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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

CAMPAIGN TO SAFEGUARD AMERICA'S)
WATERS, a project of EARTH ISLAND)
INSTITUTE; and FRIENDS OF THE EARTH,)

Appellants,)

v.)

ALASKA DEPARTMENT OF)
ENVIRONMENTAL CONSERVATION,)
DIVISION OF WATER,)

Case No. 1JU-10-793 CI

Appellee,)

and)

ALASKA CRUISE ASSOCIATION,)

Intervenor-Appellee.)

BRIEF OF APPELLANTS

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APPLICABLE STATUTES AND REGULATIONS

I. STATUTES

A. AS 46.03.462. Terms and conditions of discharge permits

<Text of subsec. (a) effective until Jan. 1, 2016>

(a) An owner or operator may not discharge any treated sewage, graywater, or other wastewater from a commercial passenger vessel into the marine waters of the state unless the owner or operator

(1) obtains a permit under AS 46.03.100, which shall comply with the terms and conditions of vessel discharge requirements specified in (b) of this section; or

(2) has a plan approved by the department under (c) of this section.

<Text of subsec. (a) effective Jan. 1, 2016>

(a) An owner or operator may not discharge any treated sewage, graywater, or other wastewater from a commercial passenger vessel into the marine waters of the state unless the owner or operator obtains a permit under AS 46.03.100, which shall comply with the terms and conditions of vessel discharge requirements specified in (b) of this section.

<Text of subsec. (b) effective until Dec. 31, 2015>

(b) The minimum standard terms and conditions for all discharge permits authorized under this section require that the owner or operator

(1) may not discharge untreated sewage, treated sewage, graywater, or other wastewaters in a manner that violates any applicable effluent limits or standards under

state or federal law, including Alaska Water Quality Standards governing pollution at the point of discharge, except as provided in (e) of this section;

(2) shall maintain records and provide the reports required under AS 46.03.465(a);

(3) shall collect and test samples as required under AS 46.03.465(b) and (d) and provide the reports with respect to those samples required by AS 46.03.475(c);

(4) shall report discharges in accordance with AS 46.03.475(a);

(5) shall allow the department access to the vessel at the time samples are taken under AS 46.03.465 for purposes of taking the samples or for purposes of verifying the integrity of the sampling process; and

(6) shall submit records, notices, and reports to the department in accordance with AS 46.03.475(b), (d), and (e).

<Text of subsec. (b) effective Dec. 31, 2015>

(b) The minimum standard terms and conditions for all discharge permits authorized under this section require that the owner or operator

(1) may not discharge untreated sewage, treated sewage, graywater, or other wastewaters in a manner that violates any applicable effluent limits or standards under state or federal law, including Alaska Water Quality Standards governing pollution at the point of discharge;

(2) shall maintain records and provide the reports required under AS 46.03.465(a);

(3) shall collect and test samples as required under AS 46.03.465(b) and (d) and provide the reports with respect to those samples required by AS 46.03.475(c);

(4) shall report discharges in accordance with AS 46.03.475(a);

(5) shall allow the department access to the vessel at the time samples are taken under AS 46.03.465 for purposes of taking the samples or for purposes of verifying the integrity of the sampling process; and

(6) shall submit records, notices, and reports to the department in accordance with AS 46.03.475(b), (d), and (e).

(c) The owner or operator of a small commercial passenger vessel may submit a plan for alternative terms and conditions of vessel discharges if the keel of the vessel was laid before January 1, 2004. The alternative terms and conditions may include alternatives to the requirements under AS 46.03.465(a)—(d). Except as provided in (d) of this section, the department shall approve the plan for a three-year period if the department finds that the alternative terms and conditions in the plan incorporate the best management practices for protecting the environment to the maximum extent feasible. The department shall adopt regulations to implement this subsection but may not require an owner or operator to retrofit a vessel solely for the purpose of waste treatment if the retrofitting requires additional stability testing or relicensing by the United States Coast Guard. In this subsection, “best management practices” means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of the marine waters of the state.

(d) A plan submitted under (c) of this section after December 31, 2012, may not be approved by the department for a period extending beyond December 31, 2015.

(e) When issuing, reissuing, renewing, or modifying a permit required under (a)(1) of this section, the department may include effluent limits or standards less stringent than

those required under (b)(1) of this section for not more than three years duration if the department finds that a permittee is using economically feasible methods of pollution prevention, control, and treatment the department considers to be the most technologically effective in controlling all wastes and other substances in the discharge but is unable to achieve compliance with Alaska Water Quality Standards at the point of discharge.

(f) In developing an effluent limit or standard under (e) of this section, the department shall

(1) require use of economically feasible methods of pollution prevention, control, and treatment the department finds to be the most technologically effective; and

(2) apply all other applicable provisions of state law and this section.

(g) When reissuing, renewing, or modifying a permit required under this section that was issued after July 10, 2009, the department may not include effluent limits or standards less stringent than the comparable effluent limitations in a previous permit issued under this section.

(h) Nothing in this section shall be construed to limit the authority of the department to

(1) restrict the areas in which discharges permitted under this section may occur;

or

(2) impose additional terms and conditions on the manner in which discharges permitted under this section may be made in a specific area.

REPEAL

<SLA 2007, ch. 56, § 9 provides that subsecs. (c) and (d) are repealed eff. Jan. 1, 2016.>

<SLA 2009, ch. 53, § 7 provides that subsecs. (e) and (f) are repealed eff. Dec. 31, 2015.>

B. AS 46.03.464. Advisory panel on wastewater treatment; commissioner's reports to the legislature

(a) A science advisory panel is established in the department. The panel consists of 11 members selected by the commissioner. Members of the panel serve without compensation but are entitled to transportation expenses and per diem as authorized for members of boards and commissions under AS 39.20.180. Each of the individuals the commissioner selects serves for up to a six-year period and have expertise in the design, operation, or function of waste-water management and treatment systems. Among the 11 panel members, the commissioner shall select at least one individual from each of the following groups:

- (1) coastal community domestic wastewater management;
- (2) the cruise ship industry;
- (3) the commercial fishing industry; and
- (4) a nongovernmental organization with an interest in water quality matters.

(b) The panel shall

(1) meet at the call of the commissioner and give public notice of meetings of the panel as required under AS 44.62.310 and 44.62.312;

(2) hold one or more public conferences or workshops before 2013, with at least one public conference or work–shop to be held between January 1, 2013, and January 1, 2015, if the department issues, renews, or modifies a permit required under AS 46.03.462(a)(1) after January 1, 2012; and

(3) assist and advise the commissioner in conducting the analyses and preparing the reports required in (c) and (d) of this section.

(c) On or before January 1, 2013, the commissioner, in consultation with the panel, shall provide a preliminary report to the legislature that summarizes

(1) methods of pollution prevention, control, and treatment in use and the level of effluent quality achieved by commercial passenger vessels;

(2) additional economically feasible methods of pollution prevention, control, and treatment that could be employed to provide the most technologically effective measures to control all wastes and other substances in the discharge; and

(3) the environmental benefit and cost of implementing additional methods of pollution prevention, control, and treatment identified in (2) of this subsection.

(d) On or before January 1, 2015, the commissioner, in consultation with the panel, shall provide a final report to the legislature that includes the topics identified in (c)(1)–(3) of this section.

CREDIT(S)

Added by SLA 2009, ch. 53, § 5, eff. July 10, 2009.

REPEAL

<SLA 2009, ch. 53, § 7 provides that this section is repealed eff. December 31, 2015.>

II. REGULATIONS

A. 18 AAC 15.200. Request for an adjudicatory hearing.

(a) Within 30 days after the department issues a permit decision reviewable under 18 AAC 15.195–18 AAC 15.340 or within 30 days after the department issues a final decision under 18 AAC 15.185, whichever is later, a person authorized to request an adjudicatory hearing under this chapter may serve a request upon the commissioner. The request must be in writing and must contain

(1) the requestor’s name, mailing address, and telephone number;

(2) the names and addresses of all persons adversely affected by the decision whom the requestor represents;

(3) a memorandum that supports the request; the memorandum must include

(A) a clear and concise factual statement of the nature and scope of the interests of the requestor, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision; that explanation must include a discussion of the factors in 18 AAC 15.220(b)(1)(A);

(B) a clear and concise statement of

(i) each disputed issue of material fact and question of law proposed for consideration at the hearing;

(ii) the relevance to the permit decision of each matter identified under (i) of this subparagraph; and

(iii) the hearing time estimated to be necessary for the adjudication;

(C) a discussion of why the request for hearing should be granted; and

(D) if applicable, specific reference to the contested terms or conditions of the department's decision, as well as suggested alternative terms and conditions that in the requestor's judgment are required to implement applicable requirements of law.

B. 18 AAC 15.220(b)(A)(1). Action on hearing requests.

(b) Within 30 days after the time has expired for a requestor to reply to responses to the request, the commissioner or a designee assigned under 18 AAC 15.235(a)(1)(A) will issue a decision on a request for an adjudicatory hearing. The commissioner or designee will

(1) grant a request for a hearing if the commissioner or designee finds that

(A) the request discloses that the requestor would be directly and adversely affected by the department's decision so as to justify an adjudicatory hearing; in determining whether a requestor is directly and adversely affected by the department's decision, the commissioner or designee will consider the nature of the interest asserted by the requestor, whether that interest is one that the applicable statutes and regulations were intended to protect, and the extent to which the department's decision directly and substantively impairs that interest[.]

