May 28, 2002

Mr. John Iani, Regional Administrator
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

Michele Brown, Commissioner
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, AK 99501

VIA FIRST CLASS MAIL & E-MAIL [(206) 553 - 0149]

Re: Comments on the Performance Partnership Agreement Between the State of Alaska and U.S. EPA Region 10

Dear Regional Administrator Iani and Commissioner Brown:

Thank you for the opportunity to comment on all three (3) forms of agreement -- PPA, PPG and Informal -- between U.S. Environmental Protection Agency (EPA) Region 10 (PPA) and the Alaska Department of Environmental Conservation (ADEC). Public Employees for Environmental Responsibility ("PEER") hereby submits comments on the PPA currently in draft for various water programs, and comments for the informal agreement regarding the air-permitting program. See Exhibits A and B, attached.

As PEER researched the process by which EPA Region 10 and the State order the transfer of monies between their offices -- and the administration of State programs in lieu of federal mandates -- we are acutely concerned with the lack of organization in your PPA, PPG and Informal Agreement process. It was very difficult to determine exactly how you were proceeding with each subject matter, and under which type of agreement. No universal public notice was issued to the people of Alaska, and both your offices seemed perplexed at the idea that this is a subject matter for public notice and comment.

Our comments on the water PPA regarding the need to waive sovereign immunity to protect State employees pertain to not only your water programs, but your air programs and all other programs in which the federal environmental statutes are enforced by the State of Alaska.

With respect to the overall manner in which you both are proceeding with the PPA, PPG and Informal agreement process, it is PEER's position that using all three (3) of these forms together, without coordination, is a disservice to the Alaskan public. All of the subject areas of common interest to EPA Region 10 and the State of Alaska should be reduced to a unified PPA, which should be drafted with the same level of rigor we are accustomed to seeing in grant-based PPGs. Informal agreements should be disfavored,

entirely. And all standard-specific PPAs should be subjected to public comment and review.

PEER looks forward to working with both of you as your agreements go to final signature, and as those agreements are scrutinized in the months to come for compliance on the part of both parties. The people of Alaska are third party beneficiaries to these agreements, and it is their health with which we all must be concerned.

Cordially,

Dan Meyer
General Counsel

Sang Jun Han, PEER Environmental Law Clerk
Washington College of Law (LLM Program '03)

Attached: Exhibit A: *Comments of Public Employees for Environmental Responsibility on the EPA Region 10/State of Alaska Performance Partnership Agreement ("PPA") relation to Water Programs, and the PPA Process, in General*

Exhibit B: *Comments of Public Employees for Environmental Responsibility on the EPA Region 10/State of Alaska Performance Partnership Agreement ("PPA") and any Performance Partnership Grants ("PPGs") or other Agreements relating to Air Permitting Programs*

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Exhibit A:

Comments of Public Employees for Environmental Responsibility on the EPA Region 10/State of Alaska Performance Partnership Agreement ("PPA") relation to Water Programs, and the PPA Process, in General

General Comments. EPA and the States established the National Environmental Performance Partnership System (NEPPS) to strengthen the management, efficiency and effectiveness of the nation's environmental programs. NEPPS also provides EPA with the tools necessary to ensure federal tax dollars are being used to implement the federal statutes enabled through the PPA. The primary mechanism for implementing NEPPS is the PPA - a contract signed by both the EPA Regional office and the state DEC, to which the people of Alaska are a third party beneficiary. The PPA is the central document detailing environmental priorities and how the two entities will work together. A

Performance Partnership Grant (PPG) is often given in conjunction with the PPA to better utilize grant money and reduce administrative burdens.

