

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

3 Campaign to Safeguard America's Waters, )  
4 a project of EARTH ISLAND )  
5 INSTITUTE; and Friends of the Earth, )

6 Appellants,

7 v.

8 ALASKA DEPARTMENT OF )  
9 ENVIRONMENTAL CONSERVATION, )  
10 DIVISION OF WATER, )

11 Appellee.

12 and

13 ALASKA CRUISE ASSOCIATION, )  
14 Intervenor-Appellee. )

**Filed in Chambers**  
STATE OF ALASKA  
FIRST JUDICIAL DISTRICT  
AT JUNEAU  
By TKay on 6-6-11

1JU-10-00793 CI

15 **DECISION ON APPEAL**

16 **I. INTRODUCTION**

17 This appeal concerns the 2010 Alaska Department of Environmental Conservation  
18 ("the Department") Large Commercial Passenger Vessel Wastewater Permit. Campaign  
19 to Safeguard America's Waters and Friends of the Earth ("the Appellants") challenged  
20 the permit at the Department level, claiming that the Department misapplied Alaska  
21 Statute 46.03.462(e)'s provision that such permits may only include wastewater standards  
22 less stringent than otherwise required under Alaska's Clean Water Act "if the department  
23 finds that a permittee is using economically feasible methods of pollution prevention,  
24 control, and treatment the department considers to be the most technologically effective"  
25 in controlling wastewater discharge. The 2010 three-year permit finds that every cruise

1 ship in the Alaska fleet with an Advanced Wastewater Discharge System uses the most  
2 technologically effective pollution system that is economically feasible and permits each  
3 ship to discharge wastewater into Alaska waters based on each ship's past pollution  
4 levels.

5 Appellants contend that the permit standards for wastewater discharge should be  
6 much higher than allowed in the 2010-2012 permit, requiring that cruise ships reduce  
7 their wastewater discharges to pollution levels that at least match the best performing  
8 pollution system currently in use by some vessels in the cruise ship fleet. Alternatively,  
9 appellants argue that the Department must do at least some winnowing or refinement of  
10 the various technologies used by and/or pollution discharges allowed for the cruise ship  
11 fleet to meet the statutory directive that wastewater systems that exceed Alaska Clean  
12 Water Act standards must be "the most" technologically effective wastewater treatment  
13 systems that are economically feasible.

14 The Department denied the requested relief on two grounds: (1) finding, among  
15 other things, that Appellants lack standing to challenge the Department permit because  
16 advocacy groups may not vicariously seek relief for their members under Department  
17 regulations and Alaska statutes; and (2) concluding that the issue raised is not  
18 "significant" because the question of whether the Department erred in issuing the permit  
19 is a question of fact and can not be decided as a pure question of law.

20 Although the Appellants should have been more precise in detailing their  
21 membership, the Department erred in concluding that no advocacy group can seek review  
22 of a Department cruise ship wastewater permitting decision at the agency level. The  
23 Department is also incorrect in its assertion that cruise ship wastewater permit decisions  
24 are not subject to judicial review.

1 The question regarding proper interpretation of AS 46.03.462(e) and its  
2 application to the 2010 Cruise Ship Discharge permit is more problematic, at least in part  
3 because of the way the original Request for Administrative Appeal was phrased and the  
4 subsequent Department interpretation of the Request. Because the Department  
5 interpreted the Request for Administrative Appeal as a contention that “allowing a system  
6 other than the Rochem [wastewater treatment] system on any vessel is inherently  
7 irreconcilable with AS 46.03.462(c),” it found no “significant” legal issue was  
8 presented.<sup>1</sup>

9 The Request for Administrative Appeal raises a broader issue than set forth above  
10 and one that involves a significant legal issue, i.e., whether the definition of “most  
11 effective technology” that is “economically feasible” in AS 46.03.462(e) is contrary to  
12 the Department’s issuance of a general three-year permit which allows all cruise ships  
13 with any Advanced Wastewater Treatment System to discharge wastewater even though  
14 these systems employ different technologies, achieve significantly different results, and  
15 the costs for improving those results are not in the agency record.

16 Because the Commissioner has not directly determined this question, the court  
17 declines to rule on the issue without affording the Commissioner an opportunity to issue a  
18 fully developed decision consistent with 18 AAC 15.220. The decision denying the  
19 opportunity for an administrative appeal due to no “significant” question of law is  
20 reversed and the matter is remanded for appropriate action by the Commissioner pursuant  
21 to 18 AAC 15.220.<sup>2</sup>

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24 <sup>1</sup> Exc. 235.

25 <sup>2</sup> This decision does not invalidate the 2010 permit. It remands for action consistent with  
this decision.

