinforce the prior statements that numerous documents were considered by DEC in the C-plan approval process that were suppressed despite repeated requests that they be disclosed. Most interesting is the reference to a 2007 BAT Conference that requestor has no knowledge of whatsoever despite his intimate involvement in PWS RCAC meetings, conversations with DEC personnel on the subject and repeated document requests. DEC's delay in consideration of the Lakosh's 6/5/08 Request for Hearing has also denied access to relevant administrative record documents that should have been produced to Lakosh for more than a year. These repeated suppressions of these documents that DEC itself deemed material to its decisions in successive C-plan approvals invalidate those C-plan approvals as unfair and capricious investigations that denied requestor due process and precluded an informed construction of comments, RFAIs and successive Requests for an Adjudicatory Hearing on the nearly identical[10] C-plans. Moreover, DEC's refusal to prepare and disclose the administrative record in for the cited prior requests will no doubt delay, and potentially further deny, due process in the instant proceedings. The Commissioner's failure to rule on the validity of these pending appeal issues for over a year also denied requestor the opportunity to present them in the instant public review of the identical Core Plan as issues that must be fully addressed in DEC Findings or otherwise automatically preserved as issues on appeal of the BPOSC C-plan. If the Commissioner ultimately denies the previously requested hearing on

[10] Although the instant C-plan permit application has the unusual defect of no description of tankers and their onboard response plans, the remainder of the application includes the nearly identical APSC Core Plan that was the subject of the vast majority of comments and appeal issues proffered by Lakosh in the successive reviews only two years apart.

substantially similar issues, Lakosh has been denied the opportunity to timely amend his comments and the instant issues on appeal to suit the constraints imposed by the Commissioner in his decision on the request. These repeated adjudicatory delays, suppression of documents and curtailment of speech constitute a clear continuing denial of due process that, each by itself, requires remand of the C-plan approval for a fair public review and investigation.

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

Statement of Issue: The requestor contends that the boom and other equipment used by each response system task force, particularly the open water task forces, cannot encounter enough oil to allow the skimmers to meet the recovery rates predicted in the Anvil Study and Permittees therefore could not meet the RPS requirement of 18 AAC 75.438. The DEC approval therefore contravened its mandates under 18 AAC 75.445(g)(1)-(6) requiring it to ensure that there was sufficient quality and quantity of boom, skimmers pumps, vessels, storage and anchors for the environmental conditions experienced at the operation, for the type of oil discharged and within the time frames required. None of the data, calculations or other documents produced to date considered the area covered by the spilled oil in an RPS sized spill and therefore could not calculate the amount of boom and associated boom towing vessels needed to concentrate the oil for recovery by skimmers. Whether or not calculation of encounter rates is explicitly required by the regulations, a comprehensive evaluation of total equipment needs simply cannot be definitively conducted without determining the spreading rate of the oil and the rate at which the oil could thereafter be concentrated for recovery by skimmers. DEC attempts to speciously evade this elemental limitation to oil recovery by stating in its Informal Review Decision that the derating of equipment in the Anvil study meets the regulatory requirement but the pumping capacity of the skimmers is not reflective of the oil recovered if the oil encounter rate is lower than the pumping rate assumed. DEC now admits in its 2009 Findings Document that the Anvil Study only "…modeled skimmer and storage information…", which fails to meet the requirements of section .445(g)(3) requiring evaluation of "types and amounts of boom, boom connectors, and anchorage devices must be of the appropriate design for the particular oil product, type of environment, and environmental conditions experienced at the facility or operation; the boom must be of sufficient length to mount an effective response to the volume of discharged oil established under 18 AAC 75.430 - 18 AAC 75.442 for each type of facility or operation". The Anvil Study is therefore a "two legged bar stool" where DEC must first evaluate whether the task force configurations shown in the C-plan can, in fact, concentrate the widely dispersed oil at the skimmer fast enough to minimally meet the derated pumping capacity of the skimmer. All DEC and Permittee evaluations to date have excluded this prerequisite encounter rate calculation despite the fact that the equation for this very calculation is shown in the C-plan and requestor's undisputed application of the equation using broadly accepted spill thickness figures and generous skimmer advancing rates shows that about half[11] of the 300,000 bbl RPS amount could be recovered within the 72-hour time

