OFFICE OF THE COMMISSIONER OF THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Southern Southeast Regional Aquaculture Association, Inc.; Northern Southeast Regional Aquaculture Association, Inc.; Kodiak Regional Aquaculture Association, Inc.; Cook Inlet Aquaculture Association, Inc.; Prince William Sound Aquaculture Corp.	)
Requestors,	)
v.	)
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF WATER,	)
Respondent.	)

COMMISSIONER DECISION

Pending before the Commissioner's Office is a Request for Partial Stay ("Request") filed by the Southern Southeast Regional Aquaculture Association, Inc.; Northern Southeast Regional Aquaculture Association, Inc.; Kodiak Regional Aquaculture Association, Inc.; Cook Inlet Aquaculture Association, Inc.; and the Prince William Sound Aquaculture Corporation (collectively, "Requestors"). (Aug. 21, 2023 Req. for Adj. Hr. ("Req.") at 6–7.) For the following reasons, the Request is **GRANTED**.

I. Background

A. Factual Background

On May 31, 2023, the Division of Water ("Division") issued APDES General Permit for Aquaculture Facilities, AKG130000 ("2023 Permit"), which permits discharges from concentrated aquatic animal production ("CAAP") facilities.[1] The 2023 Permit's effective date is October 1, 2023. Two provisions of the 2023 Permit are relevant here. The first is Part 3.2.1, which provides:

[1] CAAPs "discharge aquatic animal rearing waste and wastewater to fresh or marine surface water . . . or to a system that discharges to a surface water at least 30 days per year." ADEC 000028.

> Permittees must monitor effluent discharges as specified in Table 2. The permittee shall develop and implement a QAPP to ensure that effluent samples collected meet permit requirements.

For pH, Table 2 imposes a minimum daily effluent limit of 6.5 S.U. and a maximum daily effluent limit of 8.5. S.U. (hereafter "pH limits"). The second relevant provisions are contained in Part 3.3.2, which provides:

> Within 60 days after the last release of aquatic animals each season, permittees must visually assess the benthos for the following [subparts] and include in the Annual Report (Part 7.1.1.10.2) [the information required by the subparts]

Subparts to Part 3.3.2 elaborate that detectable residues on the seafloor trigger the requirement for a noncompliance report[2] and that "detectable" means "any amount of observable residues deposits"[3] (collectively, "monitoring requirements").

The permit that presently covers the types of facilities operated by Requestors became effective on March 1, 2018 and was administratively extended on March 1, 2023 ("2018 Permit"). The 2018 Permit does not include the above provisions.

B. Procedural Background

On August 21, 2023, Requestors filed a request for adjudicatory hearing pursuant to 18 AAC 15.200 and their Request for a stay of the above provisions of the 2023 Permit. On August 31, 2023, the Commissioner's Officer referred the request for adjudicatory hearing to the Office of Administrative Hearings ("OAH").

On September 25, 2023, the Commissioner's Office issued a Notice of Amended Stay Briefing Schedule requesting responses to the Request. On September 27, 2023, the Commissioner's Office received responses from the Division; Matt Alward and Tracy Welch, on behalf of the United Fishermen of Alaska; Jeremy Bynum, on behalf of Ketchikan Public Utilities; Hugh Mitchell, on behalf of Aquatic NW Veterinary Services; John Clifton, Ketchikan resident; Ronn Schuttie, Ketchikan resident; Karl Hagerman, Petersburg Borough Utility Director; and David Pflaum, Ketchikan resident. Also at this time, Scott Wagner submitted additional information on behalf of Requestors.

The Commissioner evaluates the Request below.

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[2] Part 3.3.2.4 provides: "For detectable residues accumulation on the seafloor, the permittee shall submit a noncompliance notification report in accordance with Appendix A, Part 3.5 unless the net pen site has an approved Z[one] O[f] D[eposit] (see Part 6.3)."
[3] Part 3.3.2.4.1.

II. Legal Standard & Analysis

A. Standard

18 AAC 15.210(c) provides that in reviewing a request for stay, the Commissioner will consider:

> (1) whether the person requesting the stay will suffer irreparable harm if a stay is not granted;
> (2) whether the rights of other persons and the public interest can be adequately protected if the stay is granted;
> (3) the relative harm to the person requesting the stay, the permit applicant or permittee, public health, safety, the environment, and the public interest, if a stay were granted or denied;
> (4) the resources that would be committed during the pendency of proceedings under this chapter if a stay were granted or denied; and
> (5) the likelihood that the person requesting the stay will prevail in the proceedings on the merits.

Factor (5) includes consideration of the nature of the threatened injury. 18 AAC 15.210(c)(5).

B. Analysis

The Commissioner evaluates each 18 AAC 15.210(c) factor below.

