



Southeast Alaska Conservation Council

SEACC 419 6th Street, Suite 200, Juneau, AK 99801
(907) 586-6942 phone • (907) 463-3312 fax
www.seacc.org • info@seacc.org

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Sent via email: DEC.Commissioner@alaska.gov

Commissioner Larry Hartig
Alaska Department of Environmental Conservation
410 Willoughby Ave. Suite 303
Juneau, AK 99811-1800

RE: Formal Adjudicatory Request, DEC Permit AKG701063

Dear Commissioner,

Pursuant to 18 AAC 15.200, this request seeks the Commissioner's review of Alaska Department of Environmental Conservation (DEC or the Department) final permit authorization number AKG701063, issued on May 23, 2012. *See* Ex. A, Permit A. The permit was issued by the Division of Water (the Division) and authorizes the United States Forest Service (Forest Service or applicant) to use Alexander Bay, also known as Pothole, as a Log Storage Area for 30 million board feet each year, for five years.

The permit in question was issued under Alaska General Permit AKG701000, authorizing log transfer facilities post-1985. *See* Ex. B, General Permit. Several of the conditions in the general permit were subsequently certified to the federal government under a Clean Water Act Section 401 certification, and are therefore independently enforceable pursuant to Alaska Statute 46.03.100(h). *See* Ex. C, 401 Certification. In addition to these requirements of the general permit, the permit in question also contains analysis asserting compliance with Alaska's antidegradation regulations, 18 AAC 70.015 (prohibiting degradation of clean waters), compliance with Alaska's zone of deposit regulations, 18 AAC 70.210(b) (requiring findings before pollution may be deposited into water), and waivers from Alaska Timber Task Force guidelines, *see* Ex. B, General Permit at 3-4 (prohibiting log storage facilities in shallow or sensitive waters).

I. AFFECTED INTERESTS

This request for a hearing is filed on behalf of the Southeast Alaska Conservation Council (SEACC). SEACC is dedicated to the conservation of natural resources, including the marine environment, in Southeast Alaska and elsewhere while providing for balanced, sustainable use of our region's resources. SEACC's purpose is to ensure that a substantial portion of this region is retained and protected in a minimally changed condition, while encouraging sustainable communities, human enjoyment, and use of these remarkable resources.

SEACC is a member-based organization with nearly 1,900 members, including Alaskans who participate in the commercial, recreational, and customary and traditional use of fish and wildlife, own tourism and recreation businesses; and run small sawmills. Members of SEACC regularly use the public waters of Alaska, including Alexander Bay, to satisfy a variety of interests, such as the harvest of marine resources for customary and traditional (subsistence), recreational, and commercial purposes, as well as the aesthetic enjoyment of this area and our coastal resources in general.

SEACC frequently participates on behalf of its members in DEC's public decision-making processes concerning clean water. SEACC regularly evaluates and comments on proposed actions of the Department regarding water quality standards and their implementation permit certifications, and pollutant discharge authorizations. SEACC submitted timely comments and supporting documents on the Notice of Intent submitted by the Forest Service for the Pothole Log Storage Facility and DEC's proposed decision. *See* Ex. D, SEACC Comments.

Promoting clean water and strong water quality standards are essential components of SEACC's goal to protect our region's natural resources, including public waters and our members' use and enjoyment of those waters. Since the mid-1990's SEACC has actively participated in the regulatory process related to the discharge of bark and woody debris from log dumping and storage activities in Alaskan coastal waters pursuant to the Clean Water Act, Alaska's water quality standards and antidegradation policy. Alaska's water quality standards and antidegradation policy are intended to protect the high quality of Alaska's coastal waters and their value for various uses over the long-term.

This request is made to ensure that SEACC and its members continue to benefit from the use and enjoyment of Alaska's tremendous coastal resources. The request also seeks to hold DEC accountable for its implementation of General Permit AKG701000 under the Alaska Pollutant Discharge Elimination System (APDES) program and its responsibility to maintain and protect the finite resource of Alaska's high quality waters.

DEC's permit allowing log storage in Pothole will degrade waters that are important in their own right and support marine species relied on for commercial, recreational, and subsistence fishing, such as Dungeness crab, halibut, and Coho, pink, and king salmon. Individuals and their communities derive significant aesthetic, economic, and cultural benefits from the waterbody and the harvest of seafood from it. The disruption, displacement, and degradation of Pothole harm the interests of SEACC and its members. Those interests not only encompass protecting ecologically productive waters like Alexander Bay, but the economic benefits to fishermen and local communities from the sustainable use of this valuable public asset.