[11] 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

limit and the submitted Censum Northwest Report shows the potential for a recovery of less than 1% of the RPS under certain scenarios. The Anvil Study does not calculate the encounter rates of the skimming systems and would produce the same result if there were no boom or boom towing vessels in the response inventory contrary to the mandated evaluation under section .445(g)(3) and (4). DEC has therefore falsely used the Anvil Study to verify the ability of Permittees to meet the RPS requirements, particularly with respect to the sufficiency of vessels or boom as required by section .445(g)(3) and (4). DEC's assertion that new generation skimmers and boom would alter the substandard outcome is specious as well because: it still omits any encounter rate analysis; the amount of boom used by all skimming task forces is substantially less than that utilized when the Anvil Study was conducted; the high-speed boom added is only associated with nearshore task forces that recover about 16% of the RPS amount, and; if there are "new generation skimmers"[12] in use by the Open Water Task Forces, they're not in the C-plan. DEC, however, argues in the 2009 Findings that the encounter rate analysis that is necessarily implied by section 445(g)(3) and is central to the ASTM F1780-97 methodology can be disregarded in favor of its "…best professional judgment…". Where the Anvil Study does not apply all approval criteria and DEC has disclosed no other standard methodology for relating the amount of boom and booming vessels to the amount of oil recovered to meet the RPS, DEC's "best professional judgment" can only be considered fictional or arbitrary and capricious at best. One must also presume that DEC utilized its best judgment when it was an active participant in formulation of the ASTM F-1780-97 standards and that it has now abandoned that professional judgment in clear contravention of its mandate to evaluate boom requirements pursuant to section .445(g)(3). DEC's contention that this industry adopted skimming system evaluation methodology "…does not provide "methodology" for the evaluation of a large spill response operation in a specific geographic location such as Prince William Sound" demonstrates that it is merely evading adoption of the accepted standard for oil recovery evaluation in order to apply the insufficient Anvil methodology along with some arbitrary[13] and undisclosed methodology for evaluation of skimming system effectiveness. These multiple subterfuges designed to totally discount the fundamental limitations imposed by oil encounter rates constitutes deliberate fraud by trying to give credit for oil recovered to huge pumps that would be continually starved for oil to pump, even at derated values, due to the inability of the booming systems to concentrate enough oil for recovery. Further fraudulent intent may be implied by the lack of effect upon recovery rates alleged in the RPS scenario that assumed initial delays in response deployment due to weather exceeding RMROL conditions for the first day of the incident. Any hope of encountering thick layers of oil immediately after the spill would surely be dashed by the broad dispersal of oil and thinning of the oil layer by severe weather during the first day of the spill, yet Permittee and DEC record no decrease in

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significant portion of the oil encountered would actually be lost from the boom before the skimmer could pump it to storage.

[12] 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.

[13] Requestor will prove at the Hearing that DEC has never applied any consistent methodology for equating the amount of boom needed to recovery any given quantity of oil.

recovery rates and the commensurate increase in skimming time needed to encounter the same amount of oil from a much more sparse oil slick. This is a knowing deception because APSC had previously attempted to show decreasing recovery rates in prior VMT C-plans by progressively increasing the derating of skimmers over time due to the dispersal of the oil lowering the encounter rate. 18 AAC 75.445(f) specifically requires:

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

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

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

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

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

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

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

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

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

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

The RMROL approval criteria in section 445(f) is designed to provide an alternative compliance mechanism beyond the strict application of the statutory RPS requirement on the basis that permittee has fully analyzed and properly planned for response using appropriate and reliable equipment designed for the problematic constraints expected in its operating area and may therefore substitute additional spill prevention and/or non-mechanical response measures during challenging conditions that would otherwise not allow full compliance with the RPS requirement. Restated in other terms, DEC understood when drafting regulations that problematic conditions at most Alaskan locations would preclude strict compliance with the statutory RPS requirement given the contemporaneous state of the art in spill response technology and so designed a mechanism to allow for extraordinary prevention and/or non-mechanical response measures to offset risk and/or mitigated damages during the periods when strict compliance with the RPS requirements was impossible. Requestor alleges that DEC did not: require Permittees to fully analyze and publish the capability and operational limits of "…**each item of oil recovery equipment**…" as required by 18 AAC 75.425(e)(3)(F)(iii); require Permittees to fully report environmental conditions throughout the ROO(s) pursuant to 18 AAC 75.425(e)(3)(D); require Permittees to design a response plan for "…severe weather and environmental limitations that might be reasonably expected to occur during a discharge…" pursuant to section 445(f); require permittee to design its response plan to reflect "…**realistic efficiency rates for the specified response methods to account for the reduction of control or removal rates under those severe weather or other environmental limitations that might reasonably be expected to occur**"; and could not therefore definitively determine Permittees compliance with sections: .445(b), (c), (d)(1), (d)(3)-(7); .445(f); .445(g)(1)-(6), .445(h), and; 445(k)(1)-(3). This failure to provide sufficient information for "…**each item of oil recovery equipment**…" to allow a definitive determination of the C-plan conformance with approval criteria is compounded by the fact that DEC did not perform its independent duty under 18 AAC 75.447 to comparatively analyze spill response equipment to identify more effective equipment and then determine which breakthrough technologies would be most appropriate for specific "physical environments", "geographic locations" or "operations". If DEC had performed this duty, the deficiencies in Permittees' application would have been blatant because DEC would have had all necessary information on the relevant technologies and physical environments to expose those deficiencies. DEC through the Attorney General had told the Alaska Supreme Court that this was, in fact, the primary purpose of the BAT Conference regulation:

