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3 March 5, 2010

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

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10 RE: Request for an Adjudicatory Hearing on DEC's Unlawful Approval of the Tesoro
11 Tank Vessel Operations Oil Discharge Prevention and Contingency Plan

12
13 Dear Commissioner Hartig;

14 Would you please accept and grant this Request for Hearing pursuant to 18 AAC 15.200 et.
15 seq. as an appeal of the 2/5/10 DEC approval of the Tesoro Alaska Tank Vessel Operations
16 Oil Discharge Prevention and Contingency Plan, (C-plan), permit? I am providing the
17 information required by 18 AAC 15.200 as follows:

18
19 (a) The instant request is submitted less than 30 days after the above titled permit approval
20 on 2/5/10.

21
22 (1) My name, address, telephone number and email address appear at the top of this page.

23
24 (2) I file this request on my own behalf as an affected person, but it is abundantly clear that
25 all natural resource users in the regions of operation where Tesoro Tank Vessels are
26 permitted to operate have had their right to reasonable concurrent use of resources and right
27 to statutory and regulatory protections violated. Indeed, all Alaskan citizens are adversely
28 affected where DEC persists in a pattern of illegal issuances of permits.

29
30 (3) (A) I am a long standing resident of Alaska who has exercised, and intends to exercise in
31 the future, reasonable concurrent uses of the natural resources in the affected coastal areas of
32 Southcentral Alaska, specifically PWS and Cook Inlet, including: subsistence hunting,
33 fishing and gathering; commercial fishing; recreation; employment in the tourism industry.
34 These uses were adversely affected by the EVOS and the C-plan is required by law to
35 prevent a reoccurrence of the damages as documented in the report of the Alaska Oil Spill
36 Commission and other State and Federal reports describing natural resource damages
37 proximately caused by the EVOS. Documentation of the damages I sustained are contained
38 in the case files of A89-140 CV and A92-321 CV as consolidated In re; Exxon Valdez. A
39 spill from Tesoro Tank Vessel operations has the potential to cause long term damage to the
40 species that I plan to harvest and the ecosystem that supports them, thereby infringing upon
41 my constitutional right to sustained yield, equal protection under the law, a fair
42 administrative investigation and reasonable concurrent use of Alaska's natural resources.
43 These potential oil spills that are not planned to be mitigated in accordance with law can also
44 impair my access to, and enjoyment of marine and coastal resources in Cook Inlet and PWS.

1 The approval of the C-plan has allowed the operation of an ultra-hazardous industry without
2 the protections of law mandated in AS 46.04 et. seq. with its associated regulations 18 AAC
3 75.400 et. seq. and as such cannot be considered a reasonable concurrent use of Alaska's
4 resources. The failure of DEC to perform these mandated duties will allow permittee to use
5 substandard methods to prevent, contain, control and recover oil spills, thereby causing
6 damage that would otherwise be abated in conformance with law. DEC has deliberately
7 issued this permit in contravention of these promulgated statutes and regulations intended to
8 prevent damage to my protected reasonable concurrent use and interests, and the interests of
9 innocent third parties from an oil spill from Permittees' facilities. Tesoro's concurrent uses
10 of Alaskan natural resources cannot be deemed reasonable unless and until DEC conducts
11 the mandated examination of spill prevention and response technologies, especially those
12 required as the "best" technologies and "breakthrough technologies" to be utilized by
13 permittees in their C-plans for oil spill prevention and response in the quantities mandated by
14 law. Damages are also sustained by stagnation of technological advancement of technologies
15 defined in 18 AAC 75.445(k)(1), (2) and (3) and as required in 18 AAC 75.447 et seq that
16 should have been available in formulation and review of all contingency plan permits to be
17 issued by DEC. Several of these permits are presently under review by DEC and they also
18 affect my uses of resources. The failure of DEC to fairly consider my comments, conduct the
19 mandated technology reviews in accordance with law, provide material documents as
20 requested and apply the mandated approval criteria violates my constitutional right to fair
21 treatment in an executive investigation and right to due process by conducting a permit
22 review with an incomplete or otherwise corrupted record. This unfair treatment constitutes
23 an intolerable corruption of government officials who are unlawfully subsidizing permittees
24 and state coffers at the expense of the constitutional rights and right to statutory protections
25 of natural resource users. I am also sustaining damages in the form of expenditure of time,
26 monetary expenditures and suffering sustained in correcting the deliberate illegal permitting
27 by DEC complained of herein.

28
29 (3)(B)(i) and (ii) The clear and concise genuine factual issues for consideration are provided
30 below with the attempt to retain the same number formatting as used in the long-pending
31 Request for Hearing on the 2007 TAPS Tanker and BPOSC C-plan Approvals as much as
32 possible to allow efficient consolidation of the three appeals when the requests are granted.
33 The relevance to the permit decision of each matter presented is contained in each of the
34 extended statements of the issue to provide more clarity of the issue and elicit a better
35 understanding of its relationship to the decision. As stated above, the underlying relevance of
36 each issue to requestor's interest is that DEC's failure to require full conformance to
37 regulatory requirements can have devastating adverse effect upon his reasonable concurrent
38 uses of natural resources where the defects in the C-plan will allow more resource damage
39 and longer duration of damage to requestor's constitutionally protected interests in
40 reasonable use of those resources. Requestor is also entitled to full expression of concerns
41 regarding the requirements of compliance and due process consideration of material
42 documents in a fair investigation of those concerns.

