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September 4, 2012

**BY FEDERAL eRULEMAKING PORTAL**

Rear Admiral Daniel B. Abel, Commander  
U.S. Coast Guard, First Coast Guard District  
408 Atlantic Avenue, Boston, MA 02110

**Subj: Comments on Draft Environmental Assessment for Implementation of Revisions to the Regulated RNA Governing Maritime Transport of Petroleum Products and Other Hazardous Materials on Buzzards Bay, Massachusetts (USCG-2012-0632).**

Dear Commander Abel:

We have reviewed the Draft Environmental Assessment for Implementation of Revisions to the Regulated RNA Governing Maritime Transport of Petroleum Products and Other Hazardous Materials on Buzzards Bay, Massachusetts (Draft EA) and provide the following comments. As detailed below, we believe that the Draft EA is both structurally and substantively deficient in a number of significant respects. Unfortunately, it appears that the Draft EA was designed to justify the decision the U.S. Coast Guard (USCG) made over five years ago rather than as a means to compare objectively various alternatives to the status quo. Accordingly, the Draft EA does not comply with either the National Environmental Policy Act (NEPA), the Council on Environmental Quality's NEPA regulations, or the U.S. Court of Appeals for the First Circuit's opinion in *United States v. Buzzards Bay Coalition*, 644 F.3d 26 (1st Cir. 2011), and therefore cannot serve as a basis for making a Finding of No Significant Impact (FONSI) and thereby eschewing the preparation of an Environmental Impact Statement (EIS).

1. Purpose and Need: Section 1 of the Draft EA identifies the purpose of the United States Coast Guard's (USCG) 2007 Final Rule, 72 Fed. Reg. 50,052 (Aug. 30, 2007) (codified at 33 C.F.R. 165.100 and vacated by *Buzzards Bay Coalition*, 644 F.3d at 39),<sup>1</sup> as follows: "[t]he

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<sup>1</sup> Because Massachusetts law does not include a provision that parallels the 2007 Final Rule's federally licensed pilot requirement for single hulled barges or the 2007 Final Rule's VMRS, the Commonwealth and the USCG agreed that the 2007 Final Rule should remain in effect (essentially on a voluntary basis) until the USCG promulgated a new rule for Buzzards Bay.



purpose of this action was to further reduce the probability of an incident that could result in the discharge or release of oil or hazardous material, or cause serious harm, to navigable waters of the United States.” Draft EA 1-2.<sup>2</sup> That, however, was not the 2007 Final Rule’s only purpose. The 2007 Final Rule’s other purpose was purportedly to “preempt those provisions of Massachusetts’ ‘Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays of the Commonwealth,’ (‘MOSPA’) regarding” sections 4 (enhanced personnel requirements for single hull barges) and 6 (tugboat escort requirements for both single and double hulled tank barges), which were already in effect and applicable to all tank barges transporting 6,000 or more barrels of oil through Buzzards Bay and the Cape Cod Canal. 72 Fed. Reg. 50,057. The purpose and need section of the Draft EA is, however, silent on whether this continues to be one of the USCG’s purposes.

Confusing matters further and thereby undermining the ability of both this Office and the public to make informed comments on the Draft EA is whether the Coast Guard intends to complete the NEPA process and treat the 2007 Final Rule as again effective, in contravention of the First Circuit’s ruling, *Buzzards Bay Coalition*, 644 F.3d at 39 (citing *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987)),<sup>3</sup> or instead to proceed with a new rulemaking for Buzzards Bay by publishing a proposed rule, as required by the Administrative Procedure Act (APA). The Draft EA is internally inconsistent on this issue. First, in Section 2 (Alternatives Considered), the Draft EA states that “Alternative 3 would be to *promulgate* a final rule that retains the 2007 Final Rule,” *id.* 2-1 (emphasis added), and that “[u]nder Alternative 4, a final rule would be *promulgated* that retains the 2007 Final Rule’s requirements and extends the 2007 Final Rule” to double hull barges. *Id.* 2-2 (emphasis added). In other sections, however, the Draft EA refers to issuing a FONSI and directly implementing the 2007 Final Rule, which suggests that the USCG intends to treat the 2007 Final Rule as effective immediately upon issuance of the FONSI, without any intervening rulemaking process and thereby without complying with the APA. *E.g. id.* 6-1. This is procedurally wrong and substantively significant, and therefore it must be clarified.