> "DEC further points to 18 AAC 75.447, which requires DEC to identify and evaluate "breakthrough" technologies by sponsoring a technology conference at least once every five years and to "engag[e] in studies, inquiries, surveys, or analyses [that DEC] believes appropriate to the consideration of new technologies." DEC argues that its reliance on a technology's appropriateness and reliability to comply with performance standards will be rendered more meaningful as a test of best available technology because DEC will have this "breakthrough technology" information at hand when

evaluating whether prevention and contingency plans use best available technology." FN 26 in *Lakosh v. Alaska Department of Environmental Conservation et. al.* 49 P.3rd 1111 (Alaska 2002)

DEC's instant insistence to apply a revisionist history on this matter is a clear effort to evade its mandated duties, obstruct justice and unlawfully subsidize Permittee's illegal operations at the expense of requestor's right to reasonable concurrent uses of the natural resources that would otherwise be protected in accordance with law from a catastrophic oil spill. DEC's abrogation of duties cited above portends for a failure of protection of resources during a spill under reasonably expected adverse conditions and subverts its mandate to regulate spill response pursuant to 18 AAC 75.320. One specific example of this predicament arises in consideration of the efficacy of the Open Water Fast Response Task Force. A recent drill of this Task Force revealed that the use of the smaller but faster boom towing vessels disabled the entire Task Force in sea states under 3 feet. Nowhere in the C-plans is this limitation listed but the RPS scenario and subsequent approval relies on these limited vessels in multiple Open Water Task Forces in sea states over 6 feet. The RPS calculations rely on the full operability of TransRec Barges shortly after their arrival on scene but these barges cannot recover oil at their rated capacities without the full operability of the boom towing vessels. It is this same limiting effect of boom towing vessels that is magnified and precludes Permittee from meeting the RPS requirements if the spill migrates into, or originates in the GOA. This is but one example among many instances where a single piece of equipment constitutes a "weak link" that can disable far more capable equipment critical to effective response. The RMROL regulation is clearly designed to ensure that all "weak links" are ferreted out so that the response system as a whole can be assessed as appropriate and reliable for the expected environmental conditions. In effect, this regulation is the "lynch pin" to ensuring compliance with all other response oriented regulations, thereby demanding strict enforcement as a prerequisite to assessment of compliance for all associated regulations. The material omission of the RMROL of these vessels and other equipment allowed Permittee to obtain their permits illegally and would preclude a safe and effective spill response where DEC would be faced with the quandary of sending responders out into conditions where both safety and effectiveness would be compromised allowing the spill to further devastate natural resources in contravention of requestor's right to reasonable concurrent use of those resources.

Issue 11: Scenarios - Most Demanding Conditions, Spill Trajectories

Statement of Issue: The requestor contends that the RPS Scenarios are unrealistic with regards to showing that the plan holders can meet RPS under the worst case conditions as is required by 18 AAC 75.425(e)(3)(F) and 75.445(f). Specifically, the requestor argued that the plan holder should show the logistics required for deploying equipment from PWS and downstream communities to work in the Gulf of Alaska and that they cannot meet the RPS under the very restrictive weather and sea conditions established by the Gulf of Alaska Agreement. This issue is largely subsumed by the better restatement of the issues presented elsewhere in the instant Request but some further clarification of the issues to spill trajectory and logistics is warranted. The intent of section 445(f) is clearly to mandate design of a response plan that stresses the response capabilities to their limit to allow DEC/public

evaluation/formulation of additional prevention and response measures to be imposed when RMROL is exceeded. The proffered scenarios did not satisfy this intent because it evaded consideration of the high speed coastal current that would widely disperse oil in a direction away from the entire response inventory in PWS. Where Permittees could barely meet the RPS given the scenario conditions and timelines, it is self evident that the RPS would not be met if the spill migrated into/through the GOA because of the stringent restriction on dispatch of vessels of 6-foot seas for 10-12 hours for service in the GOA.