II. ACTION REQUESTED

SEACC requests that the Commissioner remand the permit to the Division to consider the issues raised in this request for a hearing and to comply with statutory and regulatory requirements. *See* 18 AAC 15.220(b)(2). In the alternative, SEACC requests that the Commissioner hold a hearing on the administrative record. *Id.* at 15.220(b)(3).

This request does not require a factual hearing under 18 AAC 15.220(b)(1) because this request points out that the Division's decision did not comply with agency regulations and that the Division failed to provide a rational explanation or consider the relevant factors. SEACC does not seek to introduce additional factual information, and the issues can instead be decided as a legal matter and based on the information already before DEC.

It would be particularly wrong to hold a factual hearing in this case because the burden is on the permit applicant, not the Division or SEACC, to provide sufficient evidence supporting the permit. 18 AAC 70.210(c) (“[T]he burden of proof for providing the required information is on the person seeking to establish a zone of deposit.”), 70.015(b) (burden of providing information is on applicant); Ex. C, 401 Certification at 6¹ (“In all cases, the burden of proof for providing the required information is the responsibility of the applicant.”). Accordingly, if additional factual development is required to ensure compliance with the relevant legal standard, the Commissioner should instead remand the permit and direct staff to request additional information from the applicant.

III. ISSUES PRESENTED

A. The Forest Service Notice of Intent Is Inadequate.

The permit application, called a Notice of Intent (NOI), submitted by the Forest Service for coverage under General APDES Permit AKG701000 did not contain the information it was required to contain. The Forest Service did not provide sufficient information to the Division for it to make a reasonable assessment as to whether authorization of a log storage area at this specific location under the General Permit is appropriate.

The Forest Service, as the applicant for a permit to degrade water, must provide “all information reasonably necessary for a decision on the application.” 18 AAC 70.015(b); *see also* 18 AAC 70.210(c) (allowing department to require information from applicant). DEC has further stipulated that

[t]he NOI must provide the following additional information:

- (i) A map clearly delineating the project area, and a statement of the project acreage;
- (ii) A demonstration that operation of the [facility] constitutes important social or economic development in the area, and that a [zone of deposit] is necessary to accommodate operation of the [facility];
- (iii) A description of known existing uses of the marine water where the [facility] is located, and a demonstration that those uses will be fully protected by the proposed operation of the [facility.]

¹ Due to inconsistent pagination within exhibits, page numbers cited in this request consistently refer to pdf page numbers.

See Ex. C, 401 Certification at 6; *see also* Ex. B, General Permit at 10 (requiring same). The Forest Service, as the applicant, also bears the ultimate burden of proving compliance with the relevant authority. 18 AAC 70.210(c), 70.015(b); *see also* Exhibit C, 401 Certification at 6 (“In all cases, the burden of proof for providing the required information is the responsibility of the applicant.”).

The above standard is explicit in requiring information regarding economic necessity and existing uses, yet the NOI fails to provide that information. The Forest Service offers no data or analysis to demonstrate that this proposed activity “constitutes important social or economic development.” No financial or job growth numbers are provided, or even estimated. The NOI fails to demonstrate the degradation of water quality in the requested zone of deposit for the Pothole is necessary to accommodate important social or economic development—particularly in Petersburg, the community closest to “the area where the waters are located,” *See* 18 AAC 70.015(a)(2)A). The NOI does not indicate the relative economic consequences from various alternative approaches to using the Pothole for log storage, let alone provide a “demonstration” that such use is necessary to accommodate important social or economic development in Petersburg as required. *See generally* Ex. E, NOI.

Nor does the NOI show that using Pothole is necessary for the proposed timber project. When considering alternatives, the NOI notes that barging logs is more expensive, but does not suggest it is prohibitively expensive. *See id.* at 10-11. Instead it cites a five year old memo regarding barging for an unidentified project, which concludes that whether barging is a feasible cost “is not readily answered without looking at the particular economics of the timber sale.” *Id.* at 10. The text quoted from that memo and included in the NOI does not state that barging is infeasible for the Tonka project, let alone the project it was authored for; rather it indicates the importance of considering up-to-date economic and logistical data related to barging timber for any particular project. The NOI provides no analysis discussing the specific numbers of board feet or financial costs involved in barging logs in this project, and the NOI does not compare that to the numbers and costs associated with the proposed use of Pothole, or potential costs to participants in the Pothole’s Dungeness crab fishery.²