JURISDICTIONAL STATEMENT

Campaign to Safeguard America’s Waters, a project of Earth Island Institute (CSAW), and Friends of the Earth (FoE) appeal the Alaska Department of Environmental Conservation’s (DEC) Large Commercial Passenger Vessel Wastewater Discharge General Permit Number 2009DB0026 and its final decision denying a request for administrative review of the permit. The permit authorizes large commercial passenger vessels—cruise ships—to discharge wastewater in Alaskan waters. DEC issued the permit on April 22, 2010 and its final decision denying CSAW and FoE’s request for administrative review on July 21, 2010. CSAW and FoE filed a notice of appeal in this Court on August 23, 2010. This Court has jurisdiction to consider this appeal pursuant to AS 22.10.020(d) and AS 44.62.560(a).

STATEMENT OF ISSUES

1. Did DEC err in determining that all cruise ships are already using the “most technologically effective” methods of wastewater treatment and control, as required by AS 46.03.462(e), when the ships use a wide variety of treatment methods that vary greatly in performance?

2. Where CSAW and FoE played an active role in the legislative and administrative processes leading to this permit and both organizations have members who are harmed by the permit, did DEC err in concluding that the organizations had not established standing to pursue an appeal to the Commissioner of DEC?

STATEMENT OF THE CASE

In 2010, DEC issued a permit authorizing large cruise ships to discharge wastewater in Alaskan waters pursuant to AS 46.03.462(e). In the permit decision, DEC found that any of the wastewater treatment systems the ships currently have onboard are the “most technologically effective” treatment systems even though the quality of the treated wastewater they produce varies widely. The statute that authorizes the permit, AS 46.03.462(e), amended a 2006 ballot initiative requiring cruise ships to meet Alaska Water Quality Standards at the point of discharge. In 2009, the legislature amended the statute to provide cruise ships with another six years to meet those standards, but required that, in the interim, cruise ships use the “most technologically effective” wastewater treatment methods that are economically feasible. In the permit DEC issued this year, instead of requiring all permitted ships to meet the most stringent standards achievable with current technology, DEC authorized six different sets of standards so that all ships can continue to use any treatment system they are currently using without modification. One of the six treatment systems, a reverse osmosis system called Rochem, which has been used successfully by several ships in Alaska, outperforms all other treatment systems, and the effluent standards DEC set for that system are significantly more stringent than the standards applicable to ships using any other treatment system. The question in this litigation is whether the cruise ship wastewater discharge permit complies with the plain language of AS 46.03.462(e), a statute targeted at moving the cruise ship

industry toward meeting the ultimate goal of compliance with Alaska Water Quality Standards at the point of discharge.

I. HISTORY OF CRUISE SHIP WASTEWATER REGULATION.

About one million passengers visit Alaska each summer by cruise ship. Ex. B at 19 (S. Resources Standing Comm. (Apr. 6, 2009)) (statement of Cmm'r Hartig). These large floating cities discharge nearly 148 million gallons of wastewater in Alaskan waters each year—as much as 150,000 gallons per ship per day. *See* Ex. 37; Ex. 36. This wastewater includes water from the ships' toilets, showers, sinks, galleys, laundry facilities, and other sources. *See* Ex. 38. It can include dry cleaning fluids, other cleaning fluids, degreasing fluids used in engine rooms, brightening and polishing fluids used in cleaning brightwork, pesticides, pharmaceuticals, personal care products, DEET from insect repellants, detergents, disinfectants, fire retardants, sewage, and other pollutants. *See* Ex. 29–36; Ex. 68. This wastewater is divided into two categories: “blackwater,” or sewage, and “graywater,” or water from accommodations, galley, and laundry. Ex. 139; Ex. 48; AS 46.03.490(6). Graywater may also include waste streams from the cruise ships' day spas, photo labs, dry cleaning areas, chemical storage areas, medical facilities, and other sources. Ex.30–31.

Prior to 2000, there were few restrictions applicable to the discharge of wastewater from cruise ships. In fact, in federal waters within southeast Alaska, cruise ships could, and did, dump thousands of gallons of raw sewage. *See* Ex. 52. Even in state waters, they regularly discharged wastewater with high levels of fecal coliform and other bacteria

that present risks to aquatic life and human health. Exc. 2–4.¹ At that time, most ships used traditional marine sanitation devices to treat sewage and graywater. Exc. 48–50. These systems generally treat wastewater with either biological treatment or maceration,² followed by disinfection with chlorine, but those processes were ineffective at treating the large quantities of wastewater generated by cruise ships. Exc. 54. In 2000, in response to public outcry over the amount of untreated and partially treated wastewater dumped in Alaskan waters, a federal law was passed that prohibits the discharge of untreated sewage, authorizes the United States Environmental Protection Agency to promulgate regulations governing the discharge of treated sewage and graywater, and gives Alaska the authority to regulate the discharge of sewage in state waters. Exc. 52; 33 U.S.C. § 1901, et seq.

Following up on that legislation, Alaska tightened its own restrictions on cruise ship discharges. The Alaska Cruise Ship Initiative—a group of agency, industry, and public representatives—tested wastewater samples collected from cruise ships during the summers of 2000 and 2001. *See* Exc. 55–58. These monitoring studies found that traditional treatment methods were not effective in treating sewage or graywater—on average, the sampling data showed that discharge treated with marine sanitation devices had fecal coliform levels comparable to the concentrations found in untreated domestic wastewater. *See* Exc. 56. Of 70 blackwater samples collected, only one met federal

¹ State waters are those waters within three miles of shore. Exc. 141, 52. The areas within southeast Alaska that are beyond three miles from shore are known as “doughnut holes” because they were largely unregulated. Exc. 52.

² Maceration breaks up and dilutes solids. Exc. 55.

Clean Water Act standards for both fecal coliform and for total suspended solids.

Exc. 56. Performance was even worse when compared to Alaska's more protective water quality standards. Ninety-two samples of graywater and blackwater were collected and tested in the 2000 monitoring study. Some samples were more than 23,000 times the daily maximum of 43 coliform per 100 ml of water allowed under Alaska Water Quality Standards. *Compare* Exc. 56 (22 samples were greater than 1,000,000 MPN (most probable number of coliform) per 100 ml) *with* Exc. 142 (daily max 43 per 100 ml). The samples also exceeded Alaska Water Quality Standards for other criteria by large factors. *Compare* Exc. 56–57 (showing average concentrations of total suspended solids, biochemical oxygen demand, chemical oxygen demand, pH, and total residual chlorine) *with* Exc. 142 (showing Alaska water quality standards for the same parameters); *see also* Exc. 3–17 (providing detailed summaries of 2000 and 2001 study results). Likewise, average concentrations of metals (copper, nickel, and zinc) were between two and 300 times Alaska's water quality standards. *Compare* Exc. 57 *with* Exc. 138. Average concentrations of ammonia were 145 times the state water quality standard. *Compare* Exc. 58 *with* Exc. 138.

Small amounts of these pollutants can have serious effects for fish, marine mammals, and people; consequently, DEC has promulgated limits—the Alaska Water Quality Standards—for these pollutants based on the potential for harm to aquatic life and to humans. *See* Exc. 46 (explaining basis for water quality criteria). For example, where raw mollusks are harvested for human consumption, fecal coliform is not to

exceed 14 fecal coliform MPN per 100 ml of water. Exc. 19. Higher levels can pose a risk of illnesses for humans. *See* Exc. 22 (noting that if individuals were collecting shellfish on a day where fecal coliform measures substantially exceeded standards, those individuals would be “exposed to significant risk”); Exc. 61. Ammonia can affect the life cycle and survival of some species. *See* Exc. 149. At toxic concentrations for aquatic life, ammonia can cause loss of equilibrium, hyperexcitability, convulsions, coma, increased breathing, increased cardiac output, increased oxygen uptake, and even death. *See* Exc. 67. Copper and other chemicals and metals found in cruise ship discharges bioaccumulate in fish and mollusks. Exc. 151, 25, 43. This can result in negative effects for human health if humans consume shellfish tainted by wastewater discharged from cruise ships. Exc. 25 n.33, 43. Metals can also be toxic to many aquatic species and can result in biochemical, physiological, morphological, and behavioral changes. Exc. 65.

II. THE 2006 CRUISE SHIP BALLOT INITIATIVE AND SUBSEQUENT LEGISLATION.

To address these problems, in 2006, Alaskan voters approved a ballot measure that required cruise ships to meet Alaska Water Quality Standards at the point of discharge. *See* Exc. 53, 139; AS 46.03.462 (2006).³ The initiative succeeded in forcing cruise ships to provide better treatment for sewage. Many ships installed more advanced treatment systems. These systems were generally effective in treating fecal coliform, but they

³ The law applies to large commercial passenger vessels, which are defined to include ships with overnight accommodations for 250 or more people. *See* AS 46.03.490(2), (7), (13) (defining large and small commercial passenger vessels); AS 46.03.462(c) (providing an exception for small commercial passenger vessels). In practice, this definition includes only large cruise ships.

failed to meet Alaska Water Quality Standards at the point of discharge for certain heavy metals and ammonia that DEC identified as of concern. Exc. 173, 181. In particular, the ships had difficulty meeting the requirements with respect to ammonia, copper, nickel, and zinc; ammonia and copper presented the greatest problem. See Exc. 181, 142. One ship, the Carnival Spirit, discharged only graywater in state waters and succeeded in meeting state water quality standards consistently. No other ships were able to meet the applicable standards. Exc. 181

Because the ships were unable to meet Alaska Water Quality Standards at the point of discharge, DEC issued a general permit in 2008 that allowed the ships to meet less stringent standards but required cruise ship operators to submit source reduction evaluation reports documenting actions the cruise ship operators were taking to work toward achieving the long-term limits. Exc. 139, 179.