Issue 12: Protection of Environmentally Sensitive Areas

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

a) The requestor claimed that the plan holder has not adequately developed sensitive area protection in a "realistic" RPS scenario because the deployment of specific Geographic Response Strategies (GRS) is not denoted in the scenario. The requestor asserts that without identification of specific GRS for each sensitive area, or at least an extrapolated calculation of the equipment needed, it cannot be determined if the plan holders can deploy sufficient equipment in a timely manner to protect the sensitive areas.

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

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

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

The RPS scenarios are clearly the "response strategies" referenced by this regulation but they do not show, in any measure, the maximum amount of resources that may be required to exclude oil from sensitive areas and did not show timely exclusion of oil from the most ecologically valuable sensitive areas in PWS, in particular the Zaikof Bay and Rocky Bay herring spawning grounds. These scenarios were clearly manipulated to generate a fictional trajectory that produced the least possible shoreline impact as the trajectory totally discounted tidal flows in Hinchinbrook Entrance and Montague Strait[14]. It is abundantly

[14] There are vigorous tidal flows in both HE and Montague Strait, particularly during Spring tides and during incursion of the Alaska Coastal Current, (ACC), into PWS 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 year round 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 Straight as well and are particularly rapid when the ACC also enters PWS in the fall, so one Flood and Ebb

obvious that there was no attempt to quantify resource needs for sensitive area protection as required by section .445(d)(4) and DEC has never produced any data or calculations showing that it independently conducted such an analysis to satisfy this approval criteria. It is equally obvious that the most accurate assessment would include calculations of the accumulated needs for a complete set of GRSs deemed to be the maximum that may be affected in the path of an RPS sized spill, but there was not even an attempt to determine the maximum number of sites that may be affected, much less an attempt to quantify the total resource needs as could be easily calculated by establishing the average site protection needs among sites with GRSs and extrapolating to the larger set of potentially affected sites that would no doubt include many sensitive areas without GRSs. DEC failed to apply this approval criteria to the permit applications and the subsequent approval was therefore arbitrary and capricious. It is DEC's obligation to assess the totality of sensitive area protection needs and, to that end, DEC must continue development of GRSs in order to accurately assess those needs. Again, DEC allowed Permittee to obtain their permits illegally where it did not properly evaluate the effectiveness of oil exclusion from sensitive areas that could allow the spill to further devastate natural resources in contravention of requestor's right to reasonable concurrent use of those resources.

Issue 13: Response Planning Standard (RPS) - Prevention Credits

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

Issue 14: BAT Analysis - Towlines

Statement of Issue: The requestor contends that the applicants and DEC did not appropriately apply the BAT regulations to tug towlines, but instead applied "the static standards for the PWS tow package." DEC argued in the BAT regulation litigation that performance standards in 18 AAC 75.445(k)(2) were not static standards as they would be regularly updated but DEC has not performed any towline evaluation since the BAT statute was enacted in 1980. The definition of PWS tow package is therefore invalid as an outdated static standard. Every towline used in performing the tasks or used on the equipment subject to the 445(k)(1) and (k)(2) BAT categories, (e.g. response barge towlines), were required to be subject to the individualized section .445(k)(3) criteria at least twice over the last 12 years and not a single analysis has been performed even once to determine if there was any "breakthrough technology" appropriate for reporting despite a reported barge towline failure that has endangered the barge crew and would have precluded response activities of that barge, thereby rendering response unreliable. The escorts directly subject to the individualized section .445(k)(3) criteria must necessarily include an individualized towline analysis because this equipment is indispensible to escort functionality and it is inconceivable that the "best" escorts should be rendered totally impotent because there was no quality standard for tug towline systems at all as the RPG argument suggests and the numerous instances of towline partings has proven. By the RPG reading, one could assert

cycle would necessarily impact the Western shore of Montague Island unless there was a very strong storm entering the Straight from the South.

that the use of fishing line for a main tug towline would not violate any regulation where the intent of the of the escort inclusion in the (k)(3) BAT category would certainly include thorough comparative analyses of any technology on the tug in question where that technology could noticeably reduce the overall escort capability below that of an escort outfitted with all of the "best" components, (e.g. surge gear, towlines, pennants, shackles, tow bits and winches being the most critical components). Permittee failed to produce, and DEC failed to require, a complete and competent comparative analyses of escort towline systems consistent with 18 AAC 75.425(e)(4)(A)(iii) and .445(k)(3) despite repeated escort towline failures during drills and actual escorting. Each tanker and tug must show the working load and breaking strength of critical load bearing fixtures on the tanker and tugs to assess the appropriateness of the associated towline components given the high forces generated during dynamic towline loading. Without any description of the tankers and their critical components, a comprehensive BAT analysis cannot be performed and the permit is invalid.

