

BEFORE THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION UPON  
REQUEST FOR ADJUDICATORY HEARING

In the matter of:	)	
	)	
SOUTHEAST ALASKA	)	
CONSERVATION COUNCIL	)	
	)	
Requestor	)	
	)	
v.	)	
	)	
ALASKA DEPARTMENT OF	)	
ENVIRONMENTAL CONSERVATION,	)	
DIVISION OF WATER,	)	
	)	
Respondent.	)	DEC Authorization No. AK-G70-1063
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**ORDER DENYING REQUEST FOR ADJUDICATORY HEARING**

**I. INTRODUCTION**

This matter is before the Commissioner of Environmental Conservation on a Request for Adjudicatory Hearing from the Southeast Alaska Conservation Council (SEACC), appealing a decision of the Division of Water (Division) not to terminate an Authorization to Discharge (ATD) previously issued to the U.S. Forest Service (USFS) on May 23, 2012.<sup>1</sup> The ATD at issue in this termination request authorizes the discharge of bark and wood debris at a marine site in Alexander Bay on the southeast side of Woewodski Island, near the south end of the Wrangell Narrows in the Tongass National Forest. The location is also known locally as the “Pothole.”

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<sup>1</sup> The ATD was issued pursuant to a General Permit for Log Transfer Facilities in Alaska under the Department’s Alaska Pollutant Discharge Elimination System (APDES) program. General Permit No. AK-G70-000 (General Permit).

In this appeal, SEACC asserts that the Division erred by applying the wrong legal standard in making its April 9, 2013 decision not to terminate the ATD.<sup>2</sup> As its requested relief, under 18 AAC 15.220(b)(2), SEACC seeks a remand of the matter to the Division with instructions to terminate the ATD “for cause” pursuant to 18 AAC 83.140.<sup>3</sup>

This Order addresses the issues raised in SEACC’s Request for Adjudicatory Hearing in Section III, below.

## **II. FACTS**

This matter came before the Commissioner previously on SEACC’s appeal of the Division’s issuance of the ATD to the USFS in 2012. The ATD was necessary in order for the USFS to reestablish a log raft storage area (LSA) in Alexander Bay, which is to be used for the temporary storage of log rafts (for a few days each) transporting timber from logging operations on the Tongass National Forest. Due to navigation hazards, the log rafts have to be towed one at a time through the Wrangell Narrows and stored temporarily until they can be aggregated into larger log rafts of four to six individual rafts, which are then towed from Alexander Bay to processing facilities. The ATD expires on November 30, 2013.<sup>4</sup>

After considering the written submissions of both parties in the earlier appeal, the Commissioner issued a final written decision on August 29, 2012 (2012 Decision) denying

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<sup>2</sup> Letter to the Commissioner of Environmental Conservation from S. Eisele, Earthjustice (attorneys for SEACC) at 1 (May 9, 2013) (SEACC’s Request).

<sup>3</sup> SEACC did not request an adjudicatory hearing on disputed facts before the Commissioner or a hearing on the existing record and written briefs, as provided for in 18 AAC 15.220(b)(1) or (3). *Id.*, SEACC’s Request at 1.

<sup>4</sup> The General Permit for Log Transfer Facilities (Permit No. AK-G70-1000) also expires on November 30, 2013. *See* General Permit at 1, attached as Exh. B to SEACC’s Request for Adjudicatory Hearing on the ATD (June 22, 2012).

SEACC's request for adjudicatory hearing and stating the reasons for the decision.<sup>5</sup> SEACC did not appeal the Commissioner's 2012 Decision denying its request.

Instead, on October 5, 2012, SEACC, represented by Earthjustice, Inc., wrote to the Commissioner requesting termination of the ATD "for cause," pursuant to 18 AAC 83.130 and 18 AAC 83.140. In particular, SEACC contended that the applicant (the USFS) did not adequately disclose to the Division all of the relevant information in its application or during the earlier permit proceeding, and that the failures are significant and constitute "cause" for termination of the ATD under the Department's regulations.<sup>6</sup> The Commissioner referred the request to terminate the ATD to the Division for its consideration and response.<sup>7</sup>

The Division obtained additional information from both the USFS and SEACC in connection with the termination request. The USFS submitted a letter on December 12, 2012 explaining its position, and SEACC provided additional written information and documents on January 11, 2013. The Division issued a decision denying SEACC's request to terminate the ATD on April 9, 2013.<sup>8</sup>

Simultaneously with the denial, the Division also sent a separate letter to the USFS on April 9, 2013, requiring it to conduct a new analysis comparing the costs of log rafting and

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<sup>5</sup> Additional facts relating to the ATD proceeding are set forth in the Commissioner's 2012 Decision denying SEACC's Request for Adjudicatory Hearing and in the administrative record of that decision, which are incorporated by reference in this appeal and will not be repeated in their entirety here.