1 **II. FACTS/HISTORY OF PROCEEDINGS**

2 **A. 2000 – 2009 Cruise Ship Wastewater History**

3 In the summers of 2000 and 2001, the Alaska Cruise Ship Initiative—an entity  
4 comprised of representatives from the Department, the cruise industry and the public—  
5 tested cruise ship wastewater discharged into Alaska waters that had been treated with  
6 Type II Marine Sanitation Devices (“Type II MSD”). The results displayed pathogen  
7 concentrations similar to those found in untreated wastewater and levels of ammonia and  
8 metals that far exceeded standards established by the federal Clean Water Act and the  
9 more restrictive Alaska Water Quality Standards.<sup>3</sup> These high levels of pathogens,  
10 ammonia and metals posed significant risks to both aquatic life and the general public.<sup>4</sup>

11 In 2001, the legislature enacted AS 46.03.460-.490, which created the  
12 Commercial Passenger Vessel Environmental Compliance Program, setting wastewater  
13 limits and sampling requirements for blackwater and graywater discharged from large  
14 passenger vessels. Most cruise ships responded by installing Advanced Wastewater  
15 Treatment Systems, a type of Type II MSD that is more effective than traditional Type II  
16 MSDs.

17 In 2006, Alaskans voted to approve a ballot measure that requires cruise ships<sup>5</sup> to  
18 meet Alaska Water Quality Standards at the point of discharge.<sup>6</sup> Ballot Measure 2  
19 mandated that the Department issue permits to vessels for the discharge of “blackwater”  
20 or sewage, and “graywater” or water from accommodations, galley, laundry and other  
21 sources. While able to meet the Alaska Water Quality Standards for most pollutants,  
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23 <sup>3</sup> Exc. 55-58.

24 <sup>4</sup> *Id.*

25 <sup>5</sup> The law applies to large commercial passenger vessels, which are defined to include  
ships with overnight accommodations for 250 or more people. AS 46.03.490(2), (7), (13).

<sup>6</sup> See Exc. 53, 139; AS 46.03.462.

1 cruise ships, despite using Advanced Wastewater Treatment Systems, could not  
2 consistently comply with all of the standards for ammonia, copper, nickel and zinc.<sup>7</sup>

3 In 2008, the Department issued a general wastewater permit for cruise ships to  
4 discharge wastewater containing ammonia, copper, nickel and zinc at levels exceeding  
5 the Alaska Water Quality Standards until 2010. The 2008 Permit based interim limits on  
6 data compiled between 2004 and 2007 of the pollutant amounts found in cruise ship  
7 wastewater at the point of discharge.

8 The 2008 interim limits were pegged at the 95th percentile so that, if future  
9 performance was in line with the past, 95% of the wastewater sampled from all cruise  
10 ships discharging in Alaska waters would be within the limits for ammonia, copper,  
11 nickel and zinc while 5% would exceed the limits. Ships exceeding the limits could  
12 potentially be cited and fined. The 95th percentile was selected so that this potential  
13 liability would encourage the industry to innovate technology.<sup>8</sup>

14 As it became apparent that cruise ships would not meet Alaska wastewater quality  
15 standards by 2010, the legislature amended the cruise ship discharge statute in 2009 by  
16 House Bill 134, which allows the Department to issue up to two three-year general  
17 permits with wastewater limits less stringent than Alaska Water Quality Standards if the  
18 Department finds that each permittee covered by the permit is “using economically  
19 feasible methods of pollution prevention, control and treatment the department considers  
20 to be the most technologically effective in controlling all wastes and other substances in  
21 the discharge.”<sup>9</sup> Thus, the Department can issue general permits for 2010-2012 and  
22 2013-2015 allowing cruise ships to discharge at levels exceeding the Alaska Water  
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24 <sup>7</sup> See Exc. 173, 181.

25 <sup>8</sup> Exc. 145.

<sup>9</sup> AS 46.03.462(e).

1 Quality Standards. In 2016, all cruise ships must meet Alaska Water Quality Standards at  
2 the point of discharge unless the law is again amended.

3 House Bill 134 also provided for the creation of a Scientific Advisory Panel, to  
4 consist of eleven members appointed by the Commissioner of the Department. The Panel  
5 will conduct public conferences and workshops and draft a report before October 2012,  
6 evaluating the economic feasibility and technological effectiveness of various treatment  
7 options.<sup>10</sup> This report by the Panel is intended to guide the Department's future permit  
8 decisions.