Responding to the cruise ship industry's continued failure to meet state Water Quality Standards, the legislature amended the cruise ship discharge statute in 2009. Exc. 69–75. House Bill 134 (HB 134) provided a phase-in period to allow cruise ships another six years before they would be required to meet state Water Quality Standards. AS 46.03.462(a)–(b), (e) (2009). Under the new statute, DEC can issue a permit authorizing large cruise ships to discharge treated sewage, graywater, or other wastewater even if the cruise ships are not able to comply with Alaska Water Quality Standards at the point of discharge. *Id.* However, the law requires that a permit may only be issued with less stringent standards if DEC “finds that a permittee is using economically feasible

methods of pollution prevention, control, and treatment the department considers to be the most technologically effective in controlling all wastes and other substances in the discharge” AS 46.03.462(e); *see also* AS 46.03.462(f) (reiterating that in developing limits under AS 46.03.462(e), DEC “shall require use of economically feasible methods of pollution prevention, control, and treatment the department finds to be the most technologically effective”). A permit authorizing discharge on the basis of the most technologically effective treatment methods may not be issued for a period longer than three years. AS 46.03.462(e).

These provisions expire on January 1, 2016. *See* Exc. 75, 72 (HB 134 §§ 7, 8 providing that AS 46.03.462(e) is repealed effective December 31, 2015 and that HB 134 § 3 takes effect the same day). At that time, no permit may be issued unless the discharge meets Alaska Water Quality standards at the point of discharge. Exc. 72 (HB 134 § 3, amending AS 46.03.462 effective December 31, 2015). Thus, the law effectively allows two three-year permits—2010–2012⁴ and 2013–2015—to phase in the requirement to meet Water Quality Standards at the point of discharge, though more frequent permits of shorter duration would also be allowed under the statute.

The bill also established a new science advisory panel to ensure that DEC has complete information about wastewater treatment technology as it makes later permit decisions. According to HB 134, the legislature intended that this panel would consult

⁴ The current permit expires on April 22, 2013, just before the beginning of the 2013 cruise ship season. Thus, the first permit covers the 2010–2012 seasons and the second permit covers the 2013–2015 cruise seasons.

with DEC “to evaluate the most technologically effective and economically feasible treatment options.” Exc. 71. The panel is required to hold public conferences and workshops and must work with DEC to provide a preliminary report to the legislature within three years, by January 2013. AS 46.03.464(b)(2). The report must describe methods of pollution prevention, control, and treatment that are already in use as well as “additional economically feasible methods of pollution prevention, control, and treatment that could be employed to provide the most technologically effective measures to control all wastes and other substances in the discharge” AS 46.03.464(c). The panel is also required to consult with DEC on a final report to be provided to the legislature by January 2015, a year before the technology exception expires and cruise ships must comply with Alaska Water Quality Standards at the point of discharge. AS 46.03.464(d).

DEC also hosted a technology conference at the time HB 134 was under consideration to assess whether there was any existing technology that could meet Water Quality Standards at the point of discharge and to inform its decision in issuing the 2010–2012 permit. The result of that conference was a feasibility study describing several types of treatment systems currently in use on cruise ships as well as wastewater treatment technology used in shore-based treatment that could be adapted for use on cruise ships. *See* Exc. 173–74. According to the report, the advanced wastewater treatment systems currently installed on many cruise ships use a variety of treatment technologies to reduce pollutants in wastewater. *See* Exc. 180–82. The report gives a brief description of several examples of these treatment systems, which generally include

three phases of treatment and a disinfection stage. The primary treatment phase involves one of several types of screen filtration systems to separate solids from the wastewater. Exc. 180–81. The secondary phase is “organic digestion.” At least two types of treatment are used on cruise ships at this phase—aerobic biological oxidation and low pressure reverse osmosis, with only one of the systems described using the latter. Exc. 181. At the tertiary phase, clarification, ships use several different combinations of treatment methods including microfiltration, flotation, polishing filters, reverse osmosis, and other systems. Exc. 181. Finally, all of the systems use UV disinfection. Exc. 181. DEC’s final report explains how each of these systems work and how effective they are at treating various pollutants. The study also examines new technologies that could be adapted for use on cruise ships. *See* Exc. 194–207. It concludes that the most promising techniques are reverse osmosis, electro dialysis, ion exchange, and aerobic biological oxidation/nitrification. Exc. 210–11. Reverse osmosis, unlike the other methods, “would be able to treat both ammonia and metals.” Exc. 174. The study assesses reverse osmosis as both an existing and a new technology and recognizes that reverse osmosis is already used in treatment systems on several ships. Exc. 174, 181, 185–87.

In short, the structure of the statute provides a phased approach. It allows DEC to issue two sequential three-year permits (2010–2012 and 2013–2015) before requiring full compliance with Alaska Water Quality Standards. Both permits, or any other permits issued until 2016, require the use of the “most technologically effective” feasible methods. AS 46.03.462(e) & (f). For the 2010–2012 permit, DEC must make this

determination on the basis of its 2009 technology conference, the source reduction evaluation reports from the 2008 general permit, and other information available to the agency. By the time of the 2013–2015 permit, the first report of the science advisory panel should be available, which may identify more effective technologies.

AS 46.03.464(c).⁵ The panel’s final report is due in 2015, before the 2016 deadline for compliance with Alaska Water Quality Standards at the point of discharge.

III. THE 2010–2012 PERMIT.

DEC issued the first permit under the authority of HB 134 on April 22, 2010. The permit expires April 22, 2013. Exc. 86. In the final permit, DEC set effluent limits requiring all permittees to meet Alaska Water Quality Standards at the point of discharge for fecal coliform, total suspended solids, phosphorus, pH, and other measured parameters. But, instead of providing a single standard for ammonia and dissolved metals, the final permit included six different sets of effluent limits for those parameters. Exc. 94–96. These effluent limits for ammonia and the three dissolved metals depend on the manufacturer of the treatment system currently installed on each ship, *see* Exc. 92, ¶ 1.5.2; Exc. 95–96, and these treatment systems use different types of technology. *See* Exc. 181, Tbl. 2.2. The six categories are: Hamworthy, Marisan, Rochem, Scanship, Zenon, and “All Other Wastewater Treatment Systems.” Exc. 95–96. Ships using Rochem treatment systems, a system that uses reverse osmosis, Exc. 200–01, must meet

⁵ The report is due January 1, 2013, AS 46.03.464(c), and the cruise ship season generally begins in late April, when the permit will likely go into effect. *See* Exc. 86 (providing that the 2010–2012 permit is valid through April 22, 2013).

the most stringent standards for these parameters. Exc. 95. Ships using other treatment systems are permitted to discharge wastewater with between two and fifteen times higher concentrations of ammonia and heavy metals as ships using Rochem. For example, ships using Marisan treatment systems are permitted to discharge wastewater containing more than fifteen times the concentration of copper that ships using Rochem are permitted to discharge. Exc. 95 (AR 10). Ships using Hamworthy treatment systems may discharge wastewater with up to 12 times the concentration of ammonia and more than six times the concentration of nickel that ships using Rochem may discharge. Exc. 95 (AR 10). On one parameter, zinc, ships using Marisan treatment systems are required to meet a standard of 112 ug/L, slightly more stringent than the 118 ug/L standard applicable to Rochem. Exc. 95 (AR 10). Ships using any other treatment system, however, are permitted to discharge wastewater with more than three times the concentration of zinc that ships using Rochem or Marisan are permitted to discharge. Exc. 95–96. The standards reflect the actual performance of the treatment systems: Effluent limits were “calculated as the upper 99th percentile limit of the 2004 to 2009 wastewater sample data set for the specific wastewater treatment systems used on the ships.” Exc. 146; *see also* Exc. 83, Tbl. 5 (comparing median performance of different treatment systems from 2004 to 2008). In other words, DEC selected a standard that each ship would meet 99% of the time based on past performance.

Thus, the permit allows ships to continue using whatever treatment system is currently installed onboard: “Because there are different manufacturers of [Advanced

Wastewater Treatment Systems] and they produce varying levels of effluent quality, the General Permit includes effluent limits specific to the type of treatment system, ensuring that those systems that can do better than others are required to do so.” Exc. 140. In explaining its decision, DEC stated:

ADEC conducted its own review of cruise ship wastewater technologies, conducting a technology conference on February 18, 2009 and a follow-up report. DEC’s primary conclusion from this effort was that AWTS are very effective wastewater treatment systems. While other new and emerging technologies, as well as some existing technologies used in shore-based facilities could result in improvements to cruise ship effluent quality, none are currently readily available (and therefore not economically feasible) for installation and use on the entire cruise ship fleet that discharges in marine waters of the state. ADEC finds that cruise ships are currently using the most technologically effective treatment systems that are economically feasible.

Exc. 140. DEC never made a finding that any of the technologies currently in use are infeasible, technologically or economically, for any ship.