In particular, the Draft EA’s preference for Alternative 3a (the 2007 Final Rule) is premised on the assertion that requiring escorts and federal pilots for single hull barges but not for double hull barges will create an incentive for shipping companies to phase-out the use of single hull barges in Buzzards Bay prior to the Oil Pollution Act’s (OPA) January 1, 2015 single hull phase-out deadline. But, the Draft EA fails to account for the fact that the preferred alternative (escorts for single hulled barges but not for double hull barges) may not occur before the OPA phase-out date or will occur so close to that date that it will have no effect because of the time required to comply with the APA. In addition, and even more problematic, is that the Draft EA also fails to account for the fact that MOSPA’s escort requirement for both single and double hulled tank barges will remain in effect regardless of which of the two routes the USCG

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<sup>2</sup> No place does the USCG make clear why such an action was necessary in light of the fact that MOSPA’s more environmentally protective provisions were already in place.

<sup>3</sup> In the relevant section of the *Bowen* decision, the D.C. Circuit wrote, among other things, that “[i]f an agency rule is invalidated on procedural grounds, the agency must, of course, be given an opportunity to correct the procedural defect and *promulgate a new rule.*” *Bowen*, 821 F.2d at 758 (emphasis added).

chooses to follow. For that to change, the Massachusetts General Court would either have to repeal that section of MOSPA (Mass. Gen. L. c. 21M, § 6)—a step that is very unlikely, or the USCG would have to persuade a Federal Court to find that federal law preempts the section—something the Commonwealth has and will continue to dispute. In either case, the USCG cannot guarantee that the scenario on which the agency’s incentives-based theory is based will ever occur.

2. No Action Alternative: The USCG has failed to define correctly the no-action alternative, and that failure has distorted the Draft EA’s analysis. Under NEPA, the no-action alternative is the current status quo—literally, as the term “no-action” makes clear, the regulatory and environmental conditions that would continue to exist if the agency takes no action. *E.g.*, *Ass’n of Public Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997). In the Draft EA, however, the USCG has defined the no-action alternative as consisting of only the “USCG regulations that were in effect prior to the promulgation of the August 30, 2007 Final Rule,” Draft EA 2-1, despite the fact that at the time the USCG promulgated the 2007 Final Rule MOSPA’s enhanced personnel requirements for single hulled barges and MOSPA’s tugboat escort requirements for both single and double hulled tank barges were also already in effect. In other words, the status quo consisted of *both* the pre-2007 Final Rule *and* the MOSPA requirements, and that regulatory landscape reflects the benchmark or “baseline” against which the USCG must compare the potential environmental consequences of the other proposed alternatives. As the Draft EA indicates, this Office was consulted by the USCG regarding the alternatives, Draft EA 1-4, and, as Attachment 1 (incorporated in its entirety by reference here) reflects, we highlighted this deficiency, among others.