Regarding existing uses, the NOI is devoid of any discussion. In fact, despite the fact that Alexander Bay is so heavily used for placing crab pots that it is referred to as “Pothole,” the NOI mentions the word “crab” only once. *See* Ex. E, NOI at 11. That mention describes alternate locations and notes that those locations also have commercial crab pot activity. *Id.* This clearly fails to “describe” existing uses as DEC requires, or demonstrate that the existing uses will be fully protected. In addition to crabbing, other information in the record suggests that the Pothole area contains an important salmon habitat, including a salmon stream, *see* Ex. F, Beebe Comments at 5, and that the bay has historically been used as an anchorage for boats. *See id.* at 8, 11, 14. These existing uses are not even mentioned in the NOI.

² The only numbers provided in the NOI are tug estimates for two alternatives that were rejected. Ex. E, NOI at 11, Those numbers are not compared to other alternatives, to the chosen location, or to the discussion of barging on the prior page of the NOI.

Not only is this information absent from the NOI, the Forest Service did not provide the information to DEC in any other format either. An information request submitted by SEACC revealed that the Forest Service submitted no additional information other than what was provided in the NOI. Ex. D, SEACC Comments at 28. This is a clear violation of DEC's requirements that the applicant provide "all information reasonably necessary for a decision on the application, including the information and demonstrations required [regarding economic necessity and fully protecting existing uses]." 18 AAC 70.015(b); *see also id.* at 70.210(c) ("[T]he burden of proof for providing required information is on the [applicant]."); Exhibit C, 401 Certification at 6 ("In all cases, the burden of proof for providing the required information is the responsibility of the applicant.").

The above-noted missing information is crucial to the Division's decision to issue a permit, and to provide adequate notice for the public to give informed commentary. Because the required information was wholly lacking, the Commissioner should remand the permit to the Division, with instructions for the applicant to submit an appropriate NOI including information necessary for the Division to make the determinations required by law.

B. The Division's Economic Necessity Finding Is Unsupported.

There is not sufficient information to support the Division's conclusion of economic necessity under 18 AAC 70.015(a)(2)(A) or under the General Permit and associated Section 401 Certification. Those requirements allow DEC to authorize reduced water quality only if doing so "is necessary to accommodate important economic or social development in the area where the water is located." *Id.*; Ex. B, General Permit at 10 (incorporating same requirement into zone of deposit analysis); Ex. C, 401 Certification at 6 (same). In essence, this requires the Division to find that the action is 1) "necessary" for social or economic benefits that are 2) "important." The party applying to degrade water must provide "all information reasonably necessary for a decision." 18 AAC 70.015(b); Ex. C, 401 Certification at 6. The Division's findings were inadequate at both steps of this analysis.

The Division did not have a sufficient basis for finding the action to be "necessary." The permit finds economic necessity because "[t]he NOI states that the Pothole LSA will play an integral role in the success of USFS's timber harvesting program." Ex. A, Permit at 6. It is doubtful whether that bare assertion, even if it had actually been made in the NOI, could support the Division's finding. But, in fact, the NOI never even made the above assertion. *See generally* Ex. E, NOI. The strongest claim of necessity in the NOI merely states that Pothole is necessary for log transportation in the Narrows. *Id.* at 4. No economic or social benefit from that transportation is suggested, there is no suggestion that the entire Forest Service timber program relies on it, and there is certainly no analysis or demonstration of benefits associated with that transportation. Simply put, the decision document is premised on assertions in the NOI, but the NOI does not supply the evidence to back those assertions. *See State v. Kenaitze Indian Tribe*, 83 P.3d 1060, 1067 (Alaska 2004) (requiring agency to take "hard look," and be "genuinely engaged" in the process); *Bering Straits Coastal Mgmt. Program v. Noah*, 952 P.2d 737, 741 (Alaska 1998) (noting same and need for rational basis in record).

The Division similarly states that “a major portion of the employment will depend on use of the LSA.” Ex. A, Permit at 6. The Division provides no support for that conclusion and none is found in the NOI. No evidence submitted by the Forest Service states that any employment numbers depend on using Pothole as a log storage facility, i.e., that using Pothole is “necessary” for the benefit. For example, even if employees would benefit from this timber harvest, no information suggests that a different timber harvest would not be able to similarly benefit those employees. *See* Ex. F, Beebe Comments at 12 (noting that other timber sales are planned and could provide the timber supply necessary for jobs).