<sup>6</sup> See Letter to the Commissioner of Environmental Conservation from S. Eisele, Earthjustice, on behalf of SEACC (October 5, 2012).

<sup>7</sup> See Letter to S. Eisele, Earthjustice, from the Commissioner of Environmental Conservation (October 12, 2012).

<sup>8</sup> Letter to S. Eisele, Earthjustice, from M. Bonnet Hale, Director, DEC Division of Water (April 9, 2013).

storage to barging logs, taking into consideration the fact that an expanded upland log sort yard (the Tonka Marine Access Facility) is being built in connection with the Tonka Timber Sale north of the Wrangell Narrows in 2013. The Division's letter required that this comparison study "must be conducted using data collected during the 2013 operating season and must consider costs and overall project implementation and logistics." The letter also indicated that the timeframe for the analysis is intended to allow an evaluation of industry costs for both barging and towing alternatives as they relate to the newly constructed (in 2013) sort yard. The Division's letter required the USFS to submit the completed analysis to DEC by February 1, 2014 and stated that it is to be used in future Division permitting decisions to determine the feasibility of barging logs in lieu of log rafting and temporary storage in Alexander Bay.<sup>9</sup>

In accordance with 18 AAC 15.200, on May 9, 2013, SEACC made a timely request for adjudicatory hearing on the Division's decision declining to terminate the ATD. DEC issued a public notice on the adjudicatory hearing request on May 16, 2013, and several parties filed responses. The USFS filed its response on May 31, 2013, opposing SEACC's request for adjudicatory hearing. The Alaska Forest Association filed its response on June 4, 2013, in support of the USFS position. The Petersburg Vessel Owners Association filed a response on May 21, 2013, and Greater Southeast Alaska Conservation Community filed on June 4, 2013, both supporting SEACC's request for adjudicatory hearing. The Division filed its response in support of its decision not to terminate the ATD on June 5, 2013. SEACC filed a reply memorandum on June 14, 2013. The appeal is now before the Commissioner for a decision on SEACC's Request for Adjudicatory Hearing on the Division's decision not to terminate the ATD.

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<sup>9</sup> Letter to F. Cole, USFS Forest Supervisor, from W. Strickland, DEC Division of Water Program Manager (April 9, 2013).

### **III. DISCUSSION**

#### **A. Issues on Appeal**

In its Request for Adjudicatory Hearing, SEACC asserts that the Division applied the wrong legal standard in making its April 9, 2013 decision not to terminate the ATD. SEACC contends that termination of the ATD is required under 18 AAC 83.130 and 140 because the applicant (the USFS) did not adequately disclose to the Division all of the relevant information in its August 16, 2011 LSA application or during the permit proceeding, and also that the omissions constituted misrepresentations of facts that were significant and, thus, “cause” for termination of the ATD under the Department’s regulations.<sup>10</sup>

SEACC further argues that the withheld information renders the Department’s prior decision granting the ATD invalid under 18 AAC 70.015 (anti-degradation policy) and 18 AAC 70.210 (zone of deposit), and that for this reason also the ATD should be terminated.

#### **B. Standard of Review**

On appeal, issues of statutory or regulatory interpretation are determined “de novo” based on the independent judgment of the Commissioner, but decisions of the Division that are based on mixed questions of law and fact, or which involve the application of agency expertise and/or policy considerations are subject to the highly deferential “reasonable basis” standard of review. Under this standard, the Commissioner determines, based on the record as a whole, whether the decision was arbitrary, capricious or an abuse of discretion. *See, e.g., Cook Inlet Keeper v. State, Office of Management & Budget*, 46 P.3d 957, 961 (Alaska 2002); *Bering Straits Coastal Management Program v. Noah*, 952 P.2d 737, 741 (Alaska 1998).

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<sup>10</sup> Letter to the Commissioner of Environmental Conservation from S. Eisele, Earthjustice (attorneys for SEACC) at 1 (May 9, 2013).

### C. Applicable Regulations

The Department's regulations, in 18 AAC 83.130, provide that "the Department may modify, revoke and reissue, or terminate an APDES permit, either at the request of an interested person, including the permittee, or on the department's own initiative, for any reason specified in 18 AAC 83.135 and 18 AAC 83.140."

18 AAC 83.140 provides four grounds for terminating a permit "for cause." They are:

- (1) the permittee's non-compliance with any condition of the permit;
- (2) the permittee's failure to fully disclose all relevant facts in the application or during the permit issuance process, or the permittee's misrepresentation of any relevant fact at any time;
- (3) the department's determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination;
- (4) a change in any condition, such as closure of a plant or termination of a discharge by connection to a POTW, if the change requires either a temporary or permanent reduction or elimination of any discharge.