### 9 **B. Advanced Wastewater Treatment Systems**

10 The term Advanced Wastewater Treatment System is a generic name for a type of  
11 system that is able to treat effluent to Alaska Water Quality Standards for *most* pollutants.  
12 The systems are manufactured by different companies, employ different technologies,  
13 and achieve disparate results in removing ammonia, copper, nickel and zinc from the  
14 water.<sup>11</sup> For example, between 2004 and 2008, the median amounts of ammonia,  
15 copper, nickel and zinc in the Hamsworth Advanced Water Treatment Systems's  
16 effluent were: ammonia at 48.5 mg/l; copper at 13 ug/l; nickel at 8.5 ug/l; and zinc at 110  
17 ug/l. The medians for the Zenon Advanced Water Treatment Systems were: ammonia at  
18 13.5 mg/l; copper at 6 ug/l; nickel at 12.4 ug/l; and zinc at 61.4 ug/l. The medians for the  
19 Rochem Advanced Water Treatment Systems were: ammonia at .9 mg/l; copper at 1 ug/l;  
20 nickel at .87 ug/l; and zinc at 11.2 ug/l.<sup>12</sup>

21 The 2008 Large Ship Sampling Report by the Department states that cruise ships  
22 employing Advanced Water Treatment Systems exceeded 2008 interim limits for  
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24 <sup>10</sup> AS 46.03.464(c)(2).

25 <sup>11</sup> See Exc. 174-197.

<sup>12</sup> Exc. 143 (Table 11).

1 ammonia, copper, nickel and zinc a total of 48 times.<sup>13</sup> 34 of the 48 violations occurred  
2 on ships using Hamworthy Bioreactor technology. Holland America vessels using Zenon  
3 technology had no violations. Norwegian Cruise Line vessels using Scanship technology  
4 had one violation.<sup>14</sup>

5 The parties appear to agree that while some treatment systems appear to come  
6 close to meeting Alaska Water Quality Standards, no single system has consistently  
7 adhered to these standards for ammonia and metals. A 2010 feasibility study by OASIS  
8 Environmental states:

9 This study found that “technologies currently used in some ships such as  
10 reverse osmosis (RO) and aerobic biological oxidation/nitrification would  
11 likely provide the most adaptable systems to achieve the limits for both  
12 conventional pollutants (e.g. fecal coliform bacteria, TSS) as well as  
13 treating ammonia, copper, nickel, and zinc to the Water Quality Standards  
14 at the point of discharge. RO would be able to treat both ammonia and  
15 metals. The aerobic biological oxidation/nitrification process would only  
16 treat ammonia.<sup>15</sup>

17 The OASIS report does not contain any evidence regarding economic feasibility or draw  
18 any conclusions with regard to economic feasibility as to any particular technology.

### 19 **C. The Challenged 2010 General Wastewater Discharge Permit**

20 On April 22, 2010, the Department issued the Large Commercial Passenger Vessel  
21 Wastewater Discharge General Permit No. 2009DB0026 (“2010 Permit”), valid until  
22 April 22, 2013.<sup>16</sup> The Permit states that the Department made a determination that every  
23 Advanced Water Treatment System used by each individual permittee, i.e., cruise ship,  
24 employs the most effective technologies economically feasible:

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24 <sup>13</sup> Exc. 459 (Table 1).

25 <sup>14</sup> *Id.*

<sup>15</sup> Exc. 606.

<sup>16</sup> Exc. 86 - 130.

1 ADEC conducted its own review of cruise ship wastewater technologies,  
2 conducting a technology conference on February 18, 2009 and a follow-up  
3 report. DEC's primary conclusion from this effort was that Advanced  
4 Wastewater Treatment Systems are very effective wastewater treatment  
5 systems. While other new and emerging technologies used in shore-based  
6 facilities could result in improvements to cruise ship effluent quality, none  
7 are currently readily available (and therefore not economically feasible) for  
8 installation and use on the entire cruise ship fleet that discharges in marine  
9 waters of the state, ADEC finds that cruise ships are currently using the  
10 most technologically effective treatment systems that are economically  
11 feasible.<sup>17</sup>

12 The 2010 Permit set wastewater limits which require that permittees meet Alaska  
13 Water Quality Standards for the pollutants which all Advanced Wastewater Treatment  
14 Systems are very effective at treating, namely: fecal coliform, total suspended solids,  
15 phosphorus, pH and others. But instead of providing a single standard for ammonia and  
16 dissolved metals, the final permit includes six different sets of pollution limits, depending  
17 on the manufacturer of the treatment system currently installed on each ship.<sup>18</sup> The six  
18 categories are: Hamworthy, Marisan, Rochem, Scanship, Zenon, and "All other  
19 Wastewater Treatment Systems."<sup>19</sup>

20 The Department's 2010 permit changes the wastewater limits from those set in  
21 2008 in two primary ways. First, it evaluates a cruise ship's performance against how  
22 well ships with the same Advanced Wastewater Treatment Systems performed between  
23 2004 and 2009, rather than against the entire fleet using Advanced Wastewater Treatment  
24 Systems. That is, ships with the Hamworthy Advanced Water Treatment System are

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25 <sup>17</sup> Exc. 140.