The Division also did not have a basis for finding the social or economic benefit to be “important,” because neither the applicant nor the Division ever quantifies what the benefits would be. Nothing in the NOI from the Forest Service identifies or quantifies benefits. When the Division states that “employment will depend on use of the LSA,” Ex. A, Permit at 6, the Division fails to state what “employment” it references, and no employment numbers were provided in the NOI. The Division notes that unattributed public comments “suggest” that jobs would benefit, but makes no suggestion of how. This limited information does not meet the Forest Service’s “burden of proof for providing required information.”

More fundamentally, it is unacceptable that the employment numbers on which the Division relies for its importance finding boil down to a “suggestion” in public comments. *Id.* That support certainly does not meet the applicant’s burden. *See* 18 AAC 70.210(c), 70.015(b); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6. Further, where a regulation requires the Division to make a finding of economic necessity, the Division must do more than reference supposition offered at a public hearing. *Cf.* 18 AAC 83.125(b) (requiring DEC to “independently evaluate” submitted information when applicant submits a draft permit). While uncertainty is acceptable, the Division must at least quantify and provide support for the benefits it expects. *See Kenaitze Indian Tribe*, 83 P.3d at 1067; *Bering Straits Coastal Mgmt. Program*, 952 P.2d at 741 (both requiring “hard look” and genuine engagement in process)).

Because there was insufficient information for the Division to take a hard look at the issue, the decision is poorly reasoned and circular. For instance, instead of finding that Pothole is necessary for important development, the decision document states that Pothole itself “constitutes important economic development.” Ex. A, Permit at 6. That is clearly wrong, as no information in the record suggests that a log storage facility itself can be considered economic or social development.

Finally, the Division used the wrong legal standard to assess economic necessity. The Division must find that the authorized water degradation is necessary for important economic activity. 18 AAC 70.015(a)(2)(A); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6. That is, important economic activity couldn’t happen without the log storage area authorization. Instead, the Division states that it “evaluates the proposed activity to ensure the promotion of important social or economic development.” *See* Ex. G, Response to Comments at 9. The relevant regulations, however, do not impose any such obligation on DEC to “ensure” or “promote” economic development. Consequently, the Division failed to make the appropriate inquires as required by its regulations.

In sum, the applicant has not submitted, and the record does not contain, information sufficient to support the Division's conclusion that using Pothole as a log storage area is necessary for important development.

C. The Division Has Not Adequately Considered Alternatives.

When authorizing a zone of deposit, the Division must consider "alternatives that would eliminate, or reduce, any adverse effects of the deposit." 18 AAC 70.210(b)(1); *see also* 18 AAC 70.015(a)(2)(A) (DEC must show water degradation to be necessary); Ex. B, General Permit at 10 (same); Ex. C, 401 Certification at 6 (same). Further, the general permit under which this permit was issued requires the applicant to describe any practical alternatives and "demonstrate that none of [the] alternatives are less environmentally damaging than the proposed discharge." Ex. B, General Permit at 4. In each of the above provisions, the burden is on the Forest Service, as the applicant seeking permission to degrade water quality, to provide the information necessary to make such a determination. *Id.*; 18 AAC 70.015(b), 70.210(c); Ex. C, 401 Certification at 6.

The Division's alternatives analysis disregarded, without reason, a viable alternative that had been discussed in comments. A location east of Deception Point was identified by the National Marine Fisheries Service (NMFS) in a 1985 study assessing log transfer and storage facilities in the area.³ This study, submitted with SEACC's comments, found Deception Point suitable and, based on the "lack of commercially valuable marine organisms" found the site "preferable to the originally proposed site in Alexander Bay," aka Pothole. Ex. D, SEACC Comments at 23. The study noted that such log facilities contribute to "mortality of commercially valuable bivalves and Dungeness crab as well as to detrimentally effect [sic] feeding rates and fecundity of crabs." *Id.* at 20, 23. In recommending Deception Point, NMFS noted that the site "may resolve the issue of past conflicts with the crab fishery in Alexander Bay." *Id.*

The Division's permit does not mention the Deception Point alternative. Instead, the Division's response to comments dismissed Deception Point by stating: "The Department has found the information provided in the NOI sufficient for this general permit authorization for a LSA." Ex. G, Response to Comments at 11. However, the NOI did not mention or discuss Deception Point. Accordingly, it does not appear that the Division has met its duty to meaningfully consider alternatives, nor does information in the record support the Division's conclusion that no alternative is viable. *See Kenaitze Indian Tribe*, 83 P.3d at 1067 (agency cannot fail to consider important factor); *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 548-49 (Alaska 1983) (authorizing court to exercise "particular vigilance" when a factor is overlooked).