43 44 **Issue 1: Geographic Scope**

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

7
8 .990(156) “region of operation” means, with respect to (A) an oil discharge
9 prevention and contingency plan other than a nontank vessel plan, a region
10 established under 18 AAC 75.495;

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

16 .495(b) If the department finds that a discharge that could occur in an area beyond the
17 territorial sea would not have a significant adverse impact on the resources of the state
18 or on other interests of the state, the department will, in its discretion, adjust the
19 seaward boundary of a region established in (a) of this section to exclude that area.
20

21 DEC argues in its Findings that the ROO requirements only applies to that area where the
22 permittee crosses into state waters but this argument: misrepresents the applicable statutes
23 and regulations which specifically regulates operations beyond the territorial sea that
24 threatens state resources for those operations that include an operational component² in state
25 waters and does not limit planning to the area where tankers cross state waters; fails to
26 definitively demonstrate that Tesoro tank vessels only cross state waters in Cook Inlet where
27 tank vessel course tracks are incomplete; fails to consider Alaskans’ right to equal protection
28 under the law from substantially similar oil spill treats from beyond state waters or beyond
29 the CI ROO³; fails to recognize that there is incomplete response coverage by CISPRI
30 throughout the CI ROO, in particular for waters on the exposed outer Kenai coast.

31 The cited regulations unambiguously establish that the geographic scope of C-plan and
32 compliance with all approval criteria must apply throughout the entire Region of Operation,
33 particularly where DEC has not issued any finding showing of a lack of adverse impact
34 pursuant to .495(b). The regulation is unambiguous in that DEC may only excuse planning in
35 a transited ROO where it affirmatively determines that operations beyond the state waters of

¹ Tesoro has made no provision for response in state waters 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 or other chartered/owned tank vessels. A full disclosure of course tracks may show Tesoro tank vessels threatening state resources from state and/or federal waters in ROOs other than the CI ROO and contrary to DEC Findings there is no provision in the disclosed record that explicitly excludes tank vessel operations in state waters other than CI and PWS.

² The USCG similarly regulates tank vessels transiting any US COTP zone where they require a VRP for just one COTP zone. Only those vessels that never visit a US/Alaskan port can escape regulation in all ROOs by claiming innocent passage.

³ Where DEC acknowledges its duty to require Tesoro response for spills in federal waters within the CI ROO it must also recognize its duty to protect state resources that are equally threatened by Tesoro transits through federal waters in other defined ROOs. DEC cannot arbitrarily abandon protection of any state resources equally threatened by Tesoro’s operations beyond state waters but within the defined and regulated ROOs.

1 that ROO does not constitute a threat to state resources or interests. DEC has not issued such
2 determinations for the Kodiak or Aleutians ROO and instead only offered the definition of
3 state waters as an apparent excuse for not enforcing its regulatory duty to require planning in
4 all the ROOs transited as defined in the cited regulation. DEC has otherwise recognized its
5 duty to require response planning by permittees in the greater ROO in its findings related to
6 the Shell Camden Bay and Chukchi Sea ODPCPs and in RFAIs to Tesoro related to
7 transiting of Unimak Pass. Apart from the fact that response assets would have to transit for
8 much longer times to reach the distal state waters within the CI ROO, and thus not have the
9 skimming time to meet the RPS, it is abundantly clear that smaller fishing vessel assets
10 integral to towing boom for skimmers are not appropriate or reliable for operation in the
11 exposed Gulf of Alaska. Permittee and DEC, with full knowledge of the inappropriateness of
12 the spill response equipment for continuous deployment in the GOA, do not even attempt to
13 characterize the environmental conditions in the state waters outside of Kennedy Entrance as
14 required by regulation. These actions are clearly a deliberate attempt to generate a
15 fraudulently lower standard of "...environmental limitations that may be reasonably
16 expected to occur..." specifically designed to relieve Permittee of its obligation to prevent
17 and respond to spills in accordance with 18 AAC 75.425(e)(1)(F), .445(d) and .445(f). In
18 effect, DEC and Permittee conspired to unlawfully exclude consideration of environmental
19 conditions across the vast majority of the area of the CI ROO for the explicit purpose of
20 approving substandard spill prevention and response assets in quantities far below that
21 needed to meet the RPS at distal locations within the ROO(s). The fact that tankers may
22 latter be shown to only travel through federal waters through most of the GOA is irrelevant
23 to the issue of planning for timely and appropriate response in those state waters that are
24 adjacent to tanker course tracks or could otherwise be affected by spills in federal waters as
25 is required by the cited regulations. Indeed, where Permittee refuses to disclose their
26 complete course tracks for all tank vessels through all ROOs, it is apparently reserving the
27 right to transit in all state and federal waters outside of Kennedy Entrance. If it is later
28 revealed that there are distinct traffic patterns in federal waters and surface currents along
29 those routes show predictable patterns of potential spill migration, the time it would take for
30 the tanker or its spilled oil to migrate from the specified limited course tracks to state waters
31 could be legitimately added to the 72-hour RPS requirement, but a complete set of course
32 tracks showing all tank vessel movements within the defined ROOs and a statement of
33 limited deviation from those course tracks must first be provided in a revised C-plan.

34
35 **Issues 2-5: N/A**

36
37 **Issue 6: BAT Analysis and Equipment Listing for Stopping a Spill at its Source and**
38 **Preventing its Further Spread and Otherwise Lightering Cargo**

39 **Statement of Issue:** This issue encompasses violations of the interrelated source control,
40 BAT and lightering regulations as they are inextricably intertwined. The requestor claims
41 that the plan holder's BAT analysis for technologies specifically designed to control the
42 source of a spill and prevent its further spread and lighter a stricken tanker did not meet the
43 regulatory requirements of 18 AAC 75.445(k)(3); 75.425(e)(4)(A)(i); 75.425(e)(2)(E); and
44 75.445(d)(4) due to DEC's failure to fairly consider all viable means and then require the
45 contracting and listing of the "best" means of controlling the spill at its source and