(1) Irreparable Harm

The first factor the Commissioner considers is whether Requestors will suffer irreparable harm if a stay is not granted. Requestors argue that they will suffer irreparable harm for two reasons. First, Requestors argue that altering the pH of their discharges would "likely affect the behavior of the fish that they release from the net pens." (Req. at 6.) Hugh Mitchell, attending veterinarian for Southern Southeast Regional Aquaculture Association, Inc. and other aquaculture facilities throughout Alaska, somewhat elaborated that while "[f]ish can adapt to changes in pH within certain limits," "rapid changes can be extremely disruptive to their physiology and well-being" and that a "more appropriate approach" would focus on limiting the change in pH from influent to effluent. (Mitchell Ltr. at 1.) Second, Requestors argue that compliance with the monitoring requirements will cause them to incur significant costs due to the high cost of dive surveys in Alaska, which the Requestors estimate at $4.4 million annually. (Req. at 6–7.) Ms. Welch, commenting for the United Fishermen of Alaska, indicated an estimated compliance cost for both new requirements of "tens of millions of dollars annually." (Alward & Welch Ltr. at 1.)

The Division disagrees that the Requestors will suffer irreparable harm. As a preliminary matter, the Division argues that Requestors rely on the false premise that the 2023 Permit requires Requestors to raise the pH of the water in their discharges at the point of outfall, explaining that no such requirement is mandated given the availability, in Part 3.4, of applying for mixing zones. (Req. at 8–9.) The Commissioner disagrees with this assertion. Unless and

until a mixing zone application is authorized, and authorized "for each individual outfall,"[4] the 2023 Permit imposes a requirement that the pH limits be met at the point of discharge into navigable waters. As things currently stand, then, the 2023 Permit will, on October 1, impose a requirement that Requestors' discharges meet the Table 2 requirements for pH at each point of discharge—i.e., each outfall. The availability of a process for applying for mixing zones does not change this requirement.

The Division next argues that Requestors have failed to substantiate the harm to fish they assert is likely to result from a change in pH at the point of outfall. The Commissioner agrees. Statements that fish behavior is likely to be affected are insufficient. Mr. Mitchell's indication that rapid changes in pH "can" be extremely disruptive to fish is similarly insufficient for its lack of specificity and citational support.

Addressing Requestors' second argument, the Division counters that, as a general matter, monetary claims are insufficient to prove irreparable harm. (Div. Resp. at 10–11.) For support, the Division cites caselaw indicating that, in federal court, monetary claims cannot constitute irreparable harm. (Div. Resp. at 10 n.36.) While accurate, the rationale behind this rule is that a court litigant may generally seek monetary damages from the court, and thereby "repair" any harm caused by incurring costs that needn't have been incurred at the onset. This rule makes perfect sense in courts, which have clear authority to award monetary damages. This rule makes less sense in a DEC administrative appeal, which is limited to Commissioner-level review of certain Division decisions and may not extend to awards of monetary damages. If Requestors incur costs in complying with the challenged 2023 Permit conditions, and those conditions are ultimately reversed or changed, then Requestors will have incurred costs that they, at least in this instance, cannot recover in this forum. Accordingly, this rule does not apply in this context: costs incurred here constitute irreparable harm.

The Division next argues that Requestors' allegations of costs are unsubstantiated. (Div. Resp. at 10–11.) The Commissioner disagrees. Contrary to the Division's citations, Requestors need not have provided the Commissioner's Office with "sales figures, specific instances, or other evidentiary facts." (Div. Resp. at 10 n.36.) Statements made by the Requestors themselves, based on knowledge of their industry and experience operating their businesses, are sufficient to allege a credible allegation of costs likely to be incurred. Regarding compliance costs for the new monitoring requirements, Requestors estimate that the cost of dive surveys alone will total roughly $4.4 million annually, backed by Requestors' collective experience managing fisheries and familiarity with Alaska's economy, is sufficient. (Req. at 6.)

Regarding compliance costs for the new pH limits, covered facilities would have to apply to the Division for mixing zones for each outfall in accordance with 18 AAC 70.240. (Permit Part 3.4.) To get their application approved under 18 AAC 70.240, permittees would have to collect data demonstrating that the pH of each discharge will not: "(1) bioaccumulate, bioconcentrate, or persist above natural levels in sediments, water, or biota to significantly adverse levels, based on consideration of bioaccumulation and bioconcentration factors, toxicity, and exposure; (2) present an unacceptable risk to human health from carcinogenic, mutagenic, teratogenic, or other effects as determined using risk assessment methods approved by the department and consistent with 18 AAC 70.025; (3) settle to form objectionable deposits, except

[4] 2023 Permit Part 3.4.3.