Even had the Division evaluated Deception Point, the Division's alternatives analysis would be inadequate because it simply adopted the applicant's bare assertion that alternatives were not feasible, but did not actually do any analysis of the alternatives. *See Bering Straits Coastal Mgmt. Program*, 952 P.2d 741 (requiring "hard look" and genuine engagement in process); 18 AAC

³ While the study's title mentions only a Log Transfer Facility, Deception Point was being evaluated for both "LTF operation and log storage." Ex. D, SEACC Comments at 23.

83.125(b) (requiring DEC to “independently evaluate” submitted information when applicant submits a draft permit). For example, the NOI dismissed alternatives at December Point and Point Alexander for “operational and safety concerns” without ever disclosing or analyzing the concerns. Ex. E, NOI at 11. The Division’s permit accepted those assertions *carte blanche* and refused to consider reasonable alternatives without even investigating issues such as what safety or operational concerns exist. Ex. A, Permit at 6. While it is certainly feasible that safety concerns exist at the identified sites, it is also feasible that technological advances have mitigated issues that previously would have posed safety concerns. The Division should at least have some understanding of the cited safety concerns before dismissing otherwise relevant alternatives. Further, it appears the applicant and Division use “operational concerns” as shorthand for not economically viable. *See* Ex. E, NOI at 11; Ex. A, Permit at 6. Applicable regulatory and permit requirements, however, oblige the Division to assess the economic necessity of the proposed project and reasonable alternatives to it. 18 AAC 70.015(a)(2)(A); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6. If the Division believes alternatives are not economically feasible, the record should include an analysis, using transparent calculations, that can be reviewed by the public and any entity reviewing the decision. The Division does not meet its duty to provide a hard look if it merely repeats, without critical analysis, assertions of the applicant.

D. The Record Does Not Support the Division’s Conclusion that Existing Uses will be Fully Protected.

The Division must consider the impacts its permit will have on other uses of the waterbody, 18 AAC 70.210(b)(4), and the agency may not issue a permit to degrade the water unless “the resulting water quality will be adequate to fully protect existing uses of the water.” 18 AAC 70.015(a)(2)(C); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6. The Forest Service, as the applicant, must provide enough information for DEC to make the determination. 18 AAC 70.015(b), 70.210(c); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6. One such existing use is crabbing, hence its nickname—Pothole.

The Division does not have sufficient information to conclude that the existing use of crabbing would be fully protected by the Division’s permit. Although the record contained information attesting to conflicts with the crab fishery and adverse effects of log storage on crabs, the Division’s decision simply relied on the fact that the area had been used in the past for log storage, yet crabbing was still viable. Ex. A, Permit at 7; *see also* Ex. G, Response to Comments at 5. That reasoning is flawed because the record does not contain information sufficient to support that conclusion. Nothing in the record establishes that prior uses were of the scale contemplated now, nor that past crabbing was at the current level, nor that the two activities were compatible such that crabbing was or will be “fully” protected.

The permit authorizes a very large rafting area, comprising 9.2 acres, to be used multiple times each month. Ex. E, NOI at 4. Thirty million board feet could be moved through the area each year. *Id.* at 6. The permit allows up to 10 centimeters of bark deposition on the ocean floor. Ex. A, Permit at 10. It was inappropriate for the Division to authorize this large project area based on scarce data from dissimilar projects.

One problem with the Division's analysis is that it fails to account for the exclusion of crabbers when a large raft of logs is present in the bay. Although the Division notes that the area of the log raft is three percent of the size of the bay, comments point out that the raft would cover the most productive and useful crabbing area in the bay. Ex. F, Beebe Comments at 14. Indeed, viewing the hand-drawn log storage area on the marine chart provided in the NOI, Ex. E at 9, it is clear that at low tide the depth of the surrounding area is zero fathoms—above water or at wading depth. The log storage area would occupy the crucial area of the bay that remains well submerged at low tide. Information in the record notes that there have been past conflicts due to excluding crabbers from the area, Ex. D, SEACC Comments at 23, and suggest that the same would happen from the proposed use. Ex. F, Beebe Comments at 2-3. The Division does not address the conflict.