1 preventing the further spread of spills. The issues are related in that both cargo transfer and
2 lightering are considered source control and use the same pumps and hoses to move oil from
3 the oil hold/tanks to safe holds/tanks onboard the vessel and ultimately to a contracted and
4 dedicated lightering vessel. Tesoro failed to provide a list of the necessary contracted/owned
5 resources⁴ and personnel, nor did it provide a comparative BAT analysis of its proposed
6 resources relative to those in use in other areas, (e.g. the SERVS tug and 450-7 barge
7 lightering system). Tesoro did mention an onboard portable pump for cargo transfer but
8 failed to specifically identify the pump nor did compare the pump for BAT qualification or
9 explain why only one pump on one vessel would be “best” for its entire fleet. Such vague
10 references to critical assets, many of which are beyond Tesoro’s control or are otherwise
11 committed to spill recovery, could neither be deemed timely available nor the “best” when
12 compared to other known dedicated lightering/cargo transfer systems employing multiple
13 high volume pumps, power packs and extensive hoses. Beyond these cited defects in the C-
14 plan was DEC’s blatant disregard and unfair investigation of comments suggesting
15 appropriate alternatives and analyses for timely cargo transfer and lightering if furtherance of
16 effective and safe source control. Other source control procedures employed by salvage
17 contractors worldwide were similarly ignored. DEC’s arbitrary exclusion of effective source
18 control and spill containment measures from the mandated BAT comparative analyses shows
19 a clear intent to unlawfully subsidize Permittee’s illegal operations by allowing operation
20 with substandard equipment subsequent to an unfair investigation. This failure to show
21 timely available dedicated lightering assets or a scenario that meets state and federal
22 lightering standards also violates 18 AAC 75.007(b) in that compliance with this federal spill
23 prevention requirement is a prerequisite to issuance of the state permit. Both the limited
24 course tracks shown and the Tesoro response disavowing any of the cited federal navigation
25 restrictions show a clear intent to violate federal spill prevention measures⁵ at worst and the
26 information regarding the identity and availability of lightering assets is too vague to discern
27 compliance at best.

28 29 **Issue 7: BAT Analyses for Leak Detection and Spill Tracking**

30 **Statement of Issue:** The requestor represented that the plan holder's BAT analysis for
31 technologies specifically designed to detect a discharge and track/forecast a spill's trajectory
32 did not meet the regulatory requirements of 18 AAC 75.027(d); .425(e)(1)(F)(iv);
33 75.425(e)(2)(E); 75.425(e)(4)(A)(iii); 75.445(d)(3) and 75.445(k)(3). Requestor argues that
34 DEC failed to fairly investigate and require the proper equipment in three related but distinct
35 categories of technology: spill detection; trajectory forecasting and real-time spill
36 surveillance and tracking on water. The first two categories are subject to an individualized
37 BAT analysis and approval. There was not sufficient description regarding the sensitivity,

⁴ Although Tesoro did reference two lightering pumps, one was not owned or contracted by Tesoro and could not be considered timely available when required. The second pump, a DOP 250, was clearly not suitable for lightering. Similarly, although Tesoro referenced two Crowley barges that were not under contract nor specifically identified and located as required by regulation. No tugs were identified or contracted to move these barges for the lightering function and the response scenario never definitively identified when and how lightering would commence or be completed. Some hoses were mentioned but specific lengths and types were not identified and such vague references could not be considered sufficient to the task with any degree of certainty.

⁵ The partial published course tracks showing tank vessels transiting into the Kodiak ROO and beyond the CISPRI area of responsibility in the CI ROO constitute a violation of the USCG navigational restrictions and establishes non-compliance with federal spill prevention measures.

1 accuracy or capability of the technologies referenced in the C-plan or their alternatives and
2 no definitive findings were issued by DEC to establish which of the multiple technologies
3 were deemed “best” for detecting leaks from tankers or trajectory forecasting of the spill
4 thereafter. The fact that Tesoro has had a spill that was not detected or tracked shows its
5 existing technology unreliable and inappropriate for use in CI conditions. DEC’s categorical
6 acceptance of a conglomeration of ill-defined technologies demonstrates an arbitrary and
7 capricious approval of the C-plan where any legitimate investigation and approval would
8 necessarily have to analyze parameters critical to the functionality of each technology
9 relative efficacy of any competing technology. Although real-time on water surveillance of
10 spills is arguably not subject to a full, individualized BAT analysis, the specified equipment
11 must minimally be available, appropriate and reliable for the task. This real-time spill
12 surveillance must be continuously conducted 24/7 under Instrument Rated weather
13 conditions for up to several hundred miles⁶ from the spill source. There are numerous aircraft
14 with dedicated sensor packages that are used worldwide for this specific ocean surveillance
15 but DEC refused consider and require these proven options in an unlawful deference to
16 Permittee’s insufficient proffering. DEC’s failure to require a full BAT analysis is clearly
17 deliberate and inexcusable where it had previously issued RFAIs to PWS taker operators
18 including Tesoro detailing a broad selection of spill sensors and the shippers colluded to
19 ignore DEC’s lawful order.