<sup>18</sup> Exc. 92, 95-96.

<sup>19</sup> *Id.*



1 evaluated against the performance of other ships with Hamsworthy Advanced Water  
2 Treatment System and not against ships using the Rochem LPRO Advanced Water  
3 Treatment System or any other type of Advanced Water Treatment System. Second, the  
4 2010 Permit requires that a Wastewater Treatment System must produce wastewater at  
5 the 99th percentile— rather than the 95th percentile established in the 2008 Permit—  
6 with regard to ammonia, copper, nickel and zinc.  
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8         The changes to the 2010 permit effectively relax some of the pollution limits set in  
9 2008. By making the general permit system-specific, cruise ships with systems that  
10 perform poorly at controlling pollutants in comparison to better-performing systems on  
11 other ships are allowed to continue to discharge at approximately their past performance  
12 levels without risk of violating the general permit.<sup>20</sup> By requiring that a wastewater  
13 system's ammonia, copper nickel and zinc levels meet the 99th percentile of the limit,  
14 rather than the 95th percentile of the limit established in the 2008 Permit, each  
15 wastewater system will only exceed the interim limits 1% of the time, while discharging  
16 the above pollutants at significantly different levels. This basically means that a cruise  
17 ship employing a treatment system like the Hamsworthy system, which had significant  
18 difficulties meeting the interim limits under the 2008 Permit, will almost always be in  
19 compliance under the 2010 Permit, even if it takes no action to improve its effluent  
20 quality.  
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<sup>20</sup> See Exc. 138 (Table 8).

1 The 2010 permit is further built on the several apparent assumptions. First, it  
2 assumes that every cruise ship is different, although the precise differences between  
3 cruise ships are not in the agency record. It further assumes that since it is not known  
4 how much it will cost for each ship to install technology to meet or come close to  
5 meeting Alaska Water Quality Standards, it is not economically feasible for any ship to  
6 improve their current wastewater systems, at least beyond the 1% “technology-forcing”  
7 portion of the 2010 permit.  
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9 **D. Appellants’ Request for an Administrative Hearing**

10 On May 19, 2010, the Appellants filed a request for an administrative hearing on  
11 the 2010 Permit. The request outlined three different groups adversely affected by the  
12 2010 Permit. The first was Campaign to Safeguard America’s Waters, a group that  
13 advocates for the interests of Alaskans, and which was intimately involved in the drafting  
14 of federal and state laws regulating cruise ship wastewater (including Ballot Measure 2).  
15 The second were those Alaska residents who voted to pass Ballot Measure 2 and who  
16 would be represented by Campaign to Safeguard America’s Waters and Friends of the  
17 Earth in the litigation. The third group was Friends of the Earth, a group working to  
18 reduce the environmental impacts of cruise ship wastewater discharge, with 300 members  
19 in Alaska.

20 The request states:

21 [T]here are no disputed issues of fact related to this request. All evidence  
22 cited was taken from public documents published by the Department. The  
23 requestors’ dispute with the [D]epartment is based solely on interpretation  
24 of Alaska statute. Therefore, there is no need for an evidentiary hearing; a  
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1 judgment can be made on this request solely on the basis of this brief and a  
2 reasoned examination of state law.<sup>21</sup>

3 The Appellants contended that the Department misinterpreted AS 46.03.462(e) in  
4 finding that all Advanced Water Treatment Systems are the most effective wastewater  
5 treatment technologies economically feasible despite the fact that the various Advanced  
6 Water Treatment Systems achieve vastly different levels of performance. The Appellants  
7 argued that that the Department's own study showed that the Rochem LPRO Advanced  
8 Water Treatment System out-performs other Advanced Water Treatment Systems for  
9 removal of metals and ammonia. The Appellants further alleged that the Department's  
10 economic feasibility determination was unsupported by any facts of record.

#### 11 **E. The Department and Alaska Cruise Association Response**

12 The Department's Division of Water opposed the request for administrative  
13 appeal, arguing that the Commissioner should "assess" whether the groups had standing  
14 and that "advanced wastewater treatment systems as a class are the most technologically  
15 and economically feasible treatment systems."<sup>22</sup> The Alaska Cruise Association also  
16 submitted a letter supporting the Division.<sup>23</sup> The Association noted that the Appellants  
17 had raised an "unnecessary" issue of fact by claiming that the Rochem reverse osmosis  
18 system outperforms other treatment systems, a question the Association argued would not  
19 be answered until the Science Advisory Panel completed its report in the years to come.<sup>24</sup>

#### 20 **F. The Commissioner's Decision**

21 The Deputy Commissioner of Environmental Conservation, acting on behalf of the  
22 Commissioner, construed the Appellants' request for an administrative appeal as a  
23 request for a hearing. Deputy Eason found that Campaign to Safeguard America's

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24 <sup>21</sup> Exc. 164-168.