Only the second ground for "cause" has been argued to apply in this case.

Additionally, 18 AAC 83.135(c) provides that the same grounds listed in 18 AAC 83.140, which may be cause to terminate a permit, also may be relied upon as cause to modify or, alternatively, to revoke and reissue, a permit, in the Department's discretion.<sup>11</sup>

The applicable regulations are straightforward, and I apply my independent judgment in interpreting the meaning of 18 AAC 83.135 and 18 AAC 83.140(2). Importantly, the use of the word "may" in 18 AAC 83.130, describing the possible actions the Department "may" take if grounds for termination exist, as well the language in 18 AAC 83.135, which states that the

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<sup>11</sup> 18 AAC 83.135(c)(1) states: "[c]ause to modify or, alternatively, revoke and reissue a permit includes the following: (1) circumstances identified as cause for termination under 18 AAC 83.140 exist, and the department determines that it is appropriate to modify or revoke and reissue a permit . . . ."

Department may decide to modify or revoke and reissue a permit instead of terminating it when “cause” is found “and the department determines that it is appropriate,” endows the Department with broad discretion to act or not to act on a request to terminate a permit “for cause.” The decision in any given case requires a consideration and balancing of various factors, such as the nature and significance of the information which was not provided, the reasonableness of the explanation provided by the applicant, whether the omission of the information constitutes intentional misrepresentation of facts, whether the permit as issued without the information still includes adequate protective conditions to protect water quality and designated uses, and other factors such as the duration of the permit and other actions that might be taken to address the omission of information in the particular circumstances, all of which require the application of the Department’s expertise and judgments an environmental regulatory agency, as well as considerations of Departmental policy. Therefore, the decision not to terminate the ATD is subject to the deferential “reasonable basis” standard of review, and review is generally limited to whether the decision complied with the law and was not arbitrary, capricious or an abuse of discretion.

**D. The Division’s decision not to terminate the ATD based on the EIS’s cost comparison information regarding the costs of towing versus barging logs was not arbitrary and capricious**

In the Notice of Intent (NOI) that the USFS submitted to the Division on August 16, 2011 in support of its ATD application, it stated: “[b]arging would nearly double the cost of transporting logs,” quoting from an April 24, 2007 Memorandum from the Alaska Department of Natural Resources (DNR) Regional Resource Forester, Greg Staunton, to the DNR Project

Coordinator, Joe Donohue, as its source for this information.<sup>12</sup> The 2007 memorandum addressed the need for the same Alexander Bay LSA site for temporary log raft storage (which had also been authorized previously for many years). In describing the 2007 memorandum, the USFS's NOI stated: "[t]he following analysis of log transport by barge was used in previous permit applications and is still valid for this permit."<sup>13</sup>

The USFS correctly quoted and cited to the 2007 DNR memorandum but, in its present appeal, SEACC argues that there was more recent, relevant, and contrary information on the costs of barging versus towing contained in an environmental impact statement (EIS) prepared by the USFS for the Tonka Timber Sale in 2011 and 2012. SEACC asserts that the omission of this EIS-related information from the USFS's 2011 application for an ATD was a "for cause" violation of 18 AAC 83.140(2) and requires termination of the ATD.<sup>14</sup>

The Tonka Timber Sale EIS used a model called "FASTR" to complete calculations of the relative costs and the economic value of each alternative in the EIS. As one set of inputs, the model estimated relative costs of towing versus barging logs for each alternative considered in the EIS. In the FASTR cost comparison generated for the draft Tonka Timber Sale EIS, issued on September 16, 2011, there was a conclusion that for this single timber sale, transportation by barging would be an average (across all alternatives) of approximately 34% more expensive than

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<sup>12</sup> See USFS Notice of Intent for Authorization to Discharge application at p. 10 (August 16, 2011), attached as SEACC's Exh. E to its 2012 Request for Adjudicatory Hearing on the ATD (June 22, 2012).

<sup>13</sup> *Id.*, NOI at p. 10.