21 **Issue 8: Unfair Investigation and Denial of Due Process**

22 **Statement of Issue:** Although the other issues presented include and underlying element of
23 an unfair investigation and denial of due process, the issue is presented independently here to
24 insure its independent consideration and adjudication. This claim arises from a number of
25 incidents where both the Permittee and/or DEC were mandated by expressed or implied
26 regulation to disclose information material to the review and approval process but failed to
27 provide the necessary information leaving the reviewing public without critical information
28 necessary to their fair consideration of the C-plan and otherwise allowing DEC to reach
29 unsupported conclusions of compliance. A prime example of this issue is the regulatory
30 requirement to identify each item of response equipment and provide a broad range of
31 relevant information including its location, ownership, contracted status, time frame for
32 startup, trained personnel, rated capacities, operational limitations, etc. The C-plan did not
33 include a full set of required information for each item of equipment and DEC refused to
34 fairly consider comments demanding the full disclosures mandated by regulation. Instead of
35 requiring compliance with 18 AAC 75.425(e)(3)(F)(iii) requiring specific information for
36 "each item of oil recovery equipment" as unambiguously expressed in comments, DEC
37 instead deliberately evaded this regulatory requirement by referring to C-plan sections
38 describing environmental conditions in Cook Inlet. The suppression of mandated information
39 denies requestor his due process in reviewing the plan and DEC’s refusal and deliberate
40 evasion of the issue demonstrates an unfair investigation also prohibited by the Constitution
41 of Alaska. Another egregious example of undocumented resources and a wholly unsupported
42 compliance decision is that related to the professed availability of a two barges for lightering

⁶ The EVOS migrated well past Kodiak Island covering hundreds of square miles of ocean and spills in CI or into the Alaska Coastal Current during maximum flows would generate much quicker and further migration of spills than experienced in the EVOS.

1 operations. The C-plan professes the availability of two large Crowley barges but shows no
2 contract, location, tugs for transport, personnel for operation nor times for startup of these
3 claimed resources. Despite this lack of mandated documentation necessary to show
4 compliance with discrete deployment deadlines and requestors demand for such
5 documentation, DEC baldly asserts “The scenario also describes appropriate storage
6 alternatives for the lightered oil”. Not only is there insufficient documentation to assert this
7 conclusion, but the response scenarios do not show that the mandated timely lightering is
8 actually ever conducted. These are but two examples of many cited in the instant Request
9 where documentation is absent and assumptions and conclusions are largely unsupported as
10 required or implied⁷ by regulation thereby denying due process and a fair investigation.

11 12 **Issue 9: Response Planning Standard - Sufficiency of Vessels, Skimmers and Boom**

13 **Statement of Issue:** This issue draws upon multiple interrelated regulations and involves
14 multiple sub-issues that dispute the DEC finding that Tesoro has demonstrated the ability to
15 reliably meet the RPS in section .438(b)(1) and (c). Within these multiple sub-issues are two
16 primary issues that preclude a finding of compliance: the calculation of skimmer recovery
17 rates is fatally flawed where oil encounter rates was not considered; Tesoro failed to
18 demonstrate its ability to timely and reliably recover oil in RPS quantities under demanding
19 environmental conditions regularly experienced within state waters across the greater ROO.
20 DEC disputes the applicability of encounter rates as expressed in ASTM F1780-97 in
21 determining compliance with RPS mandates and its Findings instead suggest that it may
22 substitute its “professional judgment” in determining the ability of resources and practices to
23 meet the RPS. This position is not only in conflict with its own professional judgment used
24 to develop the ASTM standard but is in conflict with regulatory requirements that demand
25 the permittee and DEC to specifically calculate the amount of boom needed to meet the RPS
26 and otherwise develop a response scenario that requires calculation of realistic skimmer
27 efficiency and oil removal rates under severe weather and environmental limitations. The
28 primary function of boom in context of meeting the RPS is necessarily concentration of oil
29 for recovery by the skimmer. The laws of physics⁸ necessarily require that an encounter rate
30 analysis be conducted to obtain a realistic determination of how much boom is needed to
31 concentrate the oil for skimmer recovery. Without this analysis, the estimation of boom
32 needed to concentrate oil for any given skimmer or collection of skimmers is, by definition,
33 arbitrary, capricious and unprofessional. Similarly, when assessing the effects of weather and
34 environmental conditions on recovery rates, the primary physical effect of widely dispersing
35 the oil into a thinner average oil layer must be taken into account in determining recovery
36 rates. Both Tesoro and DEC were well aware of these physical parameters and effects but

⁷ Although regulations do not explicitly require the “course tracks” of tank vessels, section .410(b)(1) does require disclosure of the location of the operation which in this case was not fully disclosed and clearly beyond the plan coverage given the limited disclosure. Without full disclosure of the course tracks no reviewer could ascertain whether the plan was sufficient for permitting the operation as the permittee could obtain a permit to operate in one ROO and operate illegally in other undisclosed ROOs, an obviously illegitimate permitting process.

⁸ The laws of physics referenced pertain to the behavior of oil spilled on water and its tendency to disperse to a calculable average thickness given its natural dispersion coefficient and the effect of wind and currents upon that natural dispersion as modeled in the ASTM F1780-97. This spill thickness necessarily limits the amount of oil reaching the skimmer for recovery given the amount of boom used to concentrate oil and the advancing rate of the skimmer/boom system. It is physically impossible to recover more oil than the skimmer/boom system can encounter given a calculable spill thickness, boom encounter width and advancing rate.