25 <sup>22</sup> Exc. 219-20, 226-28.

<sup>23</sup> Exc. 757 - 767.

<sup>24</sup> Exc. 758.

1 Waters and Friends of the Earth lacked standing because they had not established that  
2 they were “directly and adversely affected by the permit at issue.” He further stated that  
3 “[t]he standing asserted here is essentially vicarious, however. The applicable regulation  
4 does not provide for vicarious standing.”<sup>25</sup>

5 The decision also states that no hearing can be granted because the Appellants  
6 failed to raise a “significant question of law” in its request for an appeal. Under 18 AAC  
7 15.2220(b)(3), a hearing on a question of law can only be ordered if there is a significant  
8 question of law to be resolved. In determining that the Appellants’ legal claims raised no  
9 significant questions of law, the decision construed the request as one that essentially  
10 requested a “legal conclusion” that “allowing a system other than the Rochem system on  
11 any vessel is inherently irreconcilable with AS 46.03.462(c).”<sup>26</sup>

12 On appeal, Appellants contend (1) they have standing to appeal the  
13 Commissioner’s decision to superior court; (2) the Commissioner erred in determining  
14 that the Appellants lacked standing at the administrative level; and (3) the Department  
15 misinterpreted AS 46.03.462 in determining, as a matter of law, that all Advanced Water  
16 Treatment Systems employ the most effective technology economically feasible for every  
17 ship in Alaska’s cruise ship fleet.

### 18 **III. DISCUSSION**

#### 19 **A. The Appellants Have Standing to Bring Their Appeal in Superior 20 Court.**

##### 21 **1. The Superior Court has jurisdiction to hear Department of 22 Environmental Conservation cruise ship permit appeals.**

23 The Department argues that the Appellants do not have standing to bring this  
24 appeal because the Alaska Administrative Procedure Act (“the APA”) does not apply to

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25 <sup>25</sup> Exc. 233.

<sup>26</sup> Exc. 235.

1 Department of Environmental Conservation permits. Under AS 44.62.560, a superior  
2 court may review a final administrative order. A decision by the commissioner is a final  
3 agency decision “for the purposes of appeal as provided in AS 44.62.560.”<sup>27</sup> The  
4 Department claims that two statutes, discussed below, exempt Department decisions from  
5 judicial review.

6 Alaska Statute 44.62.330(a)(28) exempts the Department from the administrative  
7 hearing procedures in sections 360-400 of the APA but does not exempt the Department  
8 from the judicial review provision, section 560. Similarly, AS 46.03.880 allows  
9 adjudicatory hearing procedures to vary from the APA but does not exempt the agency  
10 from the APA’s judicial review procedures. Moreover, 18 AAC 15.300(c) specifically  
11 states:

12 Unless the final [Department] decision involves a remand to department  
13 staff, a final decision issued under (b) of this section [(b) includes a final  
14 decision by the commissioner] is a final agency decision for purposes of  
15 appeal as provided in AS 44.62.560 - 44.62.570 and shall be issued with a  
statement that it is a final agency decision and that an aggrieved party,  
including the department, has 30 days to appeal to the superior court.

16 Finally, Deputy Commissioner Eason certainly believed that the Appellants had the right  
17 to appeal his decision, since his Order detailed how appeal should be taken.<sup>28</sup>

18 The Department also suggests that the court’s jurisdiction is limited by the  
19 Department’s regulations on standing. Absent an express legislative alteration of the  
20 scope of judicial review, agencies may not, by regulation, limit the jurisdiction of  
21 courts.<sup>29</sup> The legislature has not expressly altered the scope of judicial review for  
22 wastewater permit appeals.

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24 <sup>27</sup> 18 AAC 15.300(c).

25 <sup>28</sup> Exc. 235-36.

<sup>29</sup> See Alaska Const. art. IV, §1; *Earth Movers of Fairbanks v. Fairbanks North Star  
Borough*, 865 P.2d 74, 7431 (Alaska 1993).