IV. ADMINISTRATIVE PROCEEDINGS AND THIS LITIGATION.

CSAW and FoE appealed the permit decision to the Commissioner of DEC on May 19, 2010, within 30 days of the issuance of the permit, pursuant to 18 AAC 15.200. *See* Exc. 164–68. In their request, CSAW and FoE raised only a legal issue and therefore requested that the Commissioner issue a final decision without conducting an evidentiary hearing. Exc. 165. The appeal argued that the permit DEC issued failed to require cruise ships to meet the standards achievable by the most technologically effective treatment system because it did not require all ships to meet the effluent limits that can be achieved

by Rochem, a treatment system DEC's own records demonstrate outperforms all other systems. *See* Exc. 166. The appeal noted that, although AS 46.03.462(e) does not require that all ships use exactly the same treatment system, "it does require a performance level equivalent to the best performing system that is demonstrated to be economically and technically feasible." Exc. 166. The appeal further argued that since some cruise ships are already successfully meeting the Rochem standards, this technology is economically feasible. Exc. 166. CSAW and FoE requested that DEC rescind the general permit and issue a new permit in compliance with Alaska law. Exc. 164.

DEC's Division of Water opposed the request for an administrative appeal, arguing that the Commissioner should "assess" whether the groups or their members had standing to pursue the appeal. Exc. 219–20. The Division also argued that, under the law, DEC has discretion to identify the most effective technology and that it had determined that no one particular technology was most effective, but that "advanced wastewater treatment systems as a class are the most technologically and economically feasible treatment systems." Exc. 226–28. The Alaska Cruise Association submitted a letter in support of the Division. *See* Exc. 212.

On July 21, 2010, Dan Easton, Deputy Commissioner, DEC, issued a short decision denying CSAW and FoE's administrative appeal of the permit. *See* Exc. 231–36. In the decision, DEC determined that the requestors had not raised a significant legal issue. The decision acknowledged that "the Rochem reverse osmosis system in use on

some vessels has produced lower effluent levels for certain parameters than other treatment systems [as] can be seen in the permit's text itself.” Exc. 234. The Deputy Commissioner found, however, that this does not establish, as a matter of law, that Rochem is the most technologically effective, though the decision did not include a finding that any other technology is equally or more effective. Exc. 235. In addition, the decision stated that the fact that Rochem is in use on some ships does not establish that, as a matter of law, it is economically feasible for all ships, though, again, it did not find that meeting the Rochem standards is infeasible for any ships. Exc. 234. The decision also denied the appeal on the alternative grounds that CSAW and FoE had not established that they had standing because it was not clear that the organizations could represent the interests of voters and the groups had not shown how their members’ interests would be affected by the permit at issue. *See* Exc. 232–33.

CSAW and FoE filed a timely notice of appeal in this Court on August 23, 2010.

SUMMARY OF ARGUMENT

When DEC issued the General Permit authorizing cruise ships to discharge wastewater into Alaska’s waters for the 2010–2012 cruise seasons, DEC failed to require cruise ships to meet the statutory standards. In 2006, Alaskan voters demanded that cruise ships meet more stringent standards to protect Alaskans’ interest in clean, healthy water. When cruise ships were unable to meet those standards, the legislature provided them with more time to meet those standards—delaying the requirement to meet Alaska Water Quality Standards by another six years and allowing cruise ships to dump

wastewater that does not comply with those standards for a full ten years beyond the date when the voter initiative first become law. The legislature specifically required, however, that if ships were not able to meet Water Quality Standards at the point of discharge, they must use economically feasible methods of pollution control that are “the most technologically effective in controlling all wastes and other substances.”

AS 46.03.462(e). The goal of the statute was to force the development and implementation of new technology so that, by 2016, cruise ships will be meeting Alaska Water Quality Standards at the point of discharge. The permit DEC recently issued, however, circumvents that goal by allowing ships to continue using the treatment systems already installed on their ships even though not all of the treatment systems provide the same quality effluent. One type of treatment technology, employed on boats using Rochem treatment systems, results in much lower concentrations of ammonia and dissolved metals than any other treatment system, yet DEC did not require all ships to meet these standards. This reverse osmosis treatment system is already used on some cruise ships in Alaska, and DEC has never found it to be infeasible for other ships. DEC’s failure to require all cruise ships to meet the same standards does not comply with the clear language of AS 46.03.462(e) or with its purpose. Therefore, the Court should remand the permit to DEC and require DEC to issue a new permit that applies the most effective technology requirement in a way that is consistent with the statute and supported by the record.

In considering CSAW and FoE's appeal of the permit, DEC denied the organizations' request for an administrative adjudication on two alternative grounds: first, it found that the organizations had not provided sufficient evidence to show that they had standing to file an appeal to the Commissioner, and second, it determined that DEC had discretion to determine what constituted the most effective technology. *See* Exc. 231–36. In addition to interpreting AS 46.03.462(e) incorrectly, DEC erred in finding that the organizations lacked standing for an appeal to the Commissioner. CSAW and FoE met the requirements for establishing standing under DEC's regulations. Moreover, under well-established Alaska precedent, CSAW and FoE meet standing requirements to appear in Alaska courts under either interest-injury or citizen-taxpayer standing. Thus, upholding DEC's administrative decision would simply force similarly-situated parties in the future to bypass administrative proceedings and turn to the courts instead of allowing the agency the first opportunity to correct its errors and fully develop the record, frustrating the purpose of administrative exhaustion requirements.

ARGUMENT

AS 46.03.462(e), the legislature's amendment to the 2006 cruise ship initiative provides:

When issuing, reissuing, renewing, or modifying a permit required under (a)(1) of this section, the department may include effluent limits or standards less stringent than [compliance with Alaska Water Quality Standards at the point of discharge] for not more than three years duration if the department finds that a permittee is using economically feasible methods of pollution prevention, control, and treatment the department considers to be the most

technologically effective in controlling all wastes and other substances in the discharge but is unable to achieve compliance with Alaska Water Quality Standards at the point of discharge.

When DEC issued the first three-year permit pursuant to that provision, however, instead of requiring all ships to meet the standards that can be achieved by the most effective technology, DEC simply authorized cruise ships to continue using their existing treatment systems, ignoring the plain language of the statute, frustrating its technology-forcing aim, and further delaying the goal of improving the quality of wastewater treatment. DEC's interpretation of the statute fails to winnow down the available technology to identify the "most effective" economically feasible technology and is therefore inconsistent with the law.

I. DEC MISAPPLIED AS 46.03.462(e) BY FAILING TO ISSUE STANDARDS BASED ON THE "MOST" TECHNOLOGICALLY EFFECTIVE TREATMENT SYSTEM.

Under the statutory requirements, permits can only be issued authorizing discharges that do not comply with Alaska Water Quality Standards if the permit requires the use of (1) the most technologically effective treatment methods that are (2) economically feasible. AS 46.03.462(e). To meet that standard, DEC can only grant a permit if all permitted ships are required to meet the standards that come closest to meeting Alaska Water Quality Standards. DEC's record shows that there is one technology currently in use on cruise ships that consistently outperforms all other systems, demonstrating that it is the most technologically effective treatment method.

DEC has never found that Rochem is infeasible for any ship, and in fact it is already

being used successfully on several ships. DEC misinterpreted the statute when it failed to require all permitted ships to meet the standards that can be achieved by this technology.

A. Standard of Review.

The primary issue in this case, whether the permit DEC issued complies with the “most effective technology” requirement embodied in AS 46.03.462(e), is a question of statutory construction subject to this Court’s independent review. Alaska courts recognize four standards of review applicable to administrative decisions:

“(1) the substantial evidence standard applies to questions of fact; (2) the reasonable basis standard applies to questions of law involving agency expertise; (3) the substitution of judgment standard applies to questions of law where no expertise is involved; and (4) the reasonable and not arbitrary standard applies to review of administrative regulations.”

Doubleday v. State, Commercial Fisheries Entry Comm’n, 238 P.3d 100, 105 (Alaska 2010) (quoting *Pasternak v. State, Commercial Fisheries Entry Comm’n*, 166 P.3d 904, 907 (Alaska 2007)). Questions of statutory interpretation are generally reviewed under the substitution of judgment standard. *Madison v. Alaska Dep’t of Fish & Game*, 696 P.2d 168, 173 (Alaska 1985); *Greenpeace, Inc. v. State Office of Mgmt. & Budget*, 79 P.3d 591, 593 (Alaska 2003). These questions “reside[] within the traditional province of judicial review and involve[] no technical expertise.” *Lakosh v. Alaska Dep’t of Env’tl Conservation*, 49 P.3d 1111, 1117 (Alaska 2002); see also *Tesoro Alaska Petroleum Co. v. Kenai PipeLine Co.*, 746 P.2d 896, 904 n.12 (Alaska 1987). When the court reviews a question of statutory interpretation, the court “adopt[s] ‘the rule of law that is most

persuasive in light of precedent, reason, and policy,’ after considering: (1) the plain meaning of the statute; (2) the legislative purpose of the statute; and (3) the intent of the statute.” *Rubey v. Alaska Comm’n on Postsecondary Educ.*, 217 P.3d 413, 415 (Alaska 2009) (quoting *Benavides v. State*, 151 P.3d 332, 334-35 (Alaska 2006)).

In *Lakosh*, the Alaska Supreme Court reviewed DEC’s decision applying a statutory “best available technology” requirement and applied its independent judgment to the legal question of whether DEC correctly interpreted “the legislature’s mandate in promulgating” the best available technology requirement. 49 P.3d at 1117. Just as the Court was able to apply its expertise and knowledge of statutory interpretation to the interpretation of “best available technology” in that case, this Court can apply its independent judgment to interpret the meaning of “most technologically effective” as it is used in AS 46.03.462(e) in this case.