1 chose instead to apply arbitrary skimmer recovery rates and boom lengths that remained
2 largely unaffected by otherwise adverse weather and environmental conditions postulated in
3 the scenarios. Without a realistic calculation of boom lengths using encounter rates, neither
4 Tesoro, DEC or the public could discern compliance with section .445(g)(4) that requires
5 evaluation of the vessel requirements for towing the required amount of boom. A
6 determination of satisfaction of sections .445(g)(3) and (4) becomes even more complicated
7 during winter conditions when ice renders boom ineffective and the only means of
8 concentrating oil for skimmers is deflection of both the oil and ice by the ice resistant hull,
9 (typically steel), of vessels. The scenarios are therefore non-compliant and the determination
10 of RPS compliance, necessarily reliant upon a scenario showing a proper calculation of
11 realistic recovery rates of the RPS assets, is therefore arbitrary and capricious.
12 Moreover, the spill scenarios proffered are conducted under weather and environmental
13 conditions favorable to oil recovery rather than the "...severe weather or other environmental
14 limitations..." mandated by section .445(f). The clear implication of this scenario selection
15 and approval is that Permittee is not required to meet the RPS in the more severe conditions
16 that are regularly encountered during its operations because it is well understood, and
17 explicitly regulated, that the more severe conditions would impose a "...reduction of control
18 or removal rates...". Allowing permittees to establish their RPS compliance at less than
19 worst case conditions⁹ is not only a violation of the explicit language of .445(f) but
20 undermines the purpose of the regulatory standard which must necessarily preserve the
21 reasonable concurrent use of resources by mitigating oil spill damage. Alaskans' right to
22 damage mitigation under law does not diminish or disappear as each storm appears or winter
23 arrives and establishing RPS compliance upon favorable summer scenarios effectively
24 eliminates the regulatory standard and our rights to protection during these regularly
25 experienced and predicable adverse conditions. Where ice and storms would clearly and
26 substantially diminish Tesoro's ability to meet RPS standards for more than 40% of the year,
27 as compared to its summer scenarios, it is painfully obvious that DEC is arbitrarily
28 approving compliance with this regulatory standard. The disabling effect of environmental
29 conditions upon the selected response assets also necessarily indicates a violation of the
30 requirement that the RPS equipment be "...appropriate and reliable for its intended use...".
31 Where any significant portion of the response equipment is disabled by environmental
32 conditions, the response system as a whole cannot be deemed "appropriate and reliable" as
33 promulgated in section .445(k)(1). A similar denial of the mandated protections occurs due
34 to the favorable location of the incident modeled in the RPS scenario where incidents
35 occurring at more distal ROO locations to the available assets would necessarily reduce
36 skimming time and decrease encounter rates. Another favorable factor that inappropriately
37 skews compliance calculations is the conflation of a .438(b)(1) scenario with the .438(c)
38 scenario. Tesoro/DEC cannot legitimately determine the ability to meet the (b)(1)

⁹ Everybody understands that the Alaskan marine environment can generate "worst case conditions" that exceed the ability of all response equipment but DEC must deny the permit or impose operating constraints when the spill mitigating capability required by law is not available. Neither the applicable statute nor regulations permit exemption from mandated mitigating capability due to the fact that a particular set of environmental conditions are too challenging. Indeed, the entire purpose of the standard is to deny permits where and when a permittee cannot mitigate spills. If, however, the RMROL section is deemed to allow operation beyond the limits of response capability, it is not in conformance with the statute and the mitigating prevention measures must be shown to offset the mitigation duty only after the ability of the most capable response equipment has been exhausted.

1 requirement by relying upon skimming the slow continuous release of oil associated with a
2 type (c) out of region event. The applicable regulations and prior c-plan analyses clearly
3 required recovery of the instantaneous release of the type (b) RPS amount that is
4 substantially more unfavorable to recovery given the subsequent delay in mobilization and
5 concurrent dispersal of the spill. It is equally arbitrary to determine compliance with the type
6 (c) requirements by artificially delaying the determination of a type (c) event to allow arrival
7 of out of region assets beyond the 72 hour timeline established by regulation. Clearly the
8 sinking of a tanker posited by the scenario must immediately trigger the running of the 72
9 hour type (c) deadline. In short, the determination of RPS compliance by DEC under less
10 than worst case spill circumstances is unlawful where it deprives citizens of the full
11 protection of law that mandates consideration of worst case spills and severe conditions to
12 insure complete mitigation to regulatory standards without limitation. Where the listed
13 assets, tactics and scenario procedures must be generally applicable to all spills, DEC cannot
14 rely on a less than worst case scenario for compliance as the equipment and tactics are
15 clearly no longer generally applicable and citizens would be deprived of mandated
16 protections at under more severe conditions and/or at various locations in violation of their
17 right to equal protection under the law.

18 The proffered RPS scenario is additionally not generally applicable for estimating response
19 mobilization and skimming times during the winter when response barge(s) are relocated to
20 Kachemak Bay and the area fishing vessels are out of the water, increasingly unavailable due
21 to high tidal fluctuations or disqualified for use in ice. The professed availability of the larger
22 OSRVs in the scenarios is also not sufficiently demonstrated where they are not restricted to
23 exclusive CISPRI use and the completion of contracted duties and offloading of cargo could
24 substantially delay their availability for response operations. Here again, Tesoro must
25 disclose and incorporate the worst case delays in order for the scenarios to be generally
26 applicable to all spills.

27
28 **Issue 10: Failure to List and Consider Realistic Maximum Response Operating**
29 **Limitations of Response Equipment- Appropriate Prevention Measures When**
30 **RMROL is Exceeded**

31 **Statement of Issue:** This issue is partially addressed as sub-issues above but is reiterated
32 here to insure consideration and adjudication. 18 AAC 75.425(e)(3)(F)(iii) requires the
33 listing of limitations of each item of response equipment but the request to comply in
34 comments was ignored by DEC. This regulation is the “lynch pin” to ensuring compliance
35 with all other response oriented regulations because it is designed to allow reviewers to
36 ascertain whether the response system components could maintain effective operations as
37 represented in worst case scenarios. Strict enforcement of this requirement is a prerequisite
38 to assessment of compliance for all associated regulations as reviewers must be assured by
39 verifiable specifications that the equipment is appropriate and reliable for the operating
40 conditions without potential impairment by weak links or capability limits in the system as is
41 explicitly required for analysis in section .445(f). These two regulatory requirements are
42 clearly complementary with the unambiguous purpose of definitively demonstrating full RPS
43 compliance at the upper limits of equipment operability. These intertwined requirements are
44 further supported by section .447 that requires DEC to independently investigate the best
45 technologies for specific locations and operations and then consider them for incorporation

1 into c-plans. While DEC may be confident that it has the information from drills, inspections
2 and from its professional judgment to ascertain this degree of equipment reliability, it may
3 not deny public reviewers this critical information mandated by regulation, particularly
4 where it has repeatedly refused to disclose its own drill reports/information/"professional"
5 methodology and drill reports and methodology prepared by competent
6 observers/professional associations are often directly contradictory to DEC assertions. While
7 the absence of the mandated information alone is a fatal defect in the permitting process
8 violating requestor's right to due process and a fair investigation, the disputed material fact
9 of equipment limitations as an essential function of appropriateness and reliability can only
10 be resolved with extensive discovery/testimony of heretofore concealed information material
11 to the issue.