A more fundamental problem is that when addressing impacts to water quality and crabbing activities, the Division relies on past uses without any information that past uses actually support the current proposal. The basis for the Division's decision, the NOI, states that the area was used for log storage from 1957 to 1997, and again from mid-2007 to the end of 2008. Ex. E, NOI at 4. The NOI does not state the extent of that use. It is not clear whether the storage was every year, and whether it was intermittent during active years. Further, the NOI does not address the volume of logs stored during any of those years, or the acreage occupied by the use. The NOI does not discuss the amount of bark deposition during the 40 years of use. And the NOI does not discuss the extent of crabbing during that time, nor the extent of crabbing currently. In fact, the NOI only mentions the word "crab" once, and that is to point out that two other alternatives also have high crab pot activity. *Id.* at 11. Nothing in the NOI states that crabbing was fully protected during the prior use, nor that it would be by the proposed use.

This information submitted by the applicant, and relied on by the agency, does not adequately address the conflict with crabbing. For example, the Division notes a 2007 study that purportedly shows minimal impact on marine life from log storage in Pothole. Ex. A, Permit at 7. But, that study came in early 2007 (April), while log storage was not occurring in Pothole, and apparently had not occurred in Pothole since 1997. *See* Ex. H, 2007 Dive Survey at 5 (April), 8 (no log storage occurring); Ex. E, NOI at 4 (log storage until 1997, and starting again in summer 2007). And, according to a comment in the record, only eight million board feet were stored in Pothole from 2007 to 2008. Ex. F, Beebe Comments at 13. Thus the 2007 study, highlighting remaining trace impacts from log storage of an unknown quantity twenty years prior, does not suggest that the proposed storage of 30 million board feet per year five years in the same small bay would leave crabbing there fully protected. This was raised in comments, *see id.*, and went unaddressed by the Division. Further, it appears that the cited dive surveys did not meaningfully evaluate the health of crab populations, as the primary commercial species, Dungeness, was not on the dive survey checklist. *See id.* at 14; Ex. H, 2007 Dive Survey at 23.

Similarly, the Division's reliance on a 2011 study, *see* Ex. A, Permit at 11, showing a healthy ecosystem three years after a small, short term log storage operation ceased, does not suggest that crabbing would be fully protected during the five years the bay is used as a major log storage area.⁴ In theory, currents flush bark debris out of bays and coves over time. The fact that some

⁴ Like the 2007 study, the 2011 study does not list Dungeness crabs. *See* Ex. I, 2011 Dive Survey at 27.

bark generated by a small log storage was flushed out after three years simply does not suggest that bark from ten times more log volume would be flushed out of the same bay, let alone quickly and consistently enough to allow crabbing to continue while the log storage is ongoing. The Division seems to assume that if a location is viable for crabs years after log storage, it indicates log storage has no impact on crabs. *See, e.g.*, Ex. A, Permit at 11-12 (dismissing scientific literature showing decade-long bark residue from log storage). The potential for future absence of bark does not suggest that accumulation of up to ten centimeters of bark over the five years of log storage would leave crabbing fully protected during that time.

It is also noteworthy that the Division finds the existence of trace amounts of bark years after log storage use as indicative of no impact, *see* Ex. A, Permit at 6, 10, while the shellfish biologist for the region cites the same information as showing an impact. Ex. F, Beebe Comments at 3. Absent any information whether trace bark amounts—let alone the ten centimeters of bark coverage authorized in the permit—actually affect Dungeness crabs, nothing in the record supports the conclusion that dive surveys showing trace bark coverage indicate no impact.

Similar problems arise from the Division's mention of the 1957-1997 use of Pothole. The NOI does not discuss the details of that prior use, suggest that crabbing was unaffected during that time, or suggest that prior crabbing activity was consistent with current crabbing activity. *See generally* Ex. E, NOI. The Division cites a 1998 dive study showing healthy marine life in Pothole. Ex. A, Permit at 6, 7, 9, 10. Again, this study came a full year after the use ended, and does not show that use of the log storage area allowed crabbing to take place at the same time as the storage occurred. To the contrary, while it dismisses the result, it nonetheless notes that bark coverage at that time was of "measurable depth and coverage." Ex. L, 1998 Dive Study at 4. Further, the study notes that only one Dungeness crab was observed throughout the entire survey. *Id.* One crab is likely insufficient to support the crabbery currently operating in the area. *See* Ex. F, Beebe Comments at 6 (reporting 30,675 pounds of Dungeness taken from Wrangell Narrows in 2010).