To the extent the agency’s decision here involves agency expertise, the Court reviews the agency’s decision for reasonableness. *Doubleday*, 238 P.3d at 105. Under this standard, the agency’s decision must have a reasonable basis both in law and in fact. *Squires v. Alaska Bd. of Architects, Eng’rs & Land Surveyors*, 205 P.3d 326, 332 n.14 (Alaska 2009).

Further, an agency’s factual conclusions must be supported by substantial evidence—they must have a reasonable basis in the law and must be supported by facts in the record as a whole. *See Hidden Heights Assisted Living, Inc. v. State*, 222 P.3d 258, 267 (Alaska 2009); *Miners Advocacy Council, Inc. v. State*, 778 P.2d 1126, 1139 (Alaska

1989). The agency must make a reasoned decision and provide a written explanation of the basis for its decision. *Trustees for Alaska v. State*, 795 P.2d 805, 809 (Alaska 1990).

B. The Plain Meaning of the Statute, Supported by its Purpose, Requires DEC to Set Effluent Standards Reflecting the Most Stringent Standards that can be Achieved with Current Technology.

The cruise ship discharge statute, AS 46.03.462(e) requires that permits allowing ships to meet standards less stringent than Alaska Water Quality Standards at the point of discharge must employ methods of pollution prevention, control, and treatment that are the “most technologically effective in controlling all wastes and other substances in the discharge.” In construing a statute, the Court looks to the plain meaning of the statute, the legislative purpose, and the intent of the statute. *See Premera Blue Cross v. State*, 171 P.3d 1110, 1115 (Alaska 2007). Alaska courts “favor[] a sliding scale approach” to statutory interpretation “under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.” *Lakosh*, 49 P.3d at 1117 (internal quotation marks and citations omitted). The plain meaning, legislative purpose, and intent of AS 46.03.462(e) all compel a conclusion that the permit DEC issued authorizing cruise ships to continue using whatever treatment systems they currently employ is invalid because it is based on an erroneous construction of the law.

1. *The Plain Language of the Statute Requires DEC to do Some Winnowing when it Selects the “Most Technologically Effective” Treatment Methods.*

The plain meaning of “most” is “to the greatest or highest degree.” *Webster’s Third New International Dictionary* (2002). It is “often used with adjectives or adverbs

to form the superlative.” *Id.* This definition requires a selection of the technology with the highest degree of effectiveness—the one that controls wastes and other substances in the discharge to the highest degree. The plain meaning of “most” does not support DEC’s decision to adopt several different standards based on different technologies that achieve very different levels of pollution reduction. *See supra* pp. 11–12 (describing technologies). Where, as is true here, one standard requires 10 to 15 times cleaner wastewater discharge than others, it cannot be said that all six standards are effective to the “greatest or highest degree.” *See supra* p. 12. Rather, only one standard, the one that achieves the highest level of effectiveness is the “most” effective.

The Alaska Supreme Court confronted a similar question in *Lakosh*. In that case, the Court reviewed DEC’s regulations defining “best available technology,” a term requiring oil spill contingency and response plans to meet certain standards and provide for the use of the best technology available at the time the plan is approved. AS 46.04.030(e) (1990); *Lakosh*, 49 P.3d at 1113 (quoting 1990 version of the statute).⁶ DEC’s regulatory definition provided that any technology meeting the statutory standards was the “best available technology.” *Lakosh*, 49 P.3d at 1116–17. DEC’s regulation required no comparative analysis to identify “state of the art” technology for oil spill response or to determine whether one type of technology might perform better than another type of technology. *Id.* at 1116. The Court considered the statute and determined that DEC could not simply define a broad universe of technology as the “best.” Rather,

⁶ This statute has since been amended.

the Court held that “best” required “a selection of the most desirable technologies from among a broader universe of technologies.” *Id.* at 1117. It further explained: “[A]s a matter of statutory interpretation, we are . . . constrained to hold that DEC’s definition must at least include some winnowing process” *Id.* at 1120.

Federal courts construing a similar “best available technology” standard have likewise noted that the standard requires an agency to set standards with an eye toward achieving the best that can be achieved with existing technology. *See Natural Res. Def. Council v. U.S. Env’tl Prot. Agency*, 863 F.2d 1420, 1431 (9th Cir. 1988) (construing a similar, “best available technology” standard and stating that under the standard, agencies “must establish effluent limitations that utilize the latest technology in order to reach the greatest attainable level of effluent reduction which could be achieved.” (internal citations and quotation marks omitted)); *Waterkeeper Alliance, Inc. v. U.S. Env’tl Prot. Agency*, 399 F.3d 486, 513 (2d Cir. 2005) (upholding standards adopted under a “best available technology economically achievable” standard where the rule “substantively establishes standards that make reference to the best performer in any industrial category” (internal quotation marks, citation, and emphasis omitted)).

In this case, even more so than in *Lakosh*, DEC has failed to winnow the field of available technologies. Instead, DEC broadly declared that whatever a ship is currently using is the most effective technology, even though DEC recognizes that some of the treatment systems approved perform substantially better than others. Exc. 140 (“Because there are different manufacturers of AWTS and they produce varying levels of effluent

quality, the General Permit includes effluent limits specific to the type of treatment system, ensuring that those systems that can do better than others are required to do so.”); *see also* Exc. 234. The different treatment systems are not just the same system with a different name, but involve different technologies to treat wastewater. *See supra* pp. 9–10. Some combine aerobic biological oxidation with ultrafiltration, others combine flotation and polishing filters with aerobic biological oxidation, one uses reverse osmosis, and others use other combinations of treatment technology. *See* Exc. 181. In fact, one set of standards does not even apply to a specific manufacturer, but is a broad category including “All Other Wastewater Treatment Systems.” *See* Exc. 137, Tbl. 7. Just as the Court in *Lakosh* held that “best” required “at least some winnowing,” here, where all of the treatment systems have markedly different results, the plain meaning of “most” requires DEC to winnow the field.

2. *The Legislative Intent and Purpose of the Statute Also Demonstrate that “Most Technologically Effective” Requires DEC to Implement the Highest Standards Currently Achievable.*

The clear intent of the statute and its legislative history reinforce the plain meaning of the statute, compelling a conclusion that DEC’s permit is not consistent with the law. *See Lakosh*, 49 P.3d at 1117. HB 134 must be read in the context of the ballot initiative that it amends and the goals of the statute. That initiative required cruise ships to meet Alaska Water Quality Standards at the point of discharge at the time it was adopted in 2006. AS 46.03.462 (2006). Because cruise ships were unable to meet those standards, the legislature amended those requirements in 2009 to provide cruise ships

with more time to meet those standards, effectively providing a 10 year phase-in period. *See supra* pp. 6-8. The 2009 legislation, however, reiterates the goal of forcing cruise ships to meet Alaska Water Quality Standards at the point of discharge. Exc. 71. “Most effective” must be measured in this context. Therefore, the technology that meets Alaska Water Quality Standards at the point of discharge to the greatest or highest degree is the “most technologically effective.”

In addition to stating the goal that cruise ships meet Water Quality Standards, the legislature structured the statute to push the industry to meet that goal. To that end, the statute required DEC to establish a science advisory panel to assist DEC in identifying the most effective technology as well as in identifying methods that could be adapted to ensure that cruise ships meet Water Quality Standards at the point of discharge. *See* Exc. 71 (HB 134 § 1); AS 46.03.464 (establishing the science advisory panel and describing its role). The panel is required to assist DEC in providing a preliminary technology report to the legislature by 2013 and a final report by 2015. AS 46.03.464(c), (d). These deadlines coincide with the end of each three-year permit term so that DEC will have the most recent information about wastewater treatment technology at hand as it issues each subsequent permit decision. The 2010–2012 permit must implement the use of the most effective pollution control technology now available, and the 2013–2015 permit must require the industry to upgrade again to the most effective, state-of-the-art equipment in order to move the ships closer to meeting the required standards by 2016.

The legislative history for the statute is even more explicit in regard to these goals. The legislature repeatedly expressed its view that this would be a technology-forcing statute that would get the cruise ship industry to the point where they could meet the water quality standards at the point of discharge. *See* Ex. A at 5 (H. Resources Standing Comm. (Mar. 25, 2009)) (Rep. Harris stating that the bill “advocates for more stringent regulation”); Ex. A at 12–13 (H. Resources Standing Comm. (Mar. 25, 2009)) (Cmm’r Hartig); Ex. B at 16 (S. Resources. Standing Comm. (Apr. 6, 2009)) (Cmm’r Hartig explaining the importance of the “technology-forcing elements” of the bill). In explaining the bill to the legislature, DEC’s Commissioner Hartig explained:

[I]f this legislation passes, what DEC would do is look at the technology conference information we got from [the 2009 conference], look at the Source Reduction Evaluation reports that we’ve gotten—we’ve acquired from the cruise ship companies over the last two seasons, and look at the other information we have on the discharge monitoring reports that we get monthly from the cruise ships that are permitted under the existing general permit, evaluate that information. And then what we would do is, we would determine what the technology standard would be in the new modified permit; and those companies that are not already achieving that, we would be able to develop compliance schedules that would be kind of the technology-forcing, vessel by vessel, to get them to that standard, you know, during this five-year permit period.

And then at the end of that period, again, we would have been through the four-year technology conference advisory panel, again further review by DEC, and then we would see whether, you know, the standard could be raised again five years from now when that permit comes up for renewal.