12 Where DEC has or will allow Tesoro to operate beyond the capability of its response assets
13 to meet the RPS, DEC must impose the most effective prevention measures available to
14 mitigate the numerous extraordinary risks presented in each ROO. Cook Inlet, in particular,
15 poses extreme risk of spill from ice, fast currents and volcanic activity that warrant
16 imposition of risk mitigation even apart from the lack of mandated spill mitigation and all
17 feasible risk mitigation should be imposed as a matter of equal protection, maintenance of
18 sustained yield and reasonable concurrent use of natural resources for CI resource users. The
19 swift currents alone and the flammable cargo should evoke dual fire tug docking mandates at
20 all loading terminals. This docking hazard from swift currents is severely exacerbated by
21 winter ice as the multiple grounding incidents have conclusively proven. Ice and swift
22 currents have also repeatedly been demonstrated as a hazard to ships in transit warranting
23 close dual enhanced technology escorts. The volcanic hazard warrants extraordinary
24 measures to insure operability of all tank vessels and response vessels as well as personnel
25 safety in ash clouds. Explicit procedures to forestall transit into the volcanic affected zone
26 and to immediately escape the zone when eruption warnings are issued should be
27 established.

29 **Issue 11: Scenarios – Consideration of the Most Demanding Conditions in Designing** 30 **Spill Response**

31 **Statement of Issue:** This issue is largely addressed as sub-issues in other issues but is
32 separately listed to insure its independent consideration and adjudication. The requestor
33 contends that the RPS Scenarios are unrealistic with regards to showing that the plan holders
34 can meet RPS under the worst case conditions as is required by AS 46.04.030, 18 AAC
35 75.425(e)(3)(F) and 75.445(f). While the argument above establishes the intent of regulatory
36 language to develop an effective response plan meeting the RPS requirements under severe
37 weather and environmental conditions, the statutory language in section .030 also shows the
38 intent to require response in all conditions including those for the "maximum and most
39 damaging oil discharge" using the "best technology that was available at the time the
40 contingency plan was submitted or renewed". Noticeably absent from section .030 is any
41 language that would exempt permittees from full compliance with planning standards under
42 challenging weather or environmental conditions. The required planning to effectively
43 mitigate the most damaging spill using the best equipment necessarily implies that careful
44 consideration of conditions that that could impair response must be made in selection of
45 equipment and tactics so as to remove all potential impediments to effective response as far

1 as the state of the art allows. Despite the fact that Tesoro identified multiple conditions that
2 would impair and/or delay response, it chose to design response scenarios that avoided these
3 conditions to falsely claim RPS compliance well short of the “most damaging oil
4 discharge”¹⁰ under “severe weather and environmental conditions” as mandated by law.
5 Were section .445(d)(5) requires that “plan strategies are sufficient to meet the applicable
6 response planning standard... within the specified time and under environmental conditions
7 that might reasonably be expected to occur at the discharge site”, the failure to plan any
8 winter spill response effectively denies the existence of winter in Alaska. This section taken
9 in the context of the controlling statute and intertwined RMROL approval criteria necessarily
10 demands design of RPS strategies using the most demanding conditions that may reasonably
11 be expected to occur, not the most favorable conditions. The response scenarios are therefore
12 fatally deficient and approvals based on these scenarios, inventory and strategies are likewise
13 not in compliance with statutory and regulatory requirements.

14
15 **Issues 12-15: N/A**

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

18 **Statement of Issue:** This issue is largely addressed as sub-issues above but is separately
19 listed to insure its independent consideration and adjudication. The requestor contends that
20 the Department has not examined all new technologies as required by 18 AAC 75.447 and
21 has not otherwise mandated the use of those technologies it has deemed appropriate for the
22 fast currents of Cook Inlet. DEC was required by law to conduct at least two comprehensive
23 BAT conferences since this regulation was adopted but has only conducted one unlawfully
24 limited conference and produced an insufficient report from that limited conference. It
25 further refused to consider that report or produce it as a review document in the instant C-
26 plan review. DEC’s dereliction of duty in this matter has substantially impaired the ability
27 of: permittees to prepare c-plans; DEC to appropriately review c-plans; the public’s right to
28 competently review c-plans with complete information regarding the efficacy of c-plan
29 components and their applicability to specific physical environments, geographic locations
30 and permittee’s operations. The instant C-plan review was therefore an unfair investigation
31 as are the subsequent Informal Review and adjudicatory process where requestors and
32 commenters were denied due process by the unlawful suppression of material evidence. DEC
33 has unequivocally established these reports as material to c-plan reviews in the BAT
34 litigation:

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

¹⁰ With all other factor being equal, those conditions or factors that delayed or impaired response would result in greater damage from any given spill. The mandate to model effective response for the “most damaging oil discharge” in section .030(r)(3) necessarily requires that the permittee must presume that all conditions/factors that could impair and impede response are appropriately considered in its analysis.