Accurately defining the no-action alternative is critical to NEPA’s required analysis, because the no action alternative “allows policy makers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action.” *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010). Here, however, the USCG’s continued insistence on ignoring the actual status quo has thwarted a fair and accurate comparison of alternatives. For example, with the correct no-action alternative as the comparator, the USCG’s finding that Alternative 3a would result in a “minor to substantial increase in control due to tug and pilot requirements” is wrong, because MOSPA already requires both single and double hulled tank barges to hire a tug escort. Draft EA 2-8. For the same reason, the USCG could not have plausibly found that Alternative 3a would result in a “substantial increase in protection from an oil spill compared to Alternative 1” or that Alternative 4 would result in a “minor long-term impact from increased vessel traffic (tug escorts).” Draft EA 2-9. The USCG also could not have concluded that Alternative 4 would result in a “minor long-term adverse impact through [an] increase in potential hazard of ship strikes with protected species from additional traffic (tug escorts),” Draft EA 2-10, because there would be no additional traffic—again, MOSPA already required escorts for both single and double hulled barges. This was certainly not the analysis the First Circuit envisioned when it issued its decision. *Buzzards Bay Coalition*, , 644 F.3d at 36 (“wisdom of displacing the Commonwealth’s regulatory regime and the environmental effects of the proposed federal action”); *see also United States v. Massachusetts*, 724 F. Supp. 2d 170, 196 (“comparison made by the Coast Guard . . . was one between its own rulemaking and no regulation (rather than a comparison between its own rulemaking and the MOSPA provisions its rulemaking purports to preempt”), 200 (holding

that the USCG's decision to "contrast[] the agency's intended action with a completely hypothetical Buzzards Bay, free of any [Massachusetts' regulation] at all" arbitrary and capricious") (D. Mass. 2010). Accordingly, the USCG must revise the no-action alternative to reflect the status quo and then re-analyze the potential consequences against the proper baseline.

3. Risk of an Oil Spill from Double Hull Barges: Throughout the Draft EA, the USCG seems to assume that the risk of a release of oil or hazardous material from a double-hulled tank barge is zero or close to zero. *E.g.*, Draft EA 1-2. The USCG, however, has not studied the risk of an oil spill from a double-hulled tank barge in Buzzards Bay. Instead, the agency relies solely in the Draft EA on its unsupported, conclusory "qualitative" assertions. Draft EA 4-20.<sup>4</sup> While double-hulled tank barges may provide some additional protection against releases of oil and other hazardous materials in some circumstances, that qualitative assertion does not allow for any *quantitative* comparison of the additional risk-reduction benefits of requiring tug escorts and/or pilots for all double-hulled tank barges transporting oil or hazardous materials through Buzzards Bay.<sup>5</sup> In other words, the USCG continues to ignore the relevant question: what does requiring an escort and a pilot for single-hulled vessels only versus requiring an escort and a pilot for both single- and double-hulled vessels mean in terms of preventing oil spills? Studies for other water bodies have concluded that requiring escorts for double-hull barges *does* in fact provide an additional, meaningful reduction in the likelihood of an oil spill. For example, the 1999 Puget Sound study predicted that escorting single-hull tankers will prevent the discharge of 243 barrels of oil, USCG, REGULATORY ASSESSMENT: USE OF TUGS TO PROTECT AGAINST OIL SPILLS IN THE PUGET SOUND AREA iv Fig. E2 & Tbl. E2 (Alt. 3) (1999), *available at* [http://www.ecy.wa.gov/programs/spills/response\\_tug/pscb.pdf](http://www.ecy.wa.gov/programs/spills/response_tug/pscb.pdf), while escorting *all* vessels will prevent the discharge of 3,856 barrels of oil. *Id.* (Alt. 5) (Attachment 2). Similarly, a 2004 study designed to assess whether Washington State should continue to require escorts for double hulled vessels concluded that Washington's "standard of safety" for preventing oil spills would not be met if the State "eliminate[d] escorts for redundant-system double-hull tankers." THE GOLSTEN ASSOCS., INC., STUDY OF TUG ESCORTS IN PUGET SOUND ix (2004), *available at* <http://www.ecy.wa.gov/programs/spills/hottopics/pipeline/pipelinephotos/tug/tugstudystuff/FinalReport.pdf> (Attachment 3). That qualitative study thus contradicts the Draft EA's analysis.

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<sup>4</sup> In contrast, the Draft EA provides a detailed discussion of the potentially impacted biological resources (Section 3.3) and socioeconomics (Section 3.4), along with supporting data and site-specific studies. In fact, of the 55 references cited in Section 8 of the Draft EA, it appears that only one of them even really touches on tank barges (the 2000 GAO Study). That study, however, does not address the probability of an oil spill from a single- versus a double-hulled tank barge transporting oil through Buzzards Bay.