Ex. A at 12–13 (H. Resources Standing Comm. (Mar. 25, 2009)); *see also* Ex. A at 33–35 (Cmm’r Hartig responding to questions from Rep. Guttenberg); Ex. B at 16–18 (S. Resources Standing Comm. (Apr. 6, 2009)) (Cmm’r Hartig). In fact, legislators pushed back and shortened the standard five-year permit term to a three-year term to ensure that DEC would be required to tighten the standards as new technology becomes available. *See* AS 46.03.462(c)–(d); Ex. A at 91–103 (H. Resources Standing Comm. (Mar. 25, 2010)) (discussing and adopting an amendment to shorten the permit term). The legislature expected that the 2010 permit would implement the best technology available based on information gleaned from the 2009 technology conference and each permit thereafter would further ratchet the standards.

The legislators also pushed for assurances that the law would not allow backsliding, but would require each permit to implement more stringent permit standards until Alaska Water Quality Standards are achieved at the point of discharge. *See* Ex. A at 33–34 (H. Resources Standing Comm. (Mar. 25, 2009)) (Cmm’r Hartig responding to questions from Rep. Seaton and stating “when we come back in two years or five years and issue a new permit, we can’t loosen the standards”). As this history shows, the clear intent of the legislature was to implement a technology-forcing statute ensuring that Alaska Water Quality Standards are met at the point of discharge by 2016, with every permit, including the first, requiring ships to attain the standards that can be achieved with the most technologically effective treatment system available at that time—in other words, the technology that moves the industry closest to the ultimate goal of meeting

Alaska Water Quality Standards at the point of discharge. But, instead of following the plain language and intent of the statute when it issued the 2010 permit, DEC allowed ships to keep doing exactly what they were doing despite recognizing that some ships are already using technology that comes much closer to meeting the required standards than the rest of the industry.

C. DEC has Not Shown that Meeting Rochem Standards is Infeasible.

Because the Rochem standards reflect the most effective technology for pollution prevention, treatment, and control, DEC can only reject those standards if they are not economically feasible. AS 46.03.462(e). DEC provides no analysis of economic feasibility in its permit decision. The fact sheet issued with the permit states that ships spent money installing advanced wastewater treatment systems in 2006 and declares that “cruise ships are currently using the most technologically effective treatment systems that are economically feasible.” Exc. 140. The statute, however, anticipates that cruise ships will have to improve their existing treatment systems in order to meet Alaska Water Quality Standards at the point of discharge. *See supra* pp. 24–27. If DEC does not require the use of more effective technology because of economic considerations, it must provide an analysis of those considerations to justify its decision. DEC has not done so.

As discussed above, the goal of AS 46.03.462(e) is to provide a phase-in period allowing ships to modify and adapt treatment technology to the point where the ships can meet Alaska Water Quality Standards at the point of discharge. *See supra* pp. 6-11, 24-27. When interpreting similar language, other courts have cautioned that economic

analysis “should reflect an evaluation of what needs to be done to move toward” the goal of the statute. *Ass’n of Pac. Fisheries v. Evtl Prot. Agency*, 615 F.2d 794, 817 (9th Cir. 1980) (quoting Cong. Research Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, 170 (1973)) (interpreting “best available technology economically achievable”); *see also Natural Res. Def. Council*, 863 F.2d at 1431 (effluent limits set under the best available technology standard should “push the industry to achieve greater levels of effluent control”); *Rybachek v. U.S. Evtl Prot. Agency*, 904 F.2d 1276, 1291 (9th Cir. 1990) (upholding restrictions under a “best available technology” standard even though those standards may cause some of the regulated businesses to close). Although they have found that an agency can permissibly reject a technology on the basis of economic considerations, the courts are clear that economic considerations are not the paramount concern and require that an agency provide some analysis to support a determination that technology is not economically feasible. *See, e.g., Waterkeeper Alliance*, 399 F.3d at 513 (an agency must “either adopt[] the technology employed by the best performers or decline[] to do so for permissible reasons”).

Similarly, in this case, although DEC can permissibly take economic factors into account, it must articulate its economic analysis on the record. In this case, DEC has not provided any rationale for concluding that meeting Rochem standards is not economically feasible, and the only evidence in the record suggests otherwise—meeting the standards that push the industry furthest toward the goal of meeting Alaska Water

Quality Standards is economically feasible because the standards are being met already. *See* Exc. 175 (“There have been several ships that have used reverse osmosis based wastewater treatment systems in Alaska that have been successful in both removing conventional pollutants and reducing the level of ammonia, copper, nickel, and zinc to Water Quality Standards at the point of discharge. These systems have been used to treat both blackwater and graywater.”); Exc. 146 (explaining that the technology-based effluent standards in the 2010 general permit are “calculated as the upper 99th percentile limit of the 2004 to 2009 wastewater sample data set for the specific wastewater systems used on the ships”).

The legislative history of the statute demonstrates the legislature’s concern that economic factors should not override the ultimate goal of pushing ships toward meeting Water Quality Standards. In questioning Commissioner Hartig, Representative Wilson expressed her concern that economic feasibility could become a “loophole.” Ex. A at 19 (H. Resources Standing Comm. (Mar. 25, 2009)). DEC maintained that this requirement would not have that effect. Ex. A at 19–20 (H. Resources Standing Comm. (Mar. 25, 2009)) (Cmm’r Hartig’s response). In fact, when pressed by the Senate to explain how DEC would consider economic feasibility, Commissioner Hartig explained that technology development and economic feasibility are considered together. *See* Ex. A at 25 (H. Resources Standing Comm. (Mar. 25, 2009)) (Cmm’r Hartig explaining that technological and economic feasibility cannot be “split” apart). As an example of the type of considerations DEC considers relevant to economic feasibility, he stated: “[F]or

instance, you have, say, one vessel that's achieving, you know, a certain level of discharge. Then why can't the other achieve that?" Ex. B at 42 (S. Resources Standing Comm. (Apr. 6, 2009)). He further explained: "An industry-wide comparison is] the kind of comparison that you're doing, rather than going to each . . . business and trying to figure out what's economically feasible for them." Ex. B at 42 (S. Resources Standing Comm. (Apr. 6, 2009)). This explanation was confirmed by the Director of DEC's Division of Water, who stated that DEC judges economic feasibility based partly on commercial availability: "And once they're commercially available to the vessels, that's kind of one of the tests for us" Ex. B at 43 (S. Res. Standing Comm. (Apr. 6, 2009)) (statement of Ms. Kent). Thus, according to DEC's explanation, if technology is already commercially available for use on cruise ships, or in use by the industry, it is economically feasible. *Cf. Ass'n of Pac. Fisheries*, 615 F.2d at 816 (for purposes of establishing that a particular technology is available, it is sufficient "that there be one operating facility which demonstrates that the level can be achieved or that there is sufficient information and data from a relevant pilot plant or semi-works plant to provide the needed economic and technical justification for such new source") (quoting Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 798 (1973)).

The standards achieved by ships using Rochem clearly meet those requirements. *See* Exc. 175. The permit standards are based on information from ships that are meeting

these standards already, and DEC has provided no justification to conclude that it is not economically feasible for all ships to meet the same standards. *See supra* pp. 11–12, 14.

D. DEC’s Decision Denying CSAW and FoE’s Administrative Appeal is Not Supported by Evidence in the Record.

Despite the plain language and clear intent of the statute, DEC refused to require ships to meet the highest standards that can be achieved economically and technologically with treatment systems available today, and DEC provides no justification for that decision in either the permit or the denial of CSAW and FoE’s appeal to the Commissioner. An agency decision that is not supported on the record is arbitrary and must be reversed. *See Trustees for Alaska*, 795 P.2d at 809; *see also Waterkeeper Alliance, Inc.*, 399 F.3d at 512–13 (agency’s selection of “best available technology economically achievable” upheld where extensive data in record supported it). Instead of providing support for its decision, DEC attempts to shift the burden to CSAW and FoE to show the Rochem standards reflect the most technologically effective pollution control methods that are economically feasible. *See* Exc. 235. The attempt, however, avoids the agency’s obligation to provide a reasoned basis for its decision supported with evidence in the record. *See Miners Advocacy*, 778 P.2d at 1139. Where, as here, the only evidence the agency has provided runs counter to its decision, the agency has not met that burden.

In its decision denying the administrative appeal, DEC acknowledges that, as its permit shows, Rochem performs better than any other technology. DEC offers only unsupported speculation to bolster its decision not to require all ships to meet those

standards. This speculation is not sufficient. *See Trustees for Alaska*, 795 P.2d at 809. DEC provides no factual evidence in support of its decision. Instead, it suggests, in a footnote, that there could be reasons Rochem might not be the most effective technology—such as reliability or performance with respect to other parameters. *See* Exc. 235 n.19. But DEC does not even go so far as to say that Rochem is, in fact, less reliable or does not perform well on other parameters; DEC only asserts that it could have considered these factors. *See* Exc. 235. Without more, this does not provide a reasoned basis for DEC’s decision.

Furthermore, the record shows that ships have used Rochem successfully in Alaska for several years. *See supra* pp. 12-13, 30 . Its performance is superior to any other technology with respect to three of the four problematic standards and superior to all but one other system with respect to zinc, for which it is nearly equal to the best. *See* Exc. 175; *supra* pp. 12, 30. In addition, Rochem, like all other permitted systems, meets Alaska Water Quality Standards at the point of discharge for other parameters. *See* Exc. 138, Tbl. 8.