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

4 Requestor specifically requested DEC BAT equipment analyses and application of its
5 findings to this C-plan for the problematic conditions of ice, high seas, debris and fast
6 currents. Requestor even submitted suggestions of equipment appropriate for comparison to
7 those employed for these problematic conditions, but DEC refused to produce and apply
8 such analyses in the instant review in direct contravention of the intent of the regulation as
9 unambiguously proffered to the Supreme Court. DEC’s unlawful conduct in the instant
10 review impaired the ability of reviewers to competently evaluate and challenge its arbitrary
11 approval of the woefully substandard equipment in the instant contested C-plan. A prime
12 example of DEC’s bad faith in this investigation is its blatant failure to require Tesoro to
13 utilize any of the high current booming¹¹ systems it deemed as BAT in its only conference
14 report published to date. The required technology analyses must therefore be conducted and
15 submitted for public review with the Tesoro C-plan after the C-plan shows full incorporation
16 of those technologies deemed best for the problematic conditions presented in each of
17 Tesoro’s ROOs.

18
19 **Issue 17: N/A**

20
21 **Issue 18: Compliance with Pending Federal Spill Prevention Requirements**

22 **Statement of the Issue:** Requestor claims that Tesoro may not be issued the instant C-plan
23 Permit for an unconditioned term of 5 years where all parties understand that impinging
24 federal regulations will require additional assets within the permit period. DEC performance
25 criteria, section .007(b), mandates that DEC approval be conditioned upon satisfaction of
26 federal spill prevention requirements. Although both requester and DEC understand that
27 although the instant review must be conducted under current regulations, Tesoro cannot meet
28 the new standards effective within a year of the approval of the five year permit. Requestor
29 therefore claims the instant approval deficient in that it fails to limit the term of the permit to
30 one year or otherwise condition the permit to require timely amendment the C-plan to
31 conform to the new federal spill prevention requirements.

32
33 (3)(B) (ii) The relevance to the permit decision of each matter identified under (i) of this
34 subparagraph is contained in the preamble and in individual extended statements of the issue
35 provided above.

36
37 (3)(B) (iii) The hearing time estimated to be necessary for the adjudication may extend up to
38 9 weeks due to the need to elicit extensive testimony from multiple DEC personnel,
39 Permittees and the PWS and CI RCACs regarding suppressed documents, incomplete tanker
40 course tracks, non-public meetings evaluating C-plan compliance using “professional
41 judgment” and the efficacy of C-plan equipment as allegedly demonstrated in unreported

¹¹ Where Tesoro must meet the RPS in the presence of ice that effectively disables all booms, it may well be superfluous to require any fast current boom given an established capability to effectively recover oil without boom during winter ice conditions.

1 drills, exercises and actual incident events. Requestor intends to consolidate the instant
2 appeal with the pending requested appeals of the TAPS tanker permit approvals.

3
4 (3)(C) The hearing request should be granted in the public interest to: substantially advance
5 the spill prevention and response capability of Permittee and other operations across the state
6 in compliance with regulatory mandates; to establish and implement a fair investigatory
7 process in the public c-plan reviews, and; to provide relief to requestor for the violation of
8 his constitutional rights to reasonable concurrent use of Alaska's natural resources, a fair
9 investigation, due process and free speech denied in the public review; and to provide for
10 equal protection under the law. If the Commissioner fairly considers the issues presented
11 above and their stark contrast to the positions presented by DEC in its deficient Findings, it
12 will become self evident that the Department's compartmentalization of regulatory
13 compliance issues has subverted the underlying intent of the applicable laws to require
14 permittee to design their spill response in a manner that provides for the maximum possible
15 natural resource protection using the most efficient tactics and the most effective equipment
16 to mitigate spill damage. No one contends that that any permittee could mitigate all spill
17 damage all of the time given Alaska's severe conditions, but the constitution, statutes and
18 regulations all demand that DEC require permittees to employ appropriate and reliable
19 measures to mitigate the most damaging spill given fair consideration of continuing
20 technological breakthroughs and, when/where there is still a potential for substantial spill
21 damage that could not be mitigated or operations restricted in accordance with law,
22 permittees must employ state-of-the-art technology and best procedures to reduce the risk of
23 spills occurring.

24 Requestor has also demonstrated his ability to properly interpret the meaning and intent of
25 applicable law in his successful litigation against DEC in the Alaska Supreme Court.
26 Requestor is therefore deserving of the requested opportunity to resolve these outstanding
27 issues as they engaged herein, in good faith.

28
29 (3)(D) A comprehensive set of alternative terms and conditions needed to meet regulatory
30 requirements is simply not possible given the incomplete set of data and evaluations that
31 were required to be produced in the C-plan and DEC review process. Full regulatory
32 compliance necessitates that any decision on satisfaction of the approval criteria be premised
33 upon a fair and expert consideration of data and analyses that has been suppressed from the
34 public review and administrative appeal process. Any administrative regulations designed to
35 shift that burden from a permittee and DEC to the requestor in order to obtain a due process
36 adjudication of his concerns is wholly unconstitutional. Such a regulation would require
37 ordinary citizens to engage in multimillion dollar data collection and expert analyses that is
38 clearly beyond the authority of DEC to compel as a prerequisite of a due process
39 administrative hearing. That being said, requestor will at least further describe the data and
40 analyses that must be compiled to ascertain regulatory compliance in a new public review of
41 the appropriately amended C-plan as follows:

42
43 Issue #1: tanker course tracks throughout all Alaskan ROOs that is potentially available from
44 tanker logs and/or GMDSS tracking data from the Alaska Marine Exchange and possibly the
45 USCG; all reliable data on environmental conditions in all of the ROOs transited and that

1 may otherwise be affected by migrating oil that is potentially available from tanker logs and
2 PRAC/RAC vessels, NOAA facilities, weather/current research papers, etc.; data and studies
3 of currents affecting oil migration through Alaskan waters that may be potentially affected
4 by spills.