<sup>5</sup> Notably, despite the fact that the 2007 Final Rule's purpose was to prevent the release of oil or *hazardous material*, the Draft EA contains no data or analysis regarding barges that transport hazardous material through Buzzards Bay and the Canal, including the number of annual trips, the type of cargo, the risks posed by that cargo, the type of vessels used to transport hazardous materials (single versus double), or whether vessels that transport hazardous material differ at all from barges that transport oil and how those differences may impact the likelihood of a release.

The First Circuit anticipated that the USCG would perform a detailed, site-specific study of the risk-reduction benefits of requiring escorts for double hulled tank barges transiting Buzzards Bay. *Buzzards Bay Coalition*, 644 F.3d at 38 (“site-specific appraisal”), 38 (“The administrative record . . . does not show that the Coast Guard ever analyzed, or *even adequately studied*, the environmental impact of its proposed action.”). While there are instances where qualitative analysis alone is acceptable, in those cases, the agency must explain “why objective data cannot be provided”—something the USCG has not done here. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, \_\_ F.3d \_\_, 2012 WL 3064872, at \*13 (9th Cir. 2012); *see also San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054 (10th Cir. 2011) (“quantitative assessments . . . are generally necessary”). Here, as the studies cited above indicate, a quantitative study is possible. And indeed, the Draft EA indicates that the USCG is planning to perform such a study jointly with the Massachusetts Department of Environmental Protection (MassDEP). Draft EA 5-1. It makes no sense, however, and is in fact contrary to NEPA’s purposes and mandate, to perform that study after the USCG finalizes the Draft EA—studies should precede and guide analysis, rather than follow it. In other words, to ensure that the USCG has in fact taken a “hard look” at the potential environmental consequences of not requiring escorts and pilots for double hulled barges, it must delay this Draft EA and await the completion of the joint-risk study.

As MassDEP’s comments indicate, escorts have in fact provided real-time risk reduction benefits to double hulled tank barges transporting oil through Buzzards Bay and thereby minimized the risk of an oil spill.<sup>6</sup> The noted November 23, 2010 incident involving a fire onboard a vessel towing a loaded tank barge through Buzzards Bay is particularly noteworthy, because a fire onboard another tug caused a major oil spill off the coast of Rhode Island in 1996. As the USCG is aware, “on January 19, 1996, the tank barge North Cape and the tug Scandia grounded on Moonstone Beach in southern Rhode Island after the tug caught fire, spilling an estimated 828,000 gallons of home heating oil.” NOAA: North Cape, RI, [http://www.darrp.noaa.gov/northeast/north\\_cape/index.html](http://www.darrp.noaa.gov/northeast/north_cape/index.html); *see also* NTSB MARINE ACCIDENT REPORT, FIRE ABOARD THE TUG SCANDIA AND THE SUBSEQUENT GROUNDING OF THE TUG AND THE TANK BARGE NORTH CAPE ON MOONSTONE BEACH, SOUTH KINGSTON, RI JANUARY 19, 1996 (1998), <http://www.nts.gov/doclib/reports/1998/MAR9803.pdf>. The North Cape and its tug were not accompanied by a tug escort, and a tugboat was not readily available to prevent the North Cape from being battered against the shore during the storm and breaching eleven of her oil cargo tanks. As far as this Office is aware, there is no evidence that this spill would have been prevented by a double-hulled tank barge, but the availability of a tug very likely would have prevented it. Similarly, the USCG has also never presented any analysis of whether a double hull would have prevented the Bouchard 120 spill in Buzzards Bay itself even though the Draft EA and the 2007 Final Rule proceed on that unstated assumption. The USCG should conduct this analysis for both of these spills.