<sup>14</sup> See SEACC Request to Terminate USFS ATD at pp. 1-5 (October 5, 2012). The Draft EIS was released on September 16, 2011, a month after the USFS's submission of the NOI to DEC.

log raft towing.<sup>15</sup> In the final Tonka Timber Sale EIS (FEIS), released on March 28, 2012, the USFS acknowledged some errors in the earlier FASTR calculations and concluded that barging for the Tonka Timber Sale would be approximately 5% more expensive than log raft towing.<sup>16</sup> SEACC alleges that the information about the 5% difference in relative costs, in particular, should have been specifically disclosed to DEC by the USFS, and that the omission invalidates the entire basis for the Division's decision to approve the Alexander Bay LSA.<sup>17</sup>

SEACC also argues that the USFS failed to disclose that the development of an expanded upland log storage area was included as part of each alternative in the Tonka Timber Sale EIS project, and that the building of this upland log sorting facility (now underway, according to the parties' submissions) would further improve the economics of barging logs as opposed to towing them in rafts.

The USFS responded by arguing that the information related to the Tonka Timber Sale was not intended to be an accurate depiction of actual transportation costs,<sup>18</sup> and it also

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<sup>15</sup> See Exh. B to SEACC Request to Terminate USFS ATD (October 5, 2012).

<sup>16</sup> See Exh. D to SEACC Request to Terminate USFS ATD (October 5, 2012); *see also* Tonka Timber Sale FEIS, App. B, p. 74.

<sup>17</sup> *Id.*, SEACC Request to Terminate USFS ATD at pp. 1-5 (October 5, 2012); *see also* Letter to M. Bonnet Hale, Director, DEC Division of Water from S. Eisele, Earthjustice (January 11, 2013).

<sup>18</sup> In its submission, the USFS explained that the FASTR model spreadsheet provides a reasonable financial comparison, based on average costs collected from Tongass sales, but it does not accurately predict the actual costs an operator will incur. *See* Letter to M. Bonnet Hale, Director, DEC Division of Water, from F. Cole, USFS Forest Supervisor (December 12, 2012). In the Final Tonka Timber Sale EIS (FEIS) at p. 3-8, for instance, the FEIS stated that while the FASTR calculations "do not provide a complete picture of actual cost and values at the time of offering, they do provide the planner with an economical range of project components and a relative comparison of alternatives." And again, at p. 3-15, the FEIS concludes: "These FASTR outputs are useful to gauge current economic conditions for a timber sale and provide a relative comparison between alternatives. They are not meant to serve as an actual appraisal of the project area or provide actual costs and values at the time of offering . . . ." *See* Exh. D to

maintained that the estimates only related to a single timber sale, whereas the USFS's request to DEC for an ATD was intended to include all Tongass National Forest timber that might be towed in log rafts through Wrangell Narrows from various sales. In this regard, the NOI submitted with the USFS's application for the ATD explicitly stated that purpose of the Alexander Bay LSA was "to facilitate the storage of log rafts of timber coming off of National Forest Lands."<sup>19</sup>

The USFS also maintains that the Tonka Timber Sale EIS was a publicly available document, which was provided to DEC, and that the Division was familiar with it, even having cited to the Draft EIS in the Draft Authorization to Discharge (dated January 20, 2012), which was made available along with DEC's public notice issued on the USFS's requested ATD on February 2, 2012. Therefore, the information in the EIS, which the USFS asserts was not a depiction of true costs or directly applicable to the ATD request in any event, was nevertheless available to DEC if it wanted to make use of it.

With respect to the upland storage facility, the USFS explained that the Tonka EIS imposed no requirement that it be built; rather, it was an option that would be available in the future at the sole discretion of the operator. Also, according to the USFS, the facility as proposed would only partially address the lack of upland storage in the Wrangell Narrows area, and was not expected to be large enough to make barging feasible for larger timber sales. In

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SEACC Request to Terminate USFS ATD (October 5, 2012), and Tonka Timber Sale FEIS, App. B, at p. 74.

<sup>19</sup> See USFS NOI at p. 4 (August 16, 2011), attached as Exh. E to SEACC Request for Adjudicatory Hearing on the ATD (June 22, 2012). The NOI further explained that the USFS estimated that sale operators would be moving a total of approximately 30-50 mmbf of timber through the Wrangell Narrows, and that "[t]he exact amount will depend on the amounts eventually approved in the NEPA process, put up for sale and sold. Market conditions for sale of timber will also have a bearing on quantities of timber harvested. Improving markets may make existing timber previously NEPA cleared available for harvest." *Id.*

addition, the USFS points out, the information that a log yard is being constructed is new, as the facility only began construction in 2013, so it was not error to exclude it from the FASTR model and the ATD application in estimating transportation costs back in 2011 and 2012. For all of these reasons, the USFS asserts it was not an error for it not to submit the Tonka Timber Sale FASTR model or the possible upland sort yard in its application for the ATD.<sup>20</sup>

In its response, the Division emphasizes that it did not base its original finding of the “economic necessity” for the Alexander Bay LSA solely on the costs of towing versus barging logs. The Division cites 18 AAC 70.015(a)(2)(A), which provides that permits resulting in the degradation of water quality may be authorized whenever they are “necessary to accommodate important economic or social development in the area where the water is located.”<sup>21</sup> In other words, while cost comparison information is considered in the “economic necessity” analysis, the Division found that it is not solely determinative of the outcome. The Division also points out that the costs of barging are still higher (5%), even if the Tonka Timber Sale data is assumed to be accurate across all timber sales.