5 Issues # 2-5: N/A

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

12 Issue # 7: data on equipment used to detect and track oil spills and practices employed
13 worldwide; a comprehensive comparative analysis of the capabilities of these technologies as
14 they may qualify the superlative technology in each category as the best technologies for use
15 under worst case conditions as they may occur in each of the ROOs and distinct geographic
16 locations therein that Permittee transits.

17 Issue # 8: immediate production of all referenced and/or requested documents that were not
18 otherwise produced as documents for the C-plan review.

19 Issue # 9: Same as # 1; produce a comprehensive BAT Conference and report that analyzes
20 the comparative effectiveness and efficiency of each piece of response equipment in
21 Permittee's response inventory as it may be used to satisfy 18 AAC 75.438 as compared to
22 other technologies that may be used for the same or similar purpose worldwide; produce an
23 encounter rate analysis for each type of skimming task force depicted in the CTM as used in
24 RPS scenarios under various worst case environmental conditions RMROL; produce a
25 comprehensive evaluation of the ability of Permittee to meet the type (b) and (c) RPS
26 scenarios utilizing ASTM F1780-97 methodology in an additive evaluation of each Task
27 Force's oil recovery capability at the RMROL of that Task Force.

28 Issue # 10: a complete list of the RMROL for each piece of response equipment in
29 Permittee's response inventory as it may be used to satisfy 18 AAC 75.438; a complete list
30 of potential compensating spill prevention and response measures that may be employed
31 when RMROL is exceeded with specificity as to geographic locations and environmental
32 conditions where and when these compensating measures will be employed; mandatory
33 imposition of all feasible risk mitigation measures when RMRIL is exceeded but minimally
34 docking and close escort by FIFI tractor tug(s) capable of GOA salvage operations.

35 Issue # 11: produce a trajectory analysis and RPS scenarios that reflect the type (b) and
36 "most damaging oil discharge" in both dense winter ice flows and at distal GOA sites, (i.e.
37 close the gap between SERVS and CISPRI response zones).

38 Issues # 12-15: N/A

39 Issue # 16: Conduct a comprehensive BAT Conference and report that analyzes the
40 comparative effectiveness and efficiency of each piece of response equipment as it may be
41 considered the best for problematic conditions at specific geographic locations in all of the
42 ROOs that Tesoro transits.

43 Issue # 17: N/A

44 Issue 18: Produce a condition of approval that requires amendment of the C-plan by 9/1/10
45 to conform to the new federal spill prevention requirements effective 2/1/11 including the

1 FIFI tractor tug(s) capable of GOA salvage operations and a heavy lift salvage vessel with
2 standoff and subsurface lightering capabilities.

3
4 To the extent that requestor can avail the Permittee and DEC of the investigation he has
5 conducted on technologies that would likely be most capable and cost effective for
6 incorporation in an amended C-plan, he suggests they revisit comments and equipment
7 suggestions previously submitted in this and the PWS tanker c-plan reviews. The fact that CI
8 swift ice flows are severely problematic for concentrating oil for recovery suggests the need
9 to acquire several custom retrofitted barges to concentrate the widely dispersed oil for
10 skimming systems that can effectively segregate the oil from the ice flows below water level
11 to prevent freezing of critical components. While the Lamor LOIS is clearly “head and
12 shoulders” qualified as BAT among all commercially available options for these problematic
13 conditions of fast currents and concentrated broken ice, an intensive research and
14 development program should be able to produce a skimming system that is cheaper and more
15 effective across the broad range of problematic conditions that are present at distal locations
16 within the ROO(s), (see AP OSRV). It may also be possible to develop metal or composite
17 clad and foam-filled boom that could be tightly strung between large recovery vessels to
18 resist damage and displacement, (sinking or lifting), of the boom in ice. These solutions are
19 no doubt very expensive, so much so that it may be preferable to construct additional on
20 shore oil storage and dispense with winter operations. Even without winter operations,
21 Tesoro would still have to deploy sufficient Ocean Buster and/or ZRV Rope Mop¹² Task
22 Forces using large tank vessels to reliably conduct operations in swift CI currents and those
23 distal ROO waters exposed to high seas in the Gulf of Alaska. If Tesoro continues to insist
24 upon a lack of restrictions to navigation in the North Pacific and/or Bering Sea a mix of high
25 sea and ice capable response vessels would be needed in these areas as well. In this
26 circumstance would it would clearly be cheaper¹³ to accept the same restriction on
27 navigation through the Aleutians as is federally mandated for TAPS tankers. DEC’s “rubber
28 stamp” on a clearly deficient C-plan is not a legal option in any event.

29
30 Sincerely; 

31
32 Tom Lakosh

¹² ZRV Rope Mops, that can effectively skim at up to 6 knots, are clearly the most appropriate technology for currents >3 knots and could be mounted in trimarans to protect the skimmers for effective operation in high seas. Ocean Busters would otherwise be acceptable for high seas and ACC velocities were it not for the very high Upper CI currents >7 knots. These technologies are both only optimal for open waters where ice would destroy Ocean Busters and would substantially degrade ZRV Rope Mop effectiveness by holding the mop filaments above the oil surface. Severe cold also freezes the rope mops, preventing oil uptake.

¹³ At least until the USCG accepts its responsibility to provide the mandated and federally funded NCP response assets for those innocent passage tankers and non-tank vessels en route to Canada and other non-US ports. Cost sharing might then be feasible. Congress clearly understood the unmitigated threat to the Aleutians from TAPS tankers in its imposed navigational restrictions when lifting the Export Ban and a worst case discharge from a Tesoro tanker could be twice as large as the EVOS.