Issue 15: Scenarios - Lists of Resources

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

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

Statement of Issue: The requestor contends that the Department has not examined new technologies as required by 18 AAC 75.447. This issue is largely subsumed in issues presented above. DEC was required by law to conduct two comprehensive BAT conferences since this regulation was adopted but has only conducted one unlawfully limited conference

and insufficient report from that limited conference but refused to consider that report or produce it as a review document. DEC's dereliction of duty in this matter has substantially impaired the ability of: permittees to prepare c-plans; DEC to appropriately review c-plans; the public's right to competently review c-plans with complete information regarding the efficacy of c-plan components and their applicability to specific physical environments, geographic locations and permittee operations. The instant C-plan review was therefore an unfair investigation as are the subsequent Informal Review and adjudicatory process where requestors and commenters were denied due process by the unlawful suppression of material evidence. DEC has unequivocally established these reports as material to c-plan reviews in the BAT litigation, thus establishing DEC's intent to unlawfully conduct the instant review and impair the ability of affected appellants to competently challenge its arbitrary approval of the instant contested C-plans. A prime example of DEC's bad faith in these investigations is painfully obvious where they stated their intent to examine high current booms for the BAT Conference but when presented with copious information on the Ocean Buster booming systems by NOFI at the BAT Conference, DEC refused to consider the improvements in effectiveness and efficiency of these systems for response in the higher sea states and high currents in HE and the GOA. If DEC had timely produced a full report on the Ocean Buster, Permittees may have well adopted its use for all Open Water Task Forces and the public could have otherwise had irrefutable evidence to demand its use absent that adoption.

Issue 17: RPS Calculations

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

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

(3)(B) (iii) The hearing time estimated to be necessary for the adjudication may extend up to 8 weeks due to the need to elicit testimony from multiple DEC personnel, Permittees and the PWS RCAC regarding suppressed documents, non-public meetings evaluating C-plan compliance and the efficacy of C-plan equipment as demonstrated in unreported drills, exercises and events. Requestor intends to consolidate the instant appeal with the pending requested appeal of the 2007 permit approvals.

(3)(C) The hearing request should be granted in the public interest to: substantially advance the spill prevention and response capability of Permittee and other operations across the state in compliance with regulatory mandates; to establish and implement a fair investigatory process in the public c-plan reviews, and; to provide relief to requestor for the violation of his constitutional rights to reasonable concurrent use of Alaska's natural resources, a fair investigation, due process and free speech denied in the public review; and to provide for equal protection under the law. If the Commissioner fairly considers the issues presented

above and their stark contrast to the positions presented by DEC in its deficient Findings, it will become self evident that the Department's compartmentalization of regulatory compliance issues has subverted the underlying intent of the applicable laws to require permittee to design their spill response in a manner that provides for the maximum possible natural resource protection using the most efficient tactics and the most effective equipment to mitigate spill damage. No one contends that that any permittee could mitigate all spill damage all of the time given Alaska's severe conditions, but the constitution, statutes and regulations all demand that DEC require permittees to employ appropriate and reliable measures to mitigate spill damage given fair consideration of continuing technological breakthroughs and, when/where there is still a potential for substantial spill damage that could not be mitigated in accordance with law, permittees must employ state-of-the-art technology and best procedures to reduce the risk of spills occurring.

Virtually all of the issues presented by requestor are closely aligned with the concerns explicitly presented to DEC by the PWS RCAC in their public review and Informal Review comments, thus establishing the broad concern of the affected communities and interests that must be definitively resolved with provision of due process proceedings. Requestor has extensively researched the technologies at issue and engaged expert sources and equipment manufacturers for 18 years to discern practical solutions for effective spill prevention and mitigation in Alaska's problematic conditions. Requestor has also demonstrated his ability to properly interpret the meaning and intent of applicable law in his successful litigation against DEC in the Alaska Supreme Court. Requestor is therefore deserving of the requested opportunity to resolve these outstanding issues as they engaged herein, in good faith. Indeed, DEC has already recognized that many of these outstanding issues must be addressed in a parallel informal workgroup process conducted with the RPG and the PWS RCAC, but this process unlawfully precludes: public participation; accurate record keeping, and; a due process appeal procedures for disputed issues of fact and law. By law, this ongoing illegitimate informal process must be brought into the light with full public participation, record keeping, and due process rights for timely resolution of issues to be immediately incorporated into an amended C-plan.