Furthermore, other information was submitted in the course of this termination proceeding, which estimates a much larger differential in costs as between barging and towing than 5%.<sup>22</sup> The only certain conclusion that may be drawn from the conflicting estimates is that

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<sup>20</sup> See Letter to M. Bonnet Hale, Director, DEC Division of Water, from F. Cole, USFS Forest Supervisor at pp. 1-3 (December 12, 2012).

<sup>21</sup> See Letter to Commissioner of Environmental Conservation from M. Bonnet Hale, Director, DEC Division of Water (June 5, 2013).

<sup>22</sup> The Alaska Forest Association’s June 4, 2013 submittal in this appeal provides estimates obtained from the Boyer Towing Company (which also provides barging services) alleging costs of barging at \$80 per thousand board feet as compared to \$45 per thousand board feet for towing. While SEACC discounts this information as biased because it comes from industry, in fact, it is not obvious why a company that offers both towing and barging services as its business would

estimating log transportation costs is a complicated analysis, involving an assessment of numerous site-specific factors, including the size of barge resources available, the amount of timber to be transported at any given time, the distances and time required to tow or barge, and a close consideration of the tides and currents in the Wrangell Narrows in relation to the location of the felled timber and the target processing facility. Consequently, all the estimates that have been presented to date are likely somewhat uncertain.

Finally, under the Department's regulations, the Division maintains that it has discretion to determine what information it "deems necessary" for an applicant to provide in order for the Department to adequately discharge its responsibilities under 18 AAC 70.015 and 18 AAC 70.210. The Division maintains that it found that the information provided by the USFS, along with other information in the record of the ATD permit proceeding, was adequate to inform its decision to issue the ATD.<sup>23</sup>

While the difference between "nearly double" the cost and a 5% increase is relevant (if the numbers are valid), the Division did not approve the ATD based on a finding that log rafting was the only feasible option that would enable the economic development to proceed.<sup>24</sup> It was

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necessarily have any reason to skew the costs one way or the other. *See* Letter to DEC Hearing Liaison from O. Graham, Alaska Forest Association (June 4, 2013).

<sup>23</sup> *See* Letter to Commissioner of Environmental Conservation from M. Bonnet Hale, Director, DEC Division of Water (June 5, 2013); *see also* DEC Division of Water's Decision denying SEACC's request for termination of the ATD (April 9, 2013).

<sup>24</sup> This issue was previously addressed in the Commissioner's 2012 Decision on SEACC's appeal of the ATD, which explained that the "necessity" finding required by DEC's regulations includes an evaluation of the overall economic importance to the region and rejected SEACC's position that the Department could not make a finding of economic necessity unless it first determined that a particular development project was not viable and would not proceed at all "but for" the issuance of the ATD. *See* Commissioner's 2012 Decision at 13. This conclusion was not appealed by SEACC.

understood by the Division that barging was more expensive, but the decision approving the ATD was based on the totality of information in the record that demonstrated all the Department's regulatory requirements would be met.<sup>25</sup>

The USFS also supplied a reasonable response as to why it did not submit the cost information from the FASTR model in connection with its ATD application. In addition, the information was publicly available in the timber sale EIS documents, so it was not "withheld" from DEC, as SEACC argues. On this record, I find that there was no false statement or misrepresentation by the USFS in its ATD application or the permit proceeding which might justify termination of the ATD for "cause."

The remaining question is whether the omitted information was so central to the Division's decision on the ATD, and the failure to submit it so egregious or harmful, that termination of the ATD is warranted at this juncture. This was a judgment call involving the facts, various policy considerations and the exercise of the Department's discretion. On this issue, I concur with the Division's determination. After evaluating all the information presented in this appeal, I have concluded that the omission of the information in the FASTR model and the potential upland facility does not negate the conclusions previously made with regard to the ATD or mandate "for cause" termination of the ATD.