Also, the record does not show that the prior use of the water for log storage was commensurate in size to the proposed one. One public hearing comment stated that one to one and a half billion board feet were stored in Pothole over 40 years—about 25 million board feet a year. Ex. G, Response to Comments at 5. That is still less than the present proposed use. More fundamentally, a comment from an unidentified individual at a public hearing, giving a range so broad as to vary by half a billion board feet, is not sufficient information upon which the agency can conclude that the proposed activity will fully protect existing uses, such as the Dungeness commercial fishery. *See* 18 AAC 70.210(c), 70.015(b); Ex. B, General Permit at 10; Ex. C, 401 Certification at 6 (placing responsibility on applicant to present information); *See Bering Straits Coastal Mgmt. Program*, 952 P.2d 741 (requiring "hard look" and genuine engagement in process). Moreover, even if that number was reliable, it does not speak to where or how the logs were stored, or the distribution over years. For example, it is easily foreseeable that logging in the area peaked earlier in the 40 year period of use, and slowed steadily until ending in 1997. Accordingly, use in the late 1990s could have been quite low, and a 1998 dive study a year after any log storage at all would have little bearing on the deposition from the much larger facility now permitted.

Further, record evidence shows that Pothole has become more important for crabbing in recent years. Letters from Fish and Game state that Pothole has become “increasingly important” to the commercial crabbing fleet, and that, in part because locations used for log storage areas no longer support fishable populations of crabs, other crabbing locations have been restricted such that Pothole is now more important than it has been in the past. *See* Ex. F, Beebe Comments at 3, 6. Accordingly, if log storage was historically compatible with crabbing, the Forest Service presented no evidence in the NOI that shows the proposed storage activities are compatible with the current, increased crabbing demand at the Pothole. Neither the NOI nor the Division’s permit discuss the amount of crabbing historically, the amount of current use, or the consequences of prior log storage on the crabbing activities occurring while log storage was active. Without any comparison as to size or terms of log storage use or crabbing use, and without any information discussing the impact of log storage on contemporaneous crabbing, the Division’s conclusion is untenable. Indeed, even if log storage and crabbing did coexist to some degree in the past, that does not fulfill the agency’s duty to “fully” protect the existing use, today.

Lastly, the studies the Division bases its decision on discuss trace amounts of bark on the ocean floor. Ex. A, Permit at 6, 7, 10. But the permit authorizes up to ten centimeters of coverage at a given point. *Id.* at 10. Thus even if it were true that the historic use of Pothole, resulting in trace bark coverage, did not impact crabs, it does not follow that the Division may conclude that continuous bark coverage up to ten centimeters will not have an impact on the crabs living on the ocean floor.

The Division’s regulations clearly require the applicant, the Forest Service, to provide the information necessary to evaluate other uses of the waterbody. The NOI provides no discussion of the extent of historic use, the extent of contemporary crabbing, nor the impact of bark deposition on crabs and crabbing. While the Division may request additional information from the applicant, it does not appear that any additional information was requested or received. *See* Ex. D, SEACC Comments at 28.

While this absence of relevant information is sufficient to justify a remand, it is worth noting that, in contrast, evidence in the record suggests that water degradation due to log storage sites is significant enough to affect crab populations. A study from NMFS noted that bark deposition has “been observed to contribute to mortality of commercially valuable bivalves and Dungeness crab as well as to detrimentally effect [sic] feeding rates and fecundity of crabs.” Ex. D, SEACC Comments at 20, 23. That study found the Pothole inappropriate for a log transfer and storage facility, and noted that there were “past conflicts with the crab fishery” in the Pothole. *Id.* at 23.

Another letter in the record, from the Alaska Department of Fish and Game’s Shellfish Section, evaluates Pothole for the specific log storage facility at issue and concludes that Pothole is inappropriate based on the impact to crabbing. Ex. F, Beebe Comments at 2-4. The letter notes that deposition from log storage results in acidification of the water as well as deformities, lesions, and reduced fecundity in crabs. *Id.* at 2. The letter cites several scientific studies demonstrating harm to crabs from log storage areas. *See Id.* (citing Ex. J, O’Clair and Freese 1988; *and* Ex. K, Kirkpatrick et al. 1998). The letter also notes that, in part because locations used for log storage areas no longer support fishable populations of crabs, crabbing locations have been restricted such that Pothole is now more important than it has been in the past. *Id.* at

3. Concerns of crabbers were highlighted in the letter. It stated that some crabbers would be forced to relocate, and reiterated concerns commercial crabbers raised at a public hearing in 2011. *Id.* The crabbers felt that past log storage “functionally excluded” crabbing the Pothole, and expressed concern over the habitat degradation in Pothole due to log storage. *Id.* The letter noted that 2007 dive studies showed trace bark cover in the majority of locations surveyed in Pothole, and that aerial surveys show consistent use of Pothole by commercial crabbers. *Id.* at 3-4.