(3)(D) A comprehensive set of alternative terms and conditions needed to meet regulatory requirements is simply not possible given the incomplete set of data and evaluations that were required to be produced in the C-plans and DEC review process. Full regulatory compliance necessitates that any decision on satisfaction of the approval criteria be premised upon a fair and expert consideration of data and analyses that has been suppressed from the public review and administrative appeal process. Contrary to the position of DEC and Permittees in the pending adjudication of the 2007 C-plan approvals, it is not the responsibility of requestor to produce the required but absent data and to properly analyze it to adduce compliance requirements. Any administrative regulations designed to shift that burden from a permittee and DEC to the requestor in order to obtain a due process adjudication of his concerns is wholly unconstitutional. Such a regulation would require ordinary citizens to engage in multimillion dollar data collection and expert analyses that is clearly beyond the authority of DEC to compel as a prerequisite of a due process administrative hearing. That being said, requestor will at least further describe the data and

analyses that must be compiled to ascertain regulatory compliance in a new public review of the appropriately amended C-plan as follows:

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

Issue # 2: data on maximum transit speeds and course tracks of all commercial vessels transiting PWS; data on tanker speeds that may be obtained from USCG VTS; a comprehensive parametric analysis of the forces that escorts must apply to avert collisions with conflicting vessel traffic in PWS; all reliable data on environmental condition in PWS along the tanker traffic routes, particularly data on barrier jets, cross channel winds, currents and eddies near land prominences that may need to be collected; a comprehensive parametric analysis of the forces that escorts must apply to avert powered and drift groundings in PWS and drift groundings at Seal Rocks, Wessel's Reef and Middleton Island, (these latter analyses would be an RMROL prevention measure in the GOA); specify maximum allowable tanker parameters, (e.g. maximum allowable resistance to towing), and minimum allowable capability of critical components, (e.g. minimum allowable bollard and chock breaking strength for specific size tankers), that would not exceed the ability of specific tug combinations to bring the tanker safely under control given worst case tanker disablement circumstances..

Issue # 3: Same as #2 above.

Issue # 4: Same as #2 above; data on the amount of concurrent tanker traffic in PWS that may be obtained from USCG Tanker Transit Logs, tanker logs; alleged DEC C-plan oversight records, VMT service logs; data on all escorts and salvage tugs as they may operate or be proposed for construction worldwide; a comprehensive comparative analysis of escort capability with regards to their use as primary, secondary and/or HE salvage tugs taking into account their ability to apply braking, steering, towing forces and conduct salvage operations in the environmental and traffic conditions experienced in the PWS for the expressed purpose of safely bringing the tanker under control in the event of the worst case grounding and collisions possible. Where such escorts will also perform the mandated salvage function, it must show the ability to meet new rescue towing, salvage and firefighting performance standards for all Alaskan COTP zones/ROOs transited.

Issue # 5: Same as # 4 above.

Issue # 6: data on equipment and tactics used to lighter and otherwise salvage tank vessels and contain the spill, particularly booming, as practiced worldwide; a comprehensive comparative analysis of the capabilities of these technologies as they may qualify as the best technologies for use under worst case conditions as they may occur in each of the ROOs that Permittee transits; demonstrate the ability to meet new USCG lightering requirements.

Issue # 7: data on equipment used to detect and track oil spills and practices employed worldwide; a comprehensive comparative analysis of the capabilities of these technologies as they may qualify the superlative technology in each category as the best technologies for use