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<sup>6</sup> In addition to these comments, Captain Gary Oliveira, General Manager of the Providence Steamboat Company, informed MassDEP that “he thinks that the presence of [a tug boat escort for double hulled tank barges] reduces the risk of a casualty,” and that “many of the industry Captains that he has spoken with . . . view the assistance that [a] tug escort can provide to them as a benefit.” Attachment 4 (Packard 2d Declaration ¶ 8).

4. Analysis of Potential Benefits from pre-OPA deadline phase-out of single hulled tank barges: The Draft EA indicates that the USCG's primary basis for selecting Alternative 3a over other Alternatives is that requiring shipping companies to hire a tug escort and a federally licensed pilot for single hulled barges but not for double hulled barges will create an incentive to phase-out the use of single hulled barges before the end of 2014 (OPA's mandatory single hull phase-out deadline). Draft EA 2-7. The Draft EA's analysis of the potential environmental benefits of reducing the use of the remaining single hulled barges is seriously flawed.

First, the Draft EA states that of the 495 tank barges that transported oil through Buzzards Bay in 2010, only 38 were single hulled tank barges. Draft EA 1-1. The Draft EA, however, does not set forth the number of single-hulled tank barges that transported oil through Buzzards Bay during 2011, so it is not possible to ascertain the number of single hulled tank barges that are still utilized in the Bay. Moreover, the Draft EA also fails to identify the total number of single hulled tank barges that remain in use and available on the East Coast to transport oil through Buzzards Bay and the Cape Cod Canal. Current data is necessary to ascertain any potential effect.

Second, the possibility that Alternative 3a will actually cause an expedited reduction in the use of single hulled barges in Buzzards Bay above and beyond what OPA's fast-approaching phase-out deadline itself will cause is entirely speculative, as the language of the Draft EA itself suggests. Draft EA 2-7 ("it is *anticipated* that Alternative 3a would provide a financial incentive" (emphasis added)). OPA's phase-out deadline itself, as the Coast Guard states, "continuously decreases the number of oil-carrying barges that must follow the [2007 Final Rule's] positive control mandates." Draft EA 4-22. This is particularly true when the deadline is now little more than two years away. In fact, the minor cost of hiring a federal pilot and a tug escort is unlikely to create an additional incentive when viewed in light of the major cost of shipping oil.<sup>7</sup> The Draft EA fails to acknowledge or even address this issue. The Draft EA also fails to acknowledge and consider the complex factors that underlie a company's decision to utilize a single versus a double-hulled tank barge. For example, if the cost of utilizing a double-hulled tank barge exceeds the cost of using a single hulled tank barge (even when including the cost of hiring a pilot and escort), then Alternative 3a does not create any incentive at all. Given the significant weight the USCG has placed on this issue, Draft EA ES-10, 2-7, 4-22, 4-28, 4-29, it is surprising how little attention it has given to these issues.

Third, and most problematic, the Draft EA fails to weigh accurately the claimed potential short term benefits of phasing out the use of single hulled barges in Buzzards Bay before the end

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<sup>7</sup> Based on the figures the USCG presented during the 2007 rulemaking and the ones that it is using in the Draft EA, Draft EA 4-28, the Commonwealth concluded that the combined annual cost of requiring an escort for all tank barges transiting Buzzards Bay and a federally licensed pilot on the towing vessel would be about \$00.0014 per gallon of oil. Joint Appendix 313 & n.9, *United States v. Massachusetts*, First Circuit Docket Nos. 10-1664 & 10-1668 (October 2010). And if that cost were passed on to consumers, the average Massachusetts homeowner would pay about \$1.022 more each year for oil. *Id.* at 313 n.9. Of course, if the shipping and oil companies simply pass this cost along to consumers, then the additional miniscule cost will not create any incentive at all.

of 2014 against the long term, recognized benefits of requiring pilots (who are not also members of the vessel's crew) and tug escorts for double hulled barges now and for many, many years after the end of 2014.<sup>8</sup> In fact, it is not at all clear whether those claimed short-term benefits will occur at all, an issue the Draft EA ignores. The period relevant to the USCG incentives-based theory is limited to, at most, two years. But, as noted above (pp.1-3), it is not at all clear that the agency would be able to implement its theory within that period. Currently, section 6 of MOSPA requires both single and double-hulled tank barges to hire an escort for their transit of Buzzards Bay and the Cape Cod Canal and there is no indication that these requirements will cease to exist or become ineffective before the end of 2014. Yet, for the USCG's incentives-based theory to have any effect, that is exactly what would need to occur. The Draft EA fails to recognize the impact of this reality in its analysis.