E. The Record Does Not Show That the Division Considered Impacts on Aquatic Life.

The Division must consider the potential impacts of a zone of deposit on aquatic life and other wildlife, including the potential for bioaccumulation and persistence. 18 AAC 70.210(b)(3). As noted above, several comments raised concerns about the impact a log storage facility would have on crabs. *See* Ex. D, SEACC Comments at 2, 21, 23; Ex. F, Beebe Comments at 2-4. The Division dismissed these concerns based on the fact that at least some log storage had occurred in the location before, and dive studies noticed only trace amounts of bark, albeit once log storage was no longer occurring. Ex. A, Permit at 11-12.

As detailed earlier in this request, while evidence in the record supports the conclusion that bark is only lightly observed by divers well after log storage has occurred, it does not support the conclusion that bark discharged from up to 30 million board feet of logs per year for up to 5 years, and resulting in up to ten centimeters of bark deposition, will not adversely impact crabs or the crab fishery, in Pothole Bay. Nor, in fact, does it support a conclusion that crabs are unharmed even by trace amounts of bark.

To the contrary, evidence cited and discussed by commenters in the record demonstrates that bark associated with log storage can have dramatic impacts on shellfish. Research by experts at NMFS’s Auke Bay Lab in Juneau indicates that Dungeness crabs exposed to bark from LTFs suffer reduced fecundity (reproduction), increased disease, reduced survival, inhibited feeding, and produced smaller egg clutches. *See* Ex. J, O’Clair and Freese 1988 at 17-20. Crabs in a former log storage area were found to have lesions in “virtually all organs and tissues.” *Id.* at 19. It is hypothesized that the chemical environment of bark deposition damages the crabs’ ovaries and leads to less egg production. *Id.* at 20. The associated toxins include sulfide and ammonia, as well as “phenols, catechols, and lignins that leach from bark and woody debris [and] may also have toxic effects on crab reproduction.” *Id.* Besides chemicals, bark as a substrate is harmful to crab egg deposits because the crab can lose eggs into the interstices of bark piles, and because the chemistry of the bark prevents the egg deposits from becoming a solid, more durable mass. *Id.* at 20-12. One less visible impact is that crabs simply go elsewhere, to brood in more natural deposits. *Id.* at 18. Another study discussed in the record found significantly reduced species richness in all bark-dominated habitats compared with bark-free habitats. *See* Ex. K, Kirkpatrick, et al. 1998.

The Division’s primary response to scientific literature was to dismiss it. The Division notes that while literature suggests decadal-long presence of bark, the Division didn’t even notice bark at a few log storage sites in Alaska. This flatly contradicts the cited 2007 study, showing trace

amounts of bark in Pothole twenty years after the last reported use ended in 1997. *See* Ex. H, 2007 Dive Survey. Further, it has no bearing on whether bark will disperse in the specific location at issue here, Pothole. The decision ignores evidence in the record stating that Pothole has “feeble” circulation and is “inadequate” for log storage due to water depth, circulation, and “the existence of a partial sill at the entrance to the bay.” *See* Ex. D, SEACC Comments at 6.

The Division’s decision also does not discuss the chemical composition of the water. This is in sharp contrast to literature suggesting that a primary way crabs are harmed from log storage is through elevated toxins in the water due to the bark. Ex. J, O’Claire and Freese 1988 at 20-21. Thus even if divers notice only a trace amount of bark, or if extant bark has been covered by other substrates, *see* Ex. A, Permit at 11-12, it does not suggest crabs are unharmed, nor that significantly higher concentrations of bark would not harm crabs.

The Division’s rationale to show that log storage would not harm to marine life was inadequate and ignored important evidence in the record. The finding should be remanded to the Division.

F. The Record Does Not Support the Division’s Waiver for Sensitive Habitats.

The Division’s permit waives Alaska Timber Task Force guidelines that preclude siting a log storage facility in a shellfish concentration area. The Division does so based on the historic use of the area as a log storage facility, and the absence of impacts on crabs. For the reasons discussed above in sections III.D-E, the Division’s ATTF waiver is similarly flawed.

IV. CONCLUSION

For the reasons discussed above, the permit should be remanded to the Division of Water for renewed consideration of the issues raised in this request, and for compliance with statutory and regulatory requirements.

Best Regards,



Buck Lindekugel
Grassroots Attorney