under worst case conditions as they may occur in each of the ROOs and distinct geographic locations therein that Permittee transits.
Issue # 8: immediate production of all referenced and/or requested documents that were not otherwise produced as documents for the C-plan in the Anchorage public depository.
Issue # 9: Same as # 1; produce a comprehensive BAT Conference and report that analyzes the comparative effectiveness and efficiency of each piece of response equipment in Permittees' response inventory as it may be used to satisfy 18 AAC 75.438 as compared to other technologies that may be used for the same or similar purpose worldwide; produce an encounter rate analysis for each type of skimming task force depicted in the SERVS Technical manual as used in RPS scenarios under various environmental conditions up to RMROL; produce a comprehensive evaluation of the ability of Permittee to meet the 300,000 bbl and 809,000 bbl RPS utilizing ASTM F1780-97 methodology in an additive evaluation of each Task Force's oil recovery capability at the RMROL of that Task Force.
Issue # 10: a complete list of the RMROL for each piece of response equipment in Permittee's response inventory as it may be used to satisfy 18 AAC 75.438; a complete list of potential compensating spill prevention and response measures that may be employed when RMROL is exceeded with specificity as to geographic locations and environmental conditions where and when these compensating measures will be employed.
Issue # 11: produce a trajectory analysis and RPS scenario(s) that reflects the concerns raised in this issue and issue #12.
Issue # 12: Same as issue #11 above; generate a list of resources needed to timely exclude oil from all sensitive areas that may be impacted in the scenario(s).
Issue # 13: Same as #4 and # 9.
Issue # 14: data for all towlines used on any vessel in Permittees spill prevention and response inventories; a BAT Conference and report on towlines used for spill response; a comprehensive comparative analysis of the capabilities of escort towline system components as they may qualify as the best technologies for use under worst case conditions in PWS or where/when emergency towing may be needed as an RMROL prevention measure.
Issue # 15: produce a comprehensive list of all resources needed to comply with each subsection of the Approval criteria in section .445; record and disclose all proceedings of the DEC, RPG and PWS RCAC workshops addressing C-plan resources.
Issue # 16: Conduct a comprehensive BAT Conference and report that analyzes the comparative effectiveness and efficiency of each piece of response equipment as it may be in use by any permittee in Alaska response inventory as it may be subject to 18 AAC 75.445(k)(1) and(2) as compared to other technologies that may be used for the same or similar purpose worldwide.
Issue # 17: Subsumed above.

To the extent that requestor can avail the Permittee and DEC of the investigation he has conducted on technologies that would likely be most capable and cost effective for incorporation in an amended C-plan, he provides a description below of the quantity and quality of equipment minimally acceptable[15] for the escorts and Open Water Task Forces in

[15] The suggested quantity of equipment are an alternative escort and OWTF configuration but additive to all other currently listed equipment and procedures. This equipment compliment is likely still far below what is necessary to meet the RPS, which can only be definitively determined with the proper analysis of completed data. It is however a

the PWS ROO, (). A full disclosure of Permittee's course tracks may require additional resources in other ROOs and more/more capable nearshore equipment is clearly needed to exclude oil from all sensitive areas that may be impacted. Some of this sensitive area equipment may be transferred from Open Water Task Forces as the suggested OWTF designs are more self-reliant, requiring fewer booming vessels and upgrade of the skimmers and boom utilized.

Suggested Minimum Escort and Open Water Task Force Tug & Barge Requirements:

1) Six advanced technology escort tugs including a HE salvage/escort tug with ~15,000 bhp in an ~185' TractorPlus hull configuration with an Ulstein X-BOW for sea keeping, FIFI I & II capability and full complement of salvage equipment and trained personnel; two ETTs, and; three PRTs. The HE tug and ETTs are to be the solely qualified primary escort tugs. A PRT is the only acceptable secondary escort tug and substitute for the HE tug during planned HE tug maintenance. The primary tug must remain tethered to the laden tanker throughout the entire transit within PWS. Laden tankers may not exceed 7 knots when within 2.5 nm of Buoy #9 and may not sail within the Western half of the outbound lane in Valdez Arm. Similarly, an inbound laden tanker may not use the Eastern half of the inbound lane in Valdez Arm. At least one FIFI I tug must be available at the VMT whenever a tanker is within ½ nm.
2) Four conventional tugs or ERVs are needed for towing the skimming and storage barges. A conventional tug/ERV may be eliminated if additional barges are converted to a fully powered OSRV. A thruster assisted OSRB may use an ERV for towing but a tug with >7,200 bhp is required for large barges without a sufficiently sized stern thruster to maintain >10 knot transit speed and maneuverability in seas >15'.
3) Dynamically positioned Lightering OSRV with: >130,000 bbl storage; heavy lift A-frame; subsea/ROV lightering capability; standoff lightering capability through a long-reach "bunkering crane" using four Framo TK-200 pumps with >600' of hydraulic, power, control and discharge hoses/cables to a manifold on the >16' diameter crane hose with an in-line booster pump; >3000' of ~10' ocean containment boom; high power booming jitney; four ship fenders; four complete TransRec skimmers, power packs and hose reels for skimming and/or lightering in close proximity to the stricken tanker.
4) An ship shaped All Purpose OSRV with: ~130,000 bbl storage, two All Purpose Skimmers each rated >1,500 bbl/hr oil recovery capable of high speed skimming in broken ice from/in Columbia Bay, four Zero Relative Velocity Rope Mop skimmers each rated >1000 bbl/hr for exchange for APSs when oil becomes widely dispersed in open waters.
5) Two Ocean Buster OSRBs with each barge equipment including: ~130,000 bbl storage; retractable Z-drive stern thruster >1,800 bhp; two Ocean Busters with an integrated debris macerating skimmer,(suggested macerator and rotary lobe pump-Boerger HFL and FL 1036 @1,257 bbl/hr in custom float), and automated and manual control through an oil level sensor or by operator remote viewing through the lighted