Likewise, DEC’s administrative decision provides no basis to conclude that meeting the standards achieved by Rochem is not economically feasible. DEC speculates that what is economically feasible for one ship might not be economically feasible for all ships. Exc. 234–35. But again, DEC entirely fails to point to any evidence that meeting the Rochem standards is not economically feasible for even one ship, let alone for all of the ships that are not meeting those standards. Exc. 234-35. The record shows, and DEC

cannot dispute, that some ships are already meeting these standards. DEC's vague statement that not all ships are identical does not provide a reasonable basis for concluding that it is not economically feasible for all ships to meet the Rochem standards. In addition, the record shows that ships that are currently using other technology may be able to modify those systems or add-on end-of-pipe treatment to incorporate reverse osmosis treatment technology into their existing systems. *See* Exc. 200-01. And, as DEC recognized during the legislative hearings regarding HB 134, if one ship is sufficiently different from others, that ship could apply for an individual permit rather than applying to discharge wastewater pursuant to the general permit. *See* Ex. A at 69-70 (H. Resources Standing Comm. (Mar. 25, 2009)). Therefore, if meeting the same standards as other ships would be impossible for one ship, that ship could present its case and receive an individual permit. DEC has provided no rationale, however, for concluding that the only technology that is economically feasible for cruise ships to treat wastewater is whatever they are currently using. DEC cannot support its decision by attempting to shift the burden to CSAW and FoE; the evidence in the record does not support DEC's decision.

II. DEC ERRED IN CONCLUDING THAT CSAW AND FOE LACKED STANDING TO APPEAL TO THE COMMISSIONER.

CSAW and FoE have standing to bring this appeal to the court. The organizations' members demonstrate interest-injury and citizen-taxpayer standing, either of which provides standing for the organizations. *See Alaskans for a Common Language, Inc., v. Kritz (ACL)*, 3 P.3d 906, 915 (Alaska 2000).

Below, DEC addressed whether the organizations met the agency’s interested party requirements for appeals to the commissioner, and the agency did not address the relevant question here, standing before a court. Exc. 232–33 (citing only agency regulation on interested parties). Accordingly, this court may find standing, and proceed to address the merits of DEC’s permit, without this court reaching DEC’s decision that the organizations could not appeal to the commissioner. CSAW and FoE made a good faith effort to be heard before the agency, a record and decision on the merits exist for review, and whether the organizations met the agency’s requirements for internal review does not affect their ability to appear here. *See Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 100–01 (Alaska 1992) (Administrative Procedures Act requirements met where appellant in good faith submitted letter of appeal, agency discerned legal issues, and record existed for review).

Nonetheless, although this court need not address DEC’s decision that CSAW and FoE were not interested parties under agency regulations, the organizations ask the court to set aside the Commissioner’s ruling on the matter because the ruling sets overly strict precedent that threatens the ability of CSAW, FOE, and other parties who wish to participate in future DEC proceedings.

A. CSAW and FoE Have Standing in this Court.

1. *Standard of Review*

“Whether a party has standing to seek judicial review of an agency’s decision . . . is a question of law, reviewable de novo.” *City of Kenai v. State, Pub. Utils. Comm’n*,

736 P.2d 760, 762 (Alaska 1987); *cf. Hoblit v. Comm’r of Natural Res.*, 678 P.2d 1337, 1342 (Alaska 1984) (noting superior court’s powers under Appellate R. 609 to grant trial de novo, and finding it an abuse of discretion not to do so in order to address standing before the court).

2. *Argument*

CSAW and FoE have standing under the Administrative Procedures Act, which grants parties the right to appeal administrative decisions to the superior court. AS 44.62.560; *see also City of Kenai*, 736 P.2d at 762–63 (Administrative Procedures Act extends standing to any party that participated below). Here, the organizations in good faith commented on the draft permit and sought internal review, and a decision and record exists for superior court review.

Further, CSAW and FoE fall squarely within Alaska’s broad jurisprudential standing requirements, which favor “accessibility to judicial forums” as opposed to a “restrictive interpretation of the standing requirement.” *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (noting that even a “trifle” is enough to “fight out a question of principle”). Although courts in Alaska at times have required member organizations to meet formal requirements for standing, *see ACL*, 3 P.3d at 915, courts have also found standing for organizations representing their own interests. *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 & n.13 (Alaska 2001) (finding standing where challenged law would affect organization’s operations). And the Supreme Court has questioned whether formal member organization standing is even required in most cases.

See Interior Trails Preservation Coal. v. Swope, 115 P.3d 527, 529 n.1 (Alaska 2005) (expressing hesitation as to need for member standing).

Here, CSAW and FoE meet even the formal requirements for member organization standing. A member organization has standing when (1) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit,” (2) “the interests it seeks to protect are germane to the organization’s purpose,” and (3) “its members would otherwise have standing to sue in their own right.” *ACL*, 3 P.3d. at 915. First, the organizations seek relief not particularized to individuals, and thus not requiring individual participation. Second, the interests members seek to protect—clean waters unhampered by the discharge of pollutants and upholding the voters’ interests in relevant legislation—are germane to the purpose of the organizations. CSAW and FoE have strong track records of advocating for Alaska’s water quality (specifically with respect to cruise ship discharge) and cruise ship legislation (including direct legislation by voters). Ex. C at 2–9; Ex. D at 2–5. Third, individual members of the organizations have standing either because they demonstrate an interest adversely affected by the action in question (interest-injury standing) or because they demonstrate an interest through their status as citizens (citizen-taxpayer standing). *ACL*, 3 P.3d at 915; *see also Trustees*, 736 P.2d at 327. CSAW and FoE address both below.

a. Interest-injury Standing

Standing exists where, as in this case, individuals have “an interest adversely affected by the conduct complained of.” *Trustees*, 736 P.2d at 327. Here the members

have interests in sailing, boating, and kayaking on; owning property on; consuming seafood from; eating food mulched with seaweed from; and commercially leading trips on the affected waters.⁷ Ex. E at 2–6; Ex. F at 2–4; Ex. G at 1–3; *see also* Ex. C at 8; Ex. D at 5–7. These injuries are well above the “trifle” required to establish interest–injury standing in Alaska. *See Trustees*, 736 P.2d at 327 (recognizing impaired aesthetic or recreational activities as injury); *Hoblitt*, 678 P.2d at 1342 (deciding that a potential increase in trespassers merited an evidentiary hearing on standing); *Moore v. State*, 553 P.2d 8, 24 (Alaska 1976) (finding standing when a threatened bay was a source of commercial income).

b. Citizen-taxpayer Standing

Also, the individual members are citizens and voters in Alaska and qualify for citizen-taxpayer standing because the issue involved is one of “public significance” and the individuals are “appropriate.” *Trustees*, 736 P.2d at 329.

⁷ Even federal courts—applying a much narrower concept of standing than Alaska courts apply—have long recognized that plaintiffs have interest-injury standing where their aesthetic or recreational enjoyment of an area is impaired based on reasonable concerns, including where actual harm to the environment has not been demonstrated. *Friends of the Earth, Inc., v. Laidlaw Envt’l Servs., Inc.*, 528 U.S. 167, 183–84 (2000) (where the “discharge of pollutants in excess of permit limits” was occurring, the Court saw “nothing ‘improbable’ about the proposition that a company’s [discharges] would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable.”); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (recognizing injury where “aesthetic and recreational values of the area will be lessened”); *see also Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988) (Alaska standing more open than federal standing).

Each of the issues involved here—water quality and the will of the voters—is publicly significant. First, cruise ship discharge exposes innumerable miles of Alaska’s waters and associated shoreline to pollutants from 150,000 gallons of waste per ship per day. *See* Exc. 37, 36. Alaskans have a strong interest in ensuring that cruise ship discharge meets the standards established to protect human and aquatic life—particularly in the Southeast where travel, recreation, and sustenance all depend heavily on the ocean. *See State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977) (noting recognition of aesthetic and environmental interests, and concluding citizens have interest to protect non-traditional or intangible interests in state land); *cf. Gilman v. Martin*, 662 P.2d 120, 123 (Alaska 1983) (municipal citizen has stake in any municipal land transaction concerning significant number of acres). Second, and independently, this case concerns legislation responding to a voter initiative, and Alaska broadly recognizes as publicly significant citizen interests in ballot initiatives and the will of voters. *N. Kenai Peninsula Road Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 640 (Alaska 1993) (citizen-taxpayer standing to challenge ordinance because it contradicted earlier voter-enacted proposition); *McCormick v. Smith*, 793 P.2d 1042, 1044 (Alaska 1990) (citizens’ involvement in voting activity listed in article XI of the Alaska Constitution “is of constitutional dimension”); *see also ACL*, 3 P.3d. at 915 n.36 (listing cases where Alaska allowed standing based on voting rights).

The members of CSAW and FOE are “appropriate” for citizen-taxpayer standing because: (1) they are adequately represented, (2) they are not “sham plaintiffs,” and (3)

there is no “plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit.” *Trustees*, 736 P.2d at 329–30. First, appellants’ counsel have litigated environmental matters at all levels of state and federal court and are committed to representing the appellants in this case. Second, there is no allegation that individual members or the organizations are “sham plaintiffs,” rather they demonstrate sincere, long-standing interest in Alaska’s environment. Ex. E at 2; Ex. F at 1–3; Ex. G at 1–3; *see also* Ex. C at 2–9; Ex. D at 2–5. Third, the appellants represent a unique combination of interests that makes them the best situated and most likely party to bring suit. *See Trustees*, 736 P.2d at 326, 330 (coalition of interests is best situated party to contest state’s mineral leasing system via citizen-taxpayer standing). Here, the coalition of organizations and their members represents legislative interests relevant to the issues at stake (such as individuals who voted for the initiative and organizations with a history of involvement in the legislation) as well as environmental interests (such as those who rely on Alaska’s waters for aesthetic, recreational, economic, property, and sustenance values). Ex. C at 4–8; Ex. D at 2–6; Ex. E at 2–5; Ex. F at 2–3; Ex. G at 1–3. The organizations are also the only parties to have participated thoroughly in the administrative process, both submitting comments and requesting an appeal. Exc. 85a–e, 164–168.