Multiple considerations have informed my decision; among them are the limited applicability of the Tonka Timber Sale FASTR model's cost information as described in the EIS, the existence of other contrary cost comparison estimates in the record, the reasoned explanation provided by the USFS for not including the FASTR results as part of its ATD application, the lack of any evidence of bad faith or intentional misrepresentation on the part of the USFS and the

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<sup>25</sup> See, generally, the discussion in the Commissioner's 2012 Decision.

fact that the General Permit and ATD contained sufficient requirements designed to protect Alexander Bay's aquatic resources.<sup>26</sup> In making my decision, I am also cognizant of the fact that the ATD in question expires in only a few months on November 30, 2013, and that while the Division ultimately decided not to terminate the ATD, it recognized the uncertainty (and disagreement) over the information relating to costs for the two transportation options and took action to acquire an updated analysis of the costs of towing log rafts compared to barging logs from the USFS. This new study is to be based on the most current information, including the log storage area being constructed for the Tonka Timber Sale in 2013. It is required to be submitted to the Division by February 1, 2014, and will be available to be utilized in future permitting decisions.

On the totality of this record, I find that the Division's considered resolution of this issue without terminating the ATD was well within its discretion under 18 AAC 83.130 and 18 AAC 83.140. The request for adjudicatory hearing on this issue is therefore denied.

**E. The omission from the ATD application of an internal USFS memorandum concerning levels of historical use of Alexander Bay for temporary log raft storage also does not compel termination of the ATD for "cause"**

SEACC's second argument regarding information omitted from the USFS's ATD application relates to the history of prior use of Alexander Bay for temporary log raft storage. SEACC asserts that the USFS failed to disclose a draft internal memorandum written by the USFS Sale Administration Program Manager, T. Sandhofer, on August 8, 2011, in which Mr. Sandhofer evaluated the extent of historical use of Alexander Bay for temporary log storage at a much lower volume (150 mmbf to 250 mmbf) than other estimates that DEC relied on in the

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<sup>26</sup> See, generally, ATD and General Permit for Log Transfer Facilities in Alaska (Exhibits A and B to SEACC's Request for Adjudicatory Hearing on the ATD (June 22, 2012)). See also the discussion of permit conditions in the Commissioner's prior 2012 Decision at p. 17.

permit proceeding.<sup>27</sup> The draft memorandum, which apparently was never finalized, acknowledged that historical “records no longer exist,” and stated that the author had estimated the levels of use as well as he could based on informal interviews with some of the tow operators and by making some local inquiries.<sup>28</sup> SEACC contends that the failure to include this internal draft memorandum in the USFS’s application for the ATD was a failure to provide all relevant information, which constitutes “cause” to terminate the ATD under 18 AAC 83.140.

The USFS counters that it never supplied DEC with any figures related to historic use of the Alexander Bay site, because it considered the amount of prior use to be highly uncertain due to the lack of historical records, and that the internal Forest Service memorandum cited by SEACC acknowledged as much.<sup>29</sup> The USFS also stated in its response that it could not confirm or deny the larger estimates of timber volumes precisely because the historical data is unavailable and also due the fact that there may have been log rafts from State and private sales stored in Alexander Bay historically, which were not included in the prior estimates.<sup>30</sup> In short, there was never any misrepresentation or false information submitted by the USFS, as it considered all the information on historical uses to be highly unreliable and did not submit any of it to DEC.

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<sup>27</sup> See Exh. H to SEACC’s Request to Terminate the ATD (October 5, 2012).

<sup>28</sup> *Id.* at 1. The USFS internal draft memorandum went on to state that “[s]ome of the individuals I talked to believe that more volume was moved through the Pothole but I cannot find the evidence to support a higher number.”

<sup>29</sup> See Letter to M. Bonnet Hale, Director, DEC Division of Water from F. Cole, USFS Forest Supervisor at p. 4-5 (December 12, 2012).

<sup>30</sup> *Id.*

In this appeal, the Alaska Forest Association also submitted a response dated June 4, 2013, in which the author, a former employee of Ketchikan Pulp Company, asserted based on personal knowledge and conversations with towing companies and Alaska Pulp Company former employees, that the total volume of timber that passed through Alexander Bay historically exceeded one billion board feet. This author also acknowledged the lack of historical records, however.<sup>31</sup>

The information on historical levels of use is somewhat relevant to the ATD because prior dive surveys conducted in Alexander Bay between 1998 and 2011 confirmed only trace impacts from bark deposition due to the Bay's prior use for log raft storage. So, knowing the amount of prior use of the LSA for log raft storage, and when it occurred, could be helpful in making predictions about the possible future impacts from the ATD. However, given the complete lack of historical records, the anecdotal information which is available is of limited use, at best.

Furthermore, the historical information was not the main basis on which the Division approved the ATD. The General Permit and the ATD issued by the Division included numerous conditions which address the bark deposition issue, including limitations on the size of the permitted area, depths, and wastes that may be discharged, a requirement for completion of a pre-discharge underwater survey, and requirements for annual monitoring and reporting during the period of the ATD, which will provide substantial additional information regarding any future bark or debris accumulation.<sup>32</sup> If the monitoring discloses impacts above approved levels,

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<sup>31</sup> See Letter to DEC Hearing Liaison from O. Graham, Alaska Forest Association (June 4, 2013).