Fourth, in light of the weight the Draft EA places on creating an incentive for shipping companies to phase out the use of single hull barges before the end of 2014, it is surprising that it has not applied this theory to other water bodies, such as California's bays and harbors and Puget Sound, where State law has long required both single and double hulled tank barges transporting oil to hire a tug escort. The USCG should explain why it treats the East Coast and the West Coast so differently in this respect. The USCG's incentive argument is also inconsistent with 2010 Federal legislation that requires not one but two tug escorts for double-hulled oil tankers operating in Prince William Sound, Alaska. Pub. L. No. 111-281, sec. 711(b), 124 Stat. 2905, 2987 (2010).

#### 5. Other Issues:

A. *Navigational Risks:* The Draft EA fails to provide any discussion regarding the risks of navigation in Buzzards Bay and the Cape Cod Canal, despite the fact that the major underlying issue is the unique navigational risks that Buzzards Bay and the Canal present to mariners. To ensure that the Draft EA analysis is based on these unique risks, the USCG must include a complete discussion of them, including the narrow and rocky ledges that surround the entrance to Buzzards Bay and what dangers those pose to mariners. For example, what risk does the partially sunken cement barge "Angela" (*see* <http://www.wreckhunter.net/DataPages/angela-dat.htm>), with her exposed and sharp steel hull, present to a disabled single or double hulled tank barge transporting oil or other hazardous materials through Buzzards Bay? In our view, the remnants of the Angela's steel structure pose a risk that is very similar to the risks posed by the submerged pipeline service platform that caused the release of oil from the double hulled tank barge 152 in the Gulf of Mexico. The discussion must also include weather characteristics that may impede safe navigation and navigational maneuvers (e.g., tugs switching from towing to pushing mode at the entrance to Buzzards Bay), including fog, winter ice, and strong storms.

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<sup>8</sup> Inconsistently, however, the Draft EA minimizes the benefits of requiring a State pilot on single hulled barges, because it "does not apply to oil-carrying barges with a double hull, so its impact is limited and constantly declining as single hull vessels are phased out." Draft EA 4-21. While there is not in fact any current State law pilot requirement for either coastwise single or double hulled barges, apparently, the USCG believes potential benefits are also tied to whether the requirement is mandated by federal law.

B. *Alternative 2*: The Draft EA's description of Alternative 2 is inaccurate. Alternative 2 is, according to the Draft EA, intended to reflect "the baseline level of protection provided by USCG and Massachusetts laws and regulations in place before the USCG promulgated the 2007 Final Rule . . . and after the U.S. Court of Appeals for the First Circuit vacated the injunction that prevented" the enforcement of MOSPA (G.L. c. 21M, §§ 1, 4, 6). Draft EA 2-1. In various sections of the Draft EA, e.g., Draft EA 2-3, 3-2, 4-20 to 21, 4-28, the USCG states that MOSPA requires companies to utilize a State licensed pilot if they are unaccompanied by tug escort. MOSPA, however, does not require companies to utilize a State licensed pilot. It appears that the USCG is referring to MOSPA's separate voluntary program, which was enacted in 2008 and 2009, was not in effect prior to the 2007 Final Rule, and has been rendered largely moot by the U.S. Court of Appeals decision. See Fact Sheet: Massachusetts Oil Spill Act Requirements Reinstated for Buzzards Bay, available at <http://www.mass.gov/dep/cleanup/laws/osarein.htm>. Accordingly, the Draft EA should not include this as a requirement in Alternative 2.