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**2. As Participants in the Administrative Proceeding Below, Appellants Have Standing to Appeal.**

The Alaska Cruise Association claims that the Appellants do not have standing for this appeal because they were not accorded party status below. A participant in administrative proceedings, such as the Appellants here, may bring an administrative appeal.<sup>30</sup>

**3. The members of Campaign to Safeguard America's Waters and Friends of the Earth have standing to sue in their own right.**

As the Alaska Supreme Court has noted: "The concept of standing has been interpreted broadly in Alaska. We have 'departed from a restrictive interpretation of the standing requirement,' adopting instead an approach 'favoring increased accessibility to judicial forums.'"<sup>31</sup>

In *Alaskans for a Common Language, Inc. v. Kritz*, the Alaska Supreme Court announced a three part test to be used in determining whether an association had standing to sue on behalf of its members: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>32</sup>

The Appellants' members seek to protect their interest in living in an environment without harmful pollutants and this interest is germane to each group's organizational

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<sup>30</sup> *City of Kenai v. State of Alaska, Pub. Utils. Comm'n*, 736 P.2d 760, 762-63 (Alaska 1987)(quoting AS 44.62.640(b)(4)).

<sup>31</sup> *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (citations omitted) (quoting *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973) and *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976)).

<sup>32</sup> 3 P.3d 906, 915 (Alaska 2000).

1 purposes. The relief sought is not particularized to individuals and does not require  
2 individual participation.

3 To establish that a member otherwise has standing to sue, members must either  
4 have (a) interest-injury standing or (b) citizen- taxpayer standing.<sup>33</sup> To achieve interest-  
5 injury standing, a party must have some interest - an “identifiable trifle” will suffice - that  
6 “is adversely affected by the complained of conduct.”<sup>34</sup> The interest may be “aesthetic or  
7 environmental.”<sup>35</sup> Campaign to Safeguard America’s Waters and Friends of the Earth  
8 have members who live in Alaska and who therefore recreate in and consume seafood  
9 from the environment directly impacted by any adverse effect of cruise ship discharge.  
10 Their interest in preservation of the environment they live in is sufficient to establish  
11 interest-injury standing.

12 The individual members of Campaign to Safeguard America’s Waters and Friends  
13 of the Earth also have citizen-taxpayer standing. This standing exists if: (1) the case is of  
14 public significance; (2) the plaintiff is appropriate, i.e., truly adverse, and best situated to  
15 bring suit; and (3) the plaintiff is capable of competently advocating the position asserted  
16 in the suit.<sup>36</sup>

17 In this case, the public significance of the suit is likely two-fold: (1) citizen’s have  
18 an interest in seeing the will of the majority of the voters carried out by the executive  
19 branch in a manner consistent with the underlying ballot initiative; and (2) this water  
20 quality law/permit impacts the public who use the Alaska waterways. Second, the  
21 members are adverse to the Department and are directly affected by the conduct at issue.  
22 Third, the individuals have retained the aid of Campaign to Safeguard America’s Waters  
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24 <sup>33</sup> *Id.*

25 <sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Trustees for Alaska v. State*, 736 P.2d 324, 330 (Alaska 1987).

1 and Friends of the Earth. Both organizations are experienced in environmental litigation  
2 and are capable of competently advocating the positions of the individuals in question.  
3 The members of Campaign to Safeguard America's Waters and Friends of the Earth have  
4 interest-injury standing and citizen-taxpayer standing to bring this appeal.

5 **B. The Department Erred in Finding that Campaign to Safeguard**  
6 **America's Waters and Friends of the Earth Lacked Standing to Appeal to the**  
7 **Commissioner.**

8 Court review of an agency determination of whether a party has standing to be  
9 heard at the agency level is decided under the "reasonable and not arbitrary" standard if  
10 the decision is based on agency regulations.<sup>37</sup> This standard is not demanding: "[W]here  
11 an agency interprets its own regulation . . . a deferential standard of review properly  
12 recognizes that the agency is best able to discern its intent in promulgating the regulation  
13 at issue."<sup>38</sup> Courts affirm agency interpretation under this deferential standard if the  
14 agency's interpretation is a reasonable one.<sup>39</sup> Generally, an interpretation not deemed  
15 "plainly erroneous and inconsistent with the regulation" is reasonable.<sup>40</sup>

16 In the Order Denying Administrative Hearing, the Deputy Commissioner of the  
17 Department found that Campaign to Safeguard America's Waters and Friends of the  
18 Earth had asserted "voter standing" on behalf of those Alaskans who voted to pass Ballot  
19 Measure 2 in 2006. The decision states that standing fails under this interest because  
20 there was no explanation of how either organization could be a representative of these  
21 Alaskans and the organizations are not voters.

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23 <sup>37</sup> *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1046 & n.15 (Alaska 2007).

24 <sup>38</sup> *Handley*, 838 P.2d at 1233 (quoting *Rose v. Commercial Fisheries Entry Comm'n*, 647  
P.2d 154, 161 (Alaska 1982)).

25 <sup>39</sup> *Anderson*, 26 P.3d at 1109.

<sup>40</sup> *Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000) (quoting *Bd. of Trade, Inc., v. State, Dept.  
of Labor, Wage and Hour Admin.*, 968 P.2d 86, 89 (Alaska 1998)).