Under NEPPS, EPA and the states evaluate their results and experiences with the PPA by examining: 1) the ***effectiveness*** of the PPA (does it lead to quantifiable, improved environmental outcomes?); 2) ***public credibility*** (are the measures used to report environmental outcomes credible and reliable?); and 3) ***fiscal soundness and program accountability*** (are public monies used in an efficient, effective, and economic manner, and is it understandable to the public?). *See e.g. 5 U.S.C. § 306(a) (2002); 31 U.S.C. § 115(c).*

PEER does not believe that the PPA as written will lead to improved environmental outcomes, nor do we believe that the measures used to report environmental outcomes are necessarily credible and reliable. Moreover, PEER is concerned that public monies are not being used in a way that will result in the best possible environmental outcomes, and that the process is mostly hidden from the public eye. The critical failure in the PPA is its inability to ensure that State employees enforcing federal standards are protected from retaliation by political forces within the State opposed to those federal standards.

Lack of Public Notice and Hearing. PEER encourages EPA and ADEC to disclose the processing of the PPA and the PPG to the public. This disclosure of the negotiation procedures may provide opportunities for a public examination of the agreement's effectiveness, as well as a public understanding of its implementation. Public comments may raise important issues. They will improve the manner in which the government agencies oversee the grant spending. Consequently, this input-output mechanism between governmental agencies and the public may guarantee the transparency of implementation of federal grant.

Whistleblower Protections. So it is *critical* that the PPA be modified to ensure that all whistleblower protections available under federal laws delegated to ADEC are made available to state employees and others responsible for implementing the federal law. Specifically, the PPA fails to provide legal protections to state employees who suffer from retaliation in response to their protected disclosures regarding federal programs delegated to the State of Alaska. In the absence of equivalent whistleblower protections or a waiver of sovereign immunity so that the employee protection provisions of federal laws apply, PEER maintains that ADEC is *not* offering an equivalent environmental program. See, e.g. 42 U.S.C. § 6926 (b) & (c) (2002). Therefore, PEER urges that the final version of this PPA state the following:

All parties agree that the State of Alaska expressly waives its immunity from suit in federal court or any other federal forum, including but not limited to a federal administrative process, under the Eleventh Amendment of the U.S. Constitution. Accordingly, the State of Alaska hereby submits itself to federal jurisdiction for the purpose of all whistleblower protection provisions of federal statutes applying to activities under this PPA. The purpose of this waiver is to ensure that the State of Alaska administers programs comparable to those programs managed by federal agencies with original authority over the delegated programs enabled through the PPA, and that the public employees or contractors managing the programs are properly supported in the execution of federal law.

Exhibit B:

Comments of Public Employees for Environmental Responsibility on the EPA Region 10/State of Alaska Performance Partnership Agreement ("PPA") and any Performance Partnership Grants ("PPGs") or other Agreements relating to Air Permitting Programs

FY 2003-2004 WORK PLAN AIR NON-POINT & MOBILE SOURCES PROGRAM AIR & WATER DATA & MONITORING PROGRAM AIR PERMITS PROGRAM

The following comments track the FY 2003-2004 Work Plan Air Non-Point & Mobile Sources Program, Air & Water Data & Monitoring Program, Air Permits Program [attached] currently being negotiated by the Alaska Department of Environmental Quality (ADEC) and U.S. Environmental protection Agency (EPA) Region 10.

Program Overview

This work plan is not publicly posted and interested stakeholders have no way of knowing of its existence. In the future, ADEC should affirmatively provide public access to both the work plan and the configuration of state and federal funding sources. Environmental

Indicators/Performance Measures

"Healthy" air is defined in this document as air that meets the carbon monoxide and particulate standards in Fairbanks, Anchorage and Juneau. There are many other communities in Alaska, including the North Slope oil activity area, where poor air quality can impact a sizeable percentage of the state's population. Furthermore, since arctic conditions are different than the lower 48, traditional indicators of air quality such as carbon monoxide and particulate do not adequately describe air "health." Since winter conditions do not promote photochemical oxidation, criteria pollutants such as ozone and nitrogen dioxide are also not good indicators. Much more appropriate indicators are hazardous air pollutants such as benzene, hexane or diesel soot. Short-term benzene monitoring studies in Anchorage and Valdez have shown elevated levels of this pollutant comparable to sizeable population centers in the lower 48.