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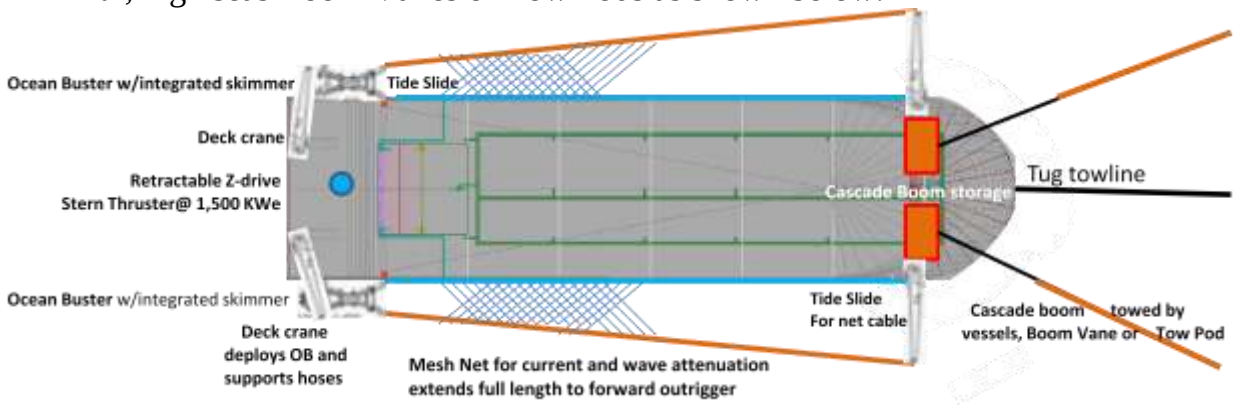
reasonable upgrade of the existing fleet/equipment for an immediate compromise until the complete data collection and analysis can be accomplished. Additional details are available in the SERVS Open Water3.pdf file previously submitted but slightly amended herein.

crane camera; two 20 m outriggers on the forward quarters for skimming independent of booming vessels; two forward Single Point Inflation boom reels each with >1,200' of high speed SPI ocean deflection boom for cascade booming with towing vessels >120', high seas Boom Vanes or Tow Pods as shown below:



6) TF 5 should include the Valdez Star towing a thruster assisted barge with >12,000 bbl storage; two Current Busters mounted on the barge in a manner similar to the OSRB above. Both the Valdez Star and barge would use boom towing vessels >75' to deploy SPI cascade booms totaling >1,400'.
7) One OSRB may remain a TransRec response barge with three TR skimmers for static/slow speed skimming immediately down current from the stricken tanker but outriggers and a stern thruster are recommended to allow for safety and an extended RMROL. Larger ocean boom is recommended to improve spill containment and control.
8) A long duration aircraft such as the Be-200, (this aircraft has multiple function capability as a firefighter and SAR asset that can be temporarily redeployed to offset the high cost), with instrument rated pilots and trained crew compliment are required for real-time spill tracking and surveillance. The aircraft must have a full complement of sensors integrated through algorithm processing to refine oil detection and mapping, dispositively identify the oil composition and determine spill thickness/volume including: laser flourosensor; side looking Synthetic Aperture Radar; microwave radiometer; azimuthing video and still cameras/line scanners with high resolution in a broad electro-optical frequency range from IR through UV; target locating/geo-coded and automated tracking capability. The aircraft must have the ability to store and transmit all sensor input to Task Force command vessels and command centers via Wi-Fi, all cell frequencies, VHF, SSB and satellite communications that also allows Integrated Satellite Tracking of Polluters. The aircraft must be capable of retransmitting communications between multiple Task Forces and the command centers. The crew complement must be sufficient to maintain visual observations, operate all sensors and conduct all communications tasks simultaneously over the maximum flight duration.

Sincerely;

Tom Lakosh

Tom Lakosh