1 The decision states that the allegations that Dr. Gershon Cohen had a role in  
2 development of the ballot measure and other cruise ship discharge laws does not give  
3 Campaign to Safeguard America's Waters standing because Cohen, although a member  
4 of Campaign to Safeguard America's Waters, was not a requestor, even though he signed  
5 the Request as the Project Director and Contact for Campaign to Safeguard America's  
6 Waters. Finally, the decision states that Friends of the Earth's general assertion that it  
7 has members in Alaska and that the organization works to reduce the impact of cruise  
8 ship wastewater discharges did not make out a direct and adverse effect on Friends of the  
9 Earth from the particular permit at issue. Finally, the decision states that the regulation  
10 governing administrative appeal does not provide for vicarious standing.

11 18 AAC 15.200(a)(3)(A) requires that a party seeking a hearing submit a  
12 "statement of the nature and scope of the interest of the requestor, and an explanation of  
13 how and to what extent those interests would be directly and adversely affected by the  
14 decision." Subsection (a)(2) of the regulation requires that the request include the names  
15 and addresses of persons whom the requestor represents, fairly clearly contemplating  
16 organizational standing.

17 The court agrees with Appellants' arguments that the Deputy Commissioner  
18 unreasonably imposed a strict "standing" requirement into the regulation and applied that  
19 strict standard to the Appellants without first giving them fair notice of such intent and  
20 the opportunity to respond. The decision also incorrectly states that the regulation does  
21 not allow vicarious standing. "Requestor" is not limited by definition in 18 AAC 15.920  
22 to individuals.<sup>41</sup>

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24 <sup>41</sup> The Appellants did fail to provide the names and addresses of their members affected by  
25 the permit decision. While the regulation appears to require this information, this oversight does  
not appear to have been the basis for the Deputy Commissioner's decision.

1 The standing requirements for an adjudicatory hearing on a Department permit  
2 decision are also not heightened by regulation to more than that required for court  
3 standing. 18 AAC 15.220 only requires that requestor “be directly and adversely affected  
4 by the department's decision so as to justify an adjudicatory hearing.” This is similar to  
5 the liberal standing requirements followed by Alaska courts, which require that there  
6 exist a “sufficient personal stake in the controversy to guarantee ‘the adversity which is  
7 fundamental to judicial proceedings.’”<sup>42</sup>

8 18 AAC 15.220 states that, in evaluating standing, the Commissioner should  
9 consider the following factors: (1) “the nature of the interest asserted by the requestor;  
10 (2) “whether that interest is one that the applicable statutes and regulations were intended  
11 to protect”; and (3) “the extent to which the department’s decision directly and  
12 substantively impairs that interest.” It is unclear from the Deputy Commissioner’s order  
13 whether these factors were actually considered. The Appellants provided relevant  
14 information addressing these factors in their Request.<sup>43</sup>

15 This decision addresses the administrative standing issue since it is the basis of  
16 one of the arguments that Appellants lack standing to bring this appeal. However, the  
17 issue appears to be otherwise moot since the Department addressed what it perceived to  
18 be the merits of the Appellants’ administrative request in its decision.

19  
20 **C. The Appellants Raised a Significant Question of Law in their Request**  
21 **for Administrative Appeal, i.e., Whether the Department’s Interpretation of**  
22 **AS 46.03.462 to Include All Advanced Wastewater Treatment Systems as the**  
23 **Most Effective Economically Feasible Technology Available for Cruise Ships**  
24 **Is Inconsistent with the Statutory “Most Technologically Effective” and**  
25 **“Economically Feasible” Technology Requirement.**

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<sup>42</sup> *Adams v. Pipeliners Union* 798, 699 P.2d 343 (Alaska 1985) (quoting *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977)).

<sup>43</sup> Exc. 81-82.

1 In their Request for an Administrative Appeal, the Appellants raised the two legal  
2 claims they now make, with greater clarity, on appeal: (1) that the Department erred in  
3 determining that *all* Advanced Water Treatment Systems are the most effective  
4 wastewater treatment technologies, even though some Advanced Water Treatment  
5 Systems achieve much better results than others; and (2) that the record does not support  
6 the Department's determination regarding economic feasibility.

7 Unfortunately, the Deputy Director interpreted the above issues as a limited  
8 request for a "legal conclusion" that "allowing a system other than the Rochem system on  
9 any vessel is inherently irreconcilable with AS 46.03.462(c)."<sup>44</sup> However, the Request  
10 expressly states that AS 46.03.463(e) does not require use of any particular treatment  
11 system. The Request instead argues that any wastewater systems under the permit should  
12 be held to the same pollution standards as the best performing system(s). Hence, while  
13 the important questions referenced above have been fully briefed at the appellate level,  
14 the Commissioner has not made a meaningful response to the initial Request for  
15 Administrative Appeal, as required by 18 AAC 15.220.