In sum, CSAW and FoE are interested organizations well encompassed by Alaska’s liberal standing requirements, and their members individually demonstrate standing under each interest-injury and citizen-taxpayer standing.

B. DEC Erred in Finding that CSAW and FoE Could Not Appeal to the Commissioner.

Under the Alaska precedent above, CSAW and FoE have standing to pursue their appeal in this court. Even had DEC been right that the organizations did not meet the agency's requirements to appear before the Commissioner, that would not affect the appeal before this court. Agencies may allow large or small classes an opportunity to contest a decision at the agency level, but those agency policies do not restrict the jurisdiction of courts. *See* Alaska Const. art. IV, § 1 (“The jurisdiction of courts shall be prescribed by law.”); AS 44.62.560 (granting the superior court jurisdiction to review agency decisions). Nonetheless, DEC's interpretation was wrong, as it unjustifiably limits who may be heard by the agency in the future.

1. *Standard of Review*

When an agency determines whether a party has standing to be heard at the agency level, courts review the decision under the “substitution of judgment” standard if judicial or statutory concepts of standing are involved, and under the “reasonable and not arbitrary” standard if only agency regulations were used to justify the decision. *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1046 & n.15 (Alaska 2007). Here, DEC ruled only on the ability to appear before the Commissioner according to agency regulations, so “reasonable and not arbitrary” is the correct standard. Exc. 232–33.

2. *Argument*

DEC's decision was arbitrary or unreasonable because it was an overly harsh interpretation of the pleading of good faith petitioners, denying them the ability to present

evidence of their standing, and drastically limiting the potential for internal review of future decisions—all without any meaningful discussion of, or foundation in, agency regulations or precedent.

DEC’s regulation requires that a party seeking a hearing submit a “statement of the nature and scope of the interests of the requestor, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision.” 18 AAC § 15.200(a)(3)(A); *see also* Exc. 232.

It was unreasonable or arbitrary for DEC to find that the organizations did not meet the regulatory requirements for standing. First, CSAW and FoE provided enough information to meet DEC’s requirements. Their request noted that they “[have] been representing the interests of thousands of Alaskans for the past decade on the issue of cruise ship pollution;” that they worked on relevant environmental issues, specifically including legislation and the ballot initiative; that the interests of supporters of the ballot initiative are being harmed; and that the pollution has “known, deleterious consequences for aquatic life.” Exc. 165, 167. This should have been sufficient for the agency to grant standing, or at least an opportunity to present evidence on standing. Indeed, the agency ascertained the legal claim involved and clearly understood that the organizations claimed “voter standing,” had “members in Alaska,” “had a role in” the ballot initiative, and had worked “to reduce the impact of cruise ship wastewater discharges.” Exc. 232–33.

Second, it was unreasonable to so narrowly interpret a regulation designed to provide the opportunity for administrative review. Agency proceedings are intended to allow citizen groups an opportunity to present their concerns to an agency without resorting to litigation, yet DEC's interpretation would require citizen groups to allege a legally sophisticated foundation documenting the standing of each individual member. For example, DEC acknowledged that the requestors were organizations, had members in Alaska, and alleged voter standing—while this does not discuss the formal elements of citizen-taxpayer standing, it alleges what should be a sufficient basis for the theory. Exc. 232–33. It is unreasonable and unrealistic to require more formality and sophistication in an administrative request to be heard. For the agency to so stringently foreclose the potential for review defies the very purposes of administrative review—allowing the agency to apply its expertise, correct errors, and develop a record. *See Eufemio*, 837 P.2d at 99.

Third, the agency's half-page analysis was arbitrary because its assumptions were unsupported and contradict general notions of standing. With scant reasoning and almost no citations to authority, the decision's standing analysis stated that (1) organizations cannot vote, and therefore cannot represent voters, (2) the fact that FoE has members in Alaska and works to reduce the impact of cruise ship discharge does not suggest an adverse effect on FoE, and (3) the regulation does not allow "vicarious standing." Exc. 232–33. These assertions find no support in the regulation DEC cited, which sets no independent standard for either voter standing or member organization standing, and

gives no indication that a requestor cannot represent the interests of others.⁸ 18 AAC § 15.200(a)(3)(A); Exc. 232 (citing same). Besides being unsupported, these conclusions are simply wrong. As demonstrated above, organizations commonly represent the interests of their members, and voters (and groups representing voters) have been granted standing liberally based on the interests at stake here. *See supra* pp. 36–40.

Fourth and finally, even if DEC had doubts about the organizations’ standing, it was arbitrary, unreasonable, and a violation of due process to deny any opportunity to address those doubts or present affidavits demonstrating standing. *See Nash v. Matanuska-Susitna Borough*, No. 13048, 2010 WL 3447841 at *8–10 (Alaska Sept. 3, 2010) (agency violates due process where it interprets an agency policy to prevent the presentation of relevant evidence, thus denying opportunity to be heard). This is particularly true here, where the regulations do not make it clear that organizations must detail their individual members’ interests when requesting a hearing, and where a requestor could reasonably assume that he or she represents the interest of the organization (not specific members). *See* 18 AAC § 15.200(a)(3)(A). Here, an honest review of the organizations’ request for a hearing makes it clear that they attempted to provide information responsive to DEC’s regulations. If DEC wishes to interpret its regulation to create a requirement that citizen groups allege standing with such specificity, it must give citizens reasonable notice and an opportunity to comply.

⁸ While DEC did not clarify what it meant by “vicarious standing,” courts commonly acknowledge standing in situations that might be deemed vicarious, such as class actions, member organizations, and third-party standing.

In sum, the agency's determination that CSAW and FoE lacked standing to appeal to the commissioner was unnecessarily harsh, defeats the purpose of administrative review, and does not find support in authority. The decision should be set aside as arbitrary or unreasonable.

III. THE COURT SHOULD REMAND THE PERMIT TO DEC.

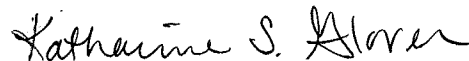
DEC's interpretation of AS 46.03.462(e) is not consistent with the statute, and General Permit No. 2009DB0026 is consequently invalid. Ordinarily, where a permit does not comply with the law, the appropriate remedy is to immediately invalidate it and remand to the agency. *See, e.g., Lakosh*, 49 P.3d at 1120; *N. Alaska Env'tl Ctr. v. State*, 2 P.3d 629, 639 (Alaska 2000); *Cook Inlet Keeper v. State*, 46 P.3d 957, 967 (Alaska 2002); *see also Alaska Survival v. State*, 723 P.2d 1281, 1283, 1292 (Alaska 1986) (directing the superior court to remand a decision to the agency because the agency failed to comply with a statutorily-mandated process). In this case, CSAW and FoE do not ask the Court to set aside the permit. Rather, in an effort to avoid disruption to the 2011 cruise ship season, CSAW and FoE request that the Court remand the permit to the agency and require it to issue a new permit that applies the most effective technology requirement in a way that is consistent with the statute and supported by the record. CSAW and FoE request that the Court order DEC to issue the new permit within 60 days of the date this Court issues its decision. If some ships are unable to meet the new standards immediately, DEC could provide compliance schedules for those ships in order

to allow them to continue their Alaska cruise operations during the 2011 season with minimum disruption. AS 46.03.020; 18 AAC 95.010.

CONCLUSION

For the foregoing reasons, CSAW and FoE respectfully request that the Court remand General Permit No. 2009DB0026 to DEC and instruct the agency to issue a new permit within 60 days of the Court's decision.

Respectfully submitted this 12th day of November, 2010.



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EARTHJUSTICE

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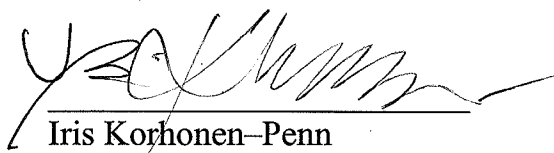
CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on November 12, 2010, a copy of the foregoing BRIEF OF APPELLANTS, with exhibits, and APPELLANTS' EXCERPTS OF RECORD was served via U.S. Mail on:

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Furthermore, in accordance with Appellate Rule 513.5(c), I certify that the typeface used in the foregoing document is 13 point Times New Roman.



Iris Korhonen-Penn
Litigation Assistant
EARTHJUSTICE

TABLE OF EXHIBITS

<u>Ex.</u>	<u>Description</u>
A	Alaska State Legislature, House Resources Standing Committee Hearing re: HB 134, Transcript of Proceedings, March 25, 2009 (excerpts)
B	Alaska State Legislature, Senate Resources Standing Committee Hearing re: HB 134, Transcript of Proceedings, April 6, 2009 (excerpts)
C	Affidavit of Gershon Cohen, Project Director, Campaign to Safeguard America's Waters, Project of Earth Island Institute
D	Affidavit of Marcelin E. Keever, Legal Director, Friends of the Earth
E	Affidavit of Larry Edwards
F	Affidavit of Jeffrey Sloss
G	Affidavit of Arthur L. Jess