Defining the performance measures for stationary source permitting in terms of reduced processing time, reduced cost and increased permit avoidance does not relate to the goal of protecting public health. Because of staff shortages, permit work on major facilities such as the Agrium fertilizer plant and the Valdez Marine Terminal has yet to begin. Furthermore, there are significant problems with permit quality such as the failure to identify and correct long-standing compliance problems or inadequate monitoring. It

would be much more appropriate to define the performance measures in terms of risk assessment and permit quality.

Fiscal Overview

Most of the states have chosen to follow the EPA formula for program funding, which relies solely on emission fees. Alaska is one of a handful of states that have opted out of this formula and instead use a combination of permit administration fees and emission fees. Although the presumption was that this enhances accountability, the actuality is that the prerequisite time-accounting, billing and complaint negotiation processes have become a nightmare. An inordinate amount of time and expense is invested in simply collecting fees with little or nothing to show for it. Most importantly, the EPA formula was designed as an incentive for emission reductions. The Alaska fee structure destroys this incentive.

EPA granted the state full program approval contingent on ADEC providing a report to the public before March 2002 that would "examine the cost of implementing their air permits programs and the ability of ADEC's current fee rates and structure to generate the necessary revenue." This report is still not forthcoming. Moreover, the "Benchmarking and Process Analysis Report" prepared by the Alaska Oil and Gas Association in November 2000 identified significant deficiencies in program funding and staffing.

There are currently no plans to implement any of the report recommendations. At the same time, ADEC has not proposed any plan or options for consideration to address admitted staffing shortages. At a minimum, ADEC should review approaches employed in other states that have proven to be a cost-effective ways to deal with staffing constraints.

Alaska Air Grant Objectives

Objective 1: *Prevent pollution exposure from anthropogenic sources in excess of health standards and reduce public exposures to unhealthy pollution incidents from non-anthropogenic sources.*

The majority of the focus is on carbon monoxide and particulate within the state's non-attainment areas. Non-anthropogenic (natural) sources in the state also include windblown dust in supposed "attainment" areas such as the Matanuska Valley as well as petroleum oil, gas seeps and wildfires.

Alaska has not had a smoke management plan to date. A "smoke management plan" is identified as a work element with a deadline of April 2004. The plan has been long overdue because of serious problems with lack of control options, interagency coordination, public education and enforcement authority. The plan has already been developed and only needs EPA certification to be useable as a control strategy. This work element should describe the review, approval and implementation processes for the plan.

There is a work plan element entitled "Mendenhall Valley PM-10 Maintenance Plan" with a deadline of December 2005. Juneau has not violated the particulate ambient air quality standard in four years. However, the firefighters have a regional training center that cannot be used six months out of every year due to incompletion of the Maintenance Plan. Since this plan could allow for fire training under appropriate weather conditions it should be developed immediately rather than waiting for four years.

Although the emphasis for ultra-low sulfur diesel fuel is supposedly on mobile sources, Alaska has a serious problem with diesel soot because the majority of rural power generation is with diesel electric generators. Thus, ultra-low sulfur diesel fuel should be used in rural Alaska not only for transportation, but also for home heating and power generation.

Objective 2: *Evaluate health risks for rural and urban Alaskans from exposures to toxic air pollutants - develop and begin to implement mitigation strategies to reduce those health risks for the population sectors most at risk.*

Air toxics in Alaska have been studied for over five years, but absolutely no actions or solutions have been produced. It is already clear that exposure to diesel soot is a significant health problem, particularly in rural Alaska because of the dependency on diesel fuel for power generation and heating. Also, a large majority of villages burn trash at their local dumps. These two problem areas should be scheduled on the work plan with deadlines for solutions.

It would seem to be reasonable to add an element addressing indoor air quality under this objective. In general, exposure to air pollutants is more significant indoors than outdoors.