16  
17 **D. Remand for Decision on the Legal Issues Presented to the Department  
Is Appropriate.**

18 The Appellants' Request for Administrative Appeal asserts that the Rochem  
19 Advanced Wastewater Treatment System, using reverse osmosis technology, is used on  
20 Alaska cruise ships Carnival Spirit, Mercury, Westerdam and Oosterdam and consistently  
21 out-performs other cruise ship wastewater systems. The Request states that while no  
22 particular wastewater treatment system is required by AS 46.03.463, any General Permit  
23  
24  
25

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<sup>44</sup> Exc. 235.

1 for wastewater discharge should require wastewater pollution limits that can match or  
2 surpass this performance level to meet the statutory requirement of “most” effective  
3 technology.<sup>45</sup> The Request goes on to argue that the statute requires cruise ships to use  
4 the most effective technology economically feasible and that adopting standards that  
5 allow some cruise ships to discharge waste at much higher pollution levels than others  
6 without proof that such results are not economically feasible violates the intent of the  
7 law.<sup>46</sup>

8  
9 As previously noted, Deputy Commissioner Eason interpreted the Request as a  
10 narrow question of fact – whether cruise ships had to install the Rochem reverse osmosis  
11 technology to comply with the statute. As also noted, this court interprets the question(s)  
12 presented by the Request more broadly than the Deputy Commissioner and the instant  
13 appeal fully develops the Request’s legal foundation.

14  
15 Although the initial Request to the Commissioner raises significant issues of law,  
16 it did not do so in a manner that made the precise questions to be answered clearly and  
17 specifically apparent. These important questions should, in the first instance, be answered  
18 by the Commissioner in one of the ways enumerated in 18 AAC 15.220. To do otherwise  
19 would result in judicial review without meaningful input from an agency with specific  
20 expertise in this complex scientific field. Therefore, remand is appropriate.

21  
22 To assist the Department in meaningfully responding to the issues raised in the  
23 Request, the core issues, as this court understands them, are outlined below.

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24  
25 <sup>45</sup> Exc. 166.

<sup>46</sup> Exc. 166-68.

1           1.       Since all cruise ships must use Advanced Wastewater Treatment Systems to  
2 discharge waste in Alaska waters, how does the Department conclude that the  
3 2010 General Permit, which allows discharge by specified systems and “all other  
4 systems,” includes the most technologically effective systems when pollution  
5 standards set by the Department vary widely?

6           2.       How does the Department conclude that it is not economically feasible for  
7 some ships to meet lower median pollution levels achieved by other ships when:  
8 (a) other ships presumably found it economically feasible to improve their  
9 systems; and (b) information regarding the economic feasibility of improvements  
10 is either unknown or not in the agency record?

11           3.       Assuming that each ship is different and may have design or other issues  
12 that make it economically or physically infeasible to use the most effective  
13 wastewater technology, how does the Department conclude that failure to meet  
14 lower median pollution levels set by other ships is economically or otherwise  
15 infeasible without ship-specific evidence of economic or other infeasibility?  
16

17           4.       Since “most” qualifies “effective” in the language of AS 46.03.462(e), is  
18 permitting all effective advanced wastewater treatment systems to discharge waste  
19 at their current levels consistent with the language of the statute and *Lakosh v.*  
20 *Alaska Department of Environmental Conservation*, 49 P.3d 1111 (Alaska 2002)?  
21

22           **E.       Appellants Did Not Waive or Fail to Exhaust Their Claims.**

23           The court agrees that the arguments of the Appellants that they did not waive the  
24 claims made on appeal or fail to exhaust administrative remedies. While the Appellants  
25

1 could and likely should have replied to the opposition briefing below, they gave sufficient  
2 notice of their claims to warrant consideration by the Commissioner.

3 **IV. CONCLUSION**

4 The Appellants have standing and have raised significant questions of law.  
5 The decision denying the opportunity for an administrative appeal due to no "significant"  
6 question of law is reversed and the matter is remanded for appropriate action by the  
7 Commissioner pursuant to 18 AAC 15.220.

8  
9 **DATED** at Juneau, Alaska this 6<sup>th</sup> day of June, 2011.

10  
11 

12 PATRICIA A. COLLINS  
13 Superior Court Judge

14 **CERTIFICATION**

15 The undersigned hereby certifies that on the 7<sup>th</sup> day of May, 2011 a true copy  
16 of the foregoing document was served on Thomas Waldo, David Ubaldi, Lindsay Wolter  
17 and Richard Elliott.

18  
19 

20 David Bogda, Appellate Clerk  
21  
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24  
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