<sup>32</sup> Some specific examples of conditions in the ATD and General Permit, which are designed to protect water quality, include: requirements for adherence to best management

the ATD also provides that a remedial action plan must be implemented. In addition, the ATD limited the maximum annual volume of timber that may be stored at the LSA in log rafts to the volume specified in the USFS's NOI, which is 30-50 mmbf.<sup>33</sup> This volume, over the life of the ATD, is well within even the lower estimates of historical use of Alexander Bay that were suggested in the internal draft USFS memorandum.<sup>34</sup>

In my August 29, 2012 Decision, I referenced the Division's conclusions as to prior use levels, which relied on testimony from a member of the public at a hearing held in Ketchikan estimating that the historical total was approximately one to one and a half billion board feet over 40 years.<sup>35</sup> However, my 2012 Decision also relied on the "annual bark monitoring and reporting [requirements included in the ATD to] provide information to the Department to evaluate any bark accumulation' that is unacceptable, so that future management decisions can address it."<sup>36</sup>

In summary, due to the acknowledged lack of a detailed and complete historical record and the wide range of volume estimates that have been submitted, I find that the USFS's

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practices, development of a Pollution Prevention Plan by the operator to control discharges, daily visual monitoring during log transfer operations, underwater bark monitoring on an annual basis, other annual reporting requirements and the requirement to complete a remediation plan in the event bark and debris coverage exceed prescribed maximums. *See* the ATD and General Permit, Exhibits A and B to SEACC's Request for Adjudicatory Hearing on the ATD (June 22, 2012), also cited in the Commissioner's 2012 Decision, at p. 17.

<sup>33</sup> *See* ATD Limitations at p. 2 (May 23, 2012), attached as Exh. A to SEACC's Request for Adjudicatory Hearing on the ATD (June 22, 2012).

<sup>34</sup> As noted, the ATD is only in effect between May 23, 2012 and November 30, 2013, at which time it terminates, which is less than two full logging seasons. *Id.* at p. 1. So, the maximum volume of timber that might be temporarily stored at the site under the ATD would likely be less than 100 mmbf.

<sup>35</sup> *See* Commissioner's 2012 Decision at p, 16.

<sup>36</sup> *Id.*

explanation for why it did not submit the draft internal memorandum to the Division as part of its ATD application is entirely reasonable. At best, the memorandum can be characterized as an uncertain estimate, based on limited anecdotal conversations long after the fact, and which almost certainly did not consider all the possible sources of log rafts that transited Wrangell Narrows over a period of many years. The draft memorandum is no more or less persuasive than other anecdotal information in the record that estimated the historical use at much higher levels. In the end, it was not necessary for the Department to have precise volumes from historical times to address potential impacts from the permitted activity. The Department included numerous conditions in the ATD that were designed to closely control and monitor any impacts from current and future use, and to provide clear avenues for remedial actions to be implemented in the event that bark deposition exceeds acceptable maximums.<sup>37</sup>

Therefore, I find that it was well within the Division's discretion to decline to initiate termination proceedings on the ATD based on the USFS's omission of the internal draft memorandum from its application. I further find that the memorandum does not constitute "cause" for terminating the ATD under 18 AAC 83.140. Consequently, the request for adjudicatory hearing on this issue is denied.

**F. The omission of the information described in Sections III.D and III.E from the USFS's application does not render the Department's prior decision granting the ATD invalid under 18 AAC 70.015(b) (anti-degradation policy) or 18 AAC 70.210 (zones of deposit)**

SEACC's final argument in this Request for Adjudicatory Hearing is that the information described in Sections III.D and III.E above, which was not included in the USFS's ATD application, effectively nullifies the Department's most important findings made previously on

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<sup>37</sup> See generally ATD and General Permit, Exhibits A and B to SEACC's Request for Adjudicatory Hearing on the ATD (June 22, 2012).

the ATD, including economic necessity, environmental impact, and maintenance of existing uses.<sup>38</sup> With respect to the barging versus towing cost information, in particular, SEACC asserts that the much smaller (5%) cost differential estimated in the Tonka Timber Sale EIS is critical to DEC's findings under 18 AAC 70.015(a)(2)(A) on the ATD because, SEACC argues, before the ATD could be issued, DEC was required to find that there is no feasible alternative to utilizing Alexander Bay as a LSA. Thus, according to SEACC, the Department applied the wrong legal standard in its previous decision approving the ATD.