A work plan element needs to be included for soil remediation. Currently, soil remediation is regulated under an archaic regulation [18 AAC 50.300 (b) (1) (A)], which requires a permit for any "production process" of five tons per hour or more requiring a pollution control device to control opacity, particulate or sulfur dioxide. This not only fails to address the significant air toxics concerns from soil remediation, but also produces a dichotomy among the various soil remediation processes. Rotary kiln operations processing five tons per hour or more are closely regulated and require both an afterburner and continuous emission monitors for carbon monoxide and oxygen. However, hot air vapor extraction (HAVE) units which process more than five tons per hour are completely unregulated because the afterburner is assumed to be a hydrocarbon control device rather than a particulate control device. This has been a problem for more than 15 years, but because of limited resources has never been dealt with. Soil remediation should be regulated based on risk to public health rather than by attempting to apply an outmoded regulation that was not designed for this purpose.

Objective 3: *Execute a construction and operating permit program in accord with the CAA that prevents significant deterioration of air quality, maintains NAAQS, and manages toxic air emissions while supporting sustainable economic growth for Alaska communities and businesses.*

The most serious concern about the permit program is the significant lack of public participation in the process. Most of the operating permits have been crafted through a series of closed door "ex parte" meetings with industry associations and individual permittees. Not only is the public excluded from these meetings, but there is also no public notification of the outcome. In fact, no member of the public ever receives copies of either industry comments or ADEC responses to comments. Most egregiously, permits are consistently modified substantially after close of public notice without granting any opportunity for further comment. The work plan must address the correction of public process deficiencies as a separate element.

One work plan element is an agreement from EPA for a 5-day expedited review in exchange for an "understanding that the public has the right to appeal those permits for 105 days after submittal to EPA." There is nothing in state regulations about a 105-day appeal process, and this must be promulgated before this work plan element is agreed to. The fee adequacy report, which was due before March 2000, has not been completed. It is therefore unlikely that a rule can be completed by October 31, 2002 increasing fees. Rather than simply increasing fees, the rule should identify the overall strategy for equating assessments to air quality improvement.

The work plan indicates that ADEC's regulations concerning construction permitting are deficient. These deficiencies have already been identified in correspondence between EPA and ADEC, and the regulations were not approved in the 63 FR 63983-63986 rule. Rather than saying, "EPA will perform a program review of ADEC's construction permitting program," the work plan element should identify specific deficiencies and appropriate corrective action.

A work plan element needs to be established to implement the recommendations of the "Benchmarking and Process Analysis Report" prepared by the Alaska Oil and Gas Association in November 2000.

Objective 4: *Perform air quality studies and assessments to ascertain ambient air quality conditions for criteria pollutants and visibility.*

There are not any real work products for this objective. There should be deadlines for determining the extent of regional haze and for deciding what corrective action is necessary.

Objective 5: *Provide electronic based air quality data and information in a manner readily available for internal and external parties to support air quality planning, permitting and other environmental decision making.*

There are no deadlines for correcting deficiencies in data reporting or format. Major data needs and deficiencies should be identified and deadlines for corrective actions established.

Objective 6: *Maintain an effective compliance assurance program that contributes to prevention and reduction of air pollution and the protection of public health.*

One deficient work plan element is "ADEC will develop a final inspector training and credential program by December 31, 2002." This element must be revised because Alaska law, AS 46.14.140(a)(13), requires "certification of inspectors" rather than an "inspector training and credential program."

Regulations allowing for inspector certification were proposed in May 1996. This work plan element must set a deadline for the adoption of the proposed certification regulations, which include but are not limited to a "training and credential program."

Objective 7: *This objective contains projects funded through the Congestion and Mitigation Air Quality (CMAQ) program from FHWA. The projects provide support for meeting local community and State air quality goals.*

There is a work plan outcome entitled "Public Awareness and Support of Individual Actions to Improve Air Quality." However, there is no work plan element to implement this outcome.

All the funding is geared towards automobiles, but there are many other mobile sources of air pollution such as aircraft, railroad engines and non-road engines. Control of these sources of air pollutants should be addressed through work plan elements.

Objective 8: *Perform air quality studies and assessments to ascertain ambient air quality conditions for fine particulates (PM2.5).*

There is considerable overlap between Objective 4 and Objective 8 concerning visibility, regional haze and fine particulates. Many of the same elements appear under both objectives.