On the other hand, MOSPA does require tank barges sailing under register (whether or not they are transporting oil) through Buzzards Bay and the Cape Cod Canal on their way to or from Canada or another foreign country to take on a Massachusetts commissioned State Pilot for District 3 during their transit of Buzzards Bay and the Canal. See *United States v. Massachusetts*, 440 F. Supp. 2d 24, 35 & n.98 (D. Mass. 2006); Mass. Gen. L. c. 103, §§ 21 & 28. This requirement was also in effect at the time the USCG promulgated the 2007 Final Rule and remains in effect to this date, yet none of the Alternatives include this requirement. In addition, the USCG has long required both single and double-hulled tank barges to have someone on board the towing or pushing vessel "acting as pilot" pursuant to the USCG's "recency" requirements. See generally Attachment 5 (Walker Declaration ¶¶ 5-6). These so-called recency requirements, however, have proven to be completely deficient as a risk reduction mechanism in Buzzards Bay. See *id.*

Alternative 2 also includes a "mandatory vessel route," but the version of MOSPA in effect prior to the 2007 Final Rule and after the U.S. Court of Appeals decision does not include such a provision. In 2006, the U.S. District Court for Massachusetts held that MOSPA's mandatory vessel route provision was invalid. *United States v. Massachusetts*, 440 F. Supp. 2d 24, 44 (D. Mass. 2006). It has not been in effect since that time. Accordingly, the Draft EA should not include this requirement in Alternative 2.

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Buzzards Bay, as the First Circuit noted, "is a brilliant jewel in the diadem of Massachusetts waters." *Buzzards Bay Coalition*, 644 F.3d at 28. It serves as the primary economic engine for Southeastern Massachusetts, includes critically important habitat for endangered and threatened species, and provides valuable recreational opportunities to both Massachusetts citizens and visiting tourists. Yet, as past incidents have taught, an oil spill in Buzzards Bay has terrible environmental and economic consequences. In fact, factors unique to Buzzards Bay make oil spills in the Bay particularly devastating and costly to clean up in comparison to other water bodies. Attachment 6 (Costa Declaration). Accordingly, employing proven risk reduction measures, including pilots (who are not also a member of the vessel's

crew) and tug escorts for both single *and* double-hulled barges, is necessary to prevent yet another oil spill in Buzzards Bay. For these reasons and the reasons set forth above, the Draft EA does not satisfy either NEPA, NEPA's regulations, or the U.S. Court of Appeals mandates and therefore cannot serve as the basis for a FONSI. On the other hand, the above analysis does indicate that when properly compared Alternative 4 is the environmentally preferable alternative and, to the extent the USCG moves forward with any new rulemaking, the one that it should propose and ultimately adopt.

Sincerely,

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Attachments:

(1) E-mail from Seth Schofield, Assistant Attorney General, Environmental Protection Division, Massachusetts Attorney General's Office, to Captain Christine Cutter, Staff Judge Advocate, USCG, re Draft Alternatives (Oct. 19, 2011) (w/ attachment);

(2) USCG, REGULATORY ASSESSMENT: USE OF TUGS TO PROTECT AGAINST OIL SPILLS IN THE PUGET SOUND AREA (1999);

(3) THE GOLSTEN ASSOCS., INC., STUDY OF TUG ESCORTS IN PUGET SOUND (2004);

(4) Second Declaration of Richard F. Packard (April 4, 2011), filed in *American Waterways Operators v. Patrick*, Civil Action No. 10-10584 (D. Mass.);

(5) Declaration of Captain Clinton L. Walker (March 14, 2011), filed in *American Waterways Operators v. Patrick*, Civil Action No. 10-10584 (D. Mass.); and

(6) Declaration of Dr. Joseph E. Costa (March 14, 2011), filed in *American Waterways Operators v. Patrick*, Civil Action No. 10-10584 (D. Mass.).