However, as noted above, I rejected this same argument previously in the 2012 Decision at p. 10, finding that there is no requirement under the Department's regulations that all other alternatives must be found to be totally infeasible before the ATD may be issued. SEACC did not appeal my interpretation of the relevant regulation at the time, and I decline to revisit it here.<sup>39</sup>

In similar vein, SEACC asserts that the lack of historically accurate data on the prior levels of use of Alexander Bay for log raft storage nullifies the Department's previous findings that bark deposition will be minimal under the ATD, which supported its decision to approve a zone of deposit under 18 AAC 70.210. However, as explained above and in the earlier decisions of the Division and the Commissioner, the ATD was issued because it met all of the protective

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<sup>38</sup> See Letter to M. Bonnet Hale, Director, DEC Division of Water from S. Eisele, Earthjustice at p. 1 (January 11, 2013).

<sup>39</sup> In addition, all the information SEACC now cites in support of its request to terminate the ATD was public and available to it at the time the ATD was approved by DEC. Thus, it could have been brought to the Department's attention earlier by SEACC, in which case the Commissioner would have had an opportunity to evaluate it when making his 2012 Decision. Absent compelling circumstances, which are not present here, the ATD will not be reopened at this late juncture to consider information that could have been presented to the Division and the Commissioner in the original ATD proceeding.

standards required for its approval in accordance with the Department's water quality laws and regulations, and the historical data concerning the Bay simply was not the decisive factor in this analysis.<sup>40</sup>

SEACC's argument here, in essence, is that DEC should terminate the ATD because it should not have granted the ATD in the first place under the applicable regulations. However, the legal standard applicable to a decision to terminate a permit is different than the standard for granting the ATD. To grant the relief requested in the current appeal, the Commissioner must find, in his discretion, that there is "cause" for termination under 18 AAC 83.140. The Commissioner has broad discretion to make that "for cause" finding or not, based on the particular circumstances of the case and general policy considerations. This is not the same decision as when the Department granted the ATD originally.<sup>41</sup>

Applying the correct legal standards to the request to terminate the ATD, I find that termination is not warranted for the reasons stated above, and I decline to do so.

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<sup>40</sup> See the ATD and Responses To Comments issued by the Division on May 23, 2012; Commissioner's 2012 Decision (August 29, 2012), and the full record of the prior proceeding.

<sup>41</sup> The Alaska Supreme Court has previously addressed how the legal standard in a permit termination proceeding differs from the original decision to grant or deny the permit. In *Kjarstad v. State of Alaska*, 703 P.2d 1167 (Alaska 1985), the Court reversed the Commercial Fisheries Entry Commission's decision to revoke a limited entry permit under a provision of the statute which allowed revocation if an applicant submitted false information on the application. The Court found that, although the fisherman had made claims in his application for points for which he was not entitled, he did not actually submit false information regarding his domicile. Instead, he left the application incomplete. The Court ruled that while the residency information the fisherman submitted was not complete, "neither was it false." *Id.*, 703 P.2d at 1173. So, the omission of domicile information on the form, which rendered it obviously inadequate, even coupled with the inaccurate claim for points, was not a sufficient basis for revocation of the applicant's fishing permit under the statute. The Court concluded: "While the CFEC has the inherent authority to revoke a license it has granted because of fraud in the application, it does not have the authority to revoke licenses merely because it granted them improvidently." *Id.*, 703 P. at 1174.

#### IV. CONCLUSION

For all the reasons stated above, I find that the Division's decision not to terminate the ATD for "cause" under 18 AAC 83.130 and 18 AAC 83.140 was fully in compliance with applicable statutes and regulations, and that it was well within the Division's discretion to decline to terminate the ATD in light of all the facts and circumstances applicable to this case, (which are discussed in detail above). Therefore, SEACC's Request for Adjudicatory Hearing is denied in its entirety pursuant to 18 AAC 15.220(b)(4).<sup>42</sup>

This Order is the final administrative decision of the Alaska Department of Environmental Conservation in this matter. Judicial review of this final administrative decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska Rule of Appellate Procedure 602(a)(2) within thirty (30) days after the date of this Order.

DATED this 15<sup>th</sup> day of July, 2013.

By:   
(Signature)

Larry Hartig  
Commissioner  
Department of Environmental Conservation

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<sup>42</sup> In this appeal, SEACC did not raise any genuine issues of disputed fact, and it also did not request an adjudicatory hearing on disputed facts or the opportunity for a hearing on the existing agency record and written briefs under 18 AAC 15.220(b)(1) and (b)(3). There being no request made or basis for ordering either of these remedies, an adjudicatory hearing is denied in accordance with 18 AAC 15.220(b)(4)(A) and (C) also.