as authorized under 18 AAC 70.210; (4) produce floating debris, oil, scum and other material in concentrations that form nuisances; (5) result in undesirable or nuisance aquatic life; (6) produce objectionable color, taste, or odor in aquatic resources harvested from the area for human consumption; (7) cause lethality to passing organisms; or (8) exceed acute aquatic life criteria at and beyond the boundaries of a smaller initial mixing zone surrounding the outfall, the size of which shall be determined using methods approved by the department." 18 AAC 70.240(d)(1)–(8). Permittees must additionally demonstrate that every mixing zone will not: "(A) result in an acute or chronic toxic effect in the water column, sediments, or biota outside the boundaries of the mixing zone; (B) create a public health hazard that would preclude or limit existing uses of the waterbody for water supply or contact recreation; (C) preclude or limit established processing activities or established commercial, sport, personal-use, or subsistence fish and shellfish harvesting; (D) result in a reduction in fish or shellfish population levels; (E) result in permanent or irreparable displacement of indigenous organisms; (F) adversely affect threatened or endangered species except as authorized under 16 U.S.C. 1531 - 1544 (Endangered Species Act); or (G) form a barrier to migratory species or fish passage." The remainder of 18 AAC 70.240 contains additional prohibitions (e.g., a presumption against mixing zones in spawning areas for certain fish). Collecting the data required to submit an approvable mixing zone application, for every outfall, will impose additional costs on Requestors. The Commissioner finds that the Requestors' allegations that they will incur additional costs, unrecoverable in this forum, in complying with the challenged 2023 Permit conditions is sufficient to constitute irreparable harm. This factor therefore weighs in favor of granting a stay.

(2) Adequate Protection of Rights of Other Persons and Public Interest

The second factor the Commissioner considers is whether the rights of other persons and the public interest can be adequately protected if the stay is granted. Requestors argue that there is "no potential harm to the public interest" because their facilities "have operated for decades without these new requirements, with no noticeable impact on the receiving waters." (Req. at 7.) Comments submitted by Ketchikan residents Clifton, Schuttie, and Pflaum reflect a shared belief that maintaining the status quo would not harm the rights or interests of those individuals. (Clifton Ltr. at 1; Schuttie 9/27/2023 email; Pflaum 9/27/2023 email.) Comments from representatives of two public utilities, both of which rely on water near Requestors' hatcheries for power generation, reflect a shared belief that their water usage is adequately protected under the status quo. (Jeremy Bynum Ltr. at 1; Hagerman Ltr. at 1.)

The Division argues that a stay will harm the environment and public interests, explaining that water quality standards, including pH limitations, were calculated to protect the environment and that deviations may have various negative impacts on fish and sea life. (Div. Resp. at 14.) The Division further argues that, other than observation, "there is no other potential source of information" about whether a violation has occurred. (Div. Resp. at 15.)

Neither side argues that any "rights" of other persons are implicated by the challenged permit provisions. At issue is whether the public interest can adequately be protected if the stay is granted. While the comments summarized above indicate that some members of the public believe their interests are adequately protected by the status quo, the Commissioner is inclined to give significant weight to the DEC Program Manager's evaluation of the risk of potential environmental harm. Program Manager McCabe is a subject-matter expert with ample experience and expertise. His affidavit details some of the environmental risks associated

uneaten feed, fish feces, fish carcasses, algae, parasites and pathogens, cleaning chemicals, and medications used to treat fish diseases—all of which, he explains, can be discharged from CAAPs. (*See* Affidavit of E. McCabe ¶¶ 3–5.)

Tempering Program Manager McCabe's concern regarding environmental risks, however, is the fact that the 2018 Permit presently mitigates most of the environmental risks presented by hatchery operations, and will continue to govern CAAP discharges even if a stay is granted. On balance, this factor is neutral.

(3) Relative Harms

Under the third factor, the Commissioner weighs the relative harm to the person requesting the stay, the permit applicant or permittee, public health, safety, the environment, and the public interest, if a stay were granted or denied. As described above, the potential harm to Requestors is, at its core, financial. The potential harm to the environment centers on the risks detailed in Program Manager McCabe's affidavit. The potential harm to the public interest—which has economic as well as environmental components—is not serious. Weighing the relative harms, this factor is neutral.

(4) Resources Committed

The fourth factor the Commissioner considers is what, and to what extent, resources would be committed in a grant or a denial of a stay. Requestors indicate that, on an annual basis, dive surveys would cost roughly $4.4 million. The Division responds that, for itself, "the fiscal, regulatory, and day-to-day consequences will be significant and immediate" if the stay is granted. (Div. Resp. at 16.) The Division explains that "program staff would need to modify all authorizations issued under the [2023 Permit] to reflect the change in pH effluent limits and seafloor monitoring requirements"—a change which, per the Division, must also undergo notice and comment. (Div. Resp. at 16.) The Division further indicates that complications would arise with management of the electronic database management system, and would require a tedious, file-by-file editing process. (Div. Resp. at 16.) The Division lastly indicates that a partial stay will introduce confusion to permittees due to expiration of the administrative extension on October 1—the date the 2023 Permit goes into effect.

The Commissioner is sympathetic to the added workload a partial stay risks piling onto the present workload of Division staff, should the stay be issued after the 2023 Permit's effective date of October 1, 2023. This factor weighs in favor of granting a stay before the effective date of the 2023 Permit.

(5) Likelihood of Success on the Merits

The fifth and last factor the Commissioner considers is the likelihood that Requestors will prevail on the merits in the parallel request for administrative hearing. When considering this factor, the Commissioner must consider the "nature of the threatened injury." 18 AAC 15.210(d). The interplay between the nature of the threatened injury and the likelihood of success is detailed in 18 AAC 15.210(d):

> If the requesting person faces irreparable harm and the rights of other persons can be adequately protected, the person requesting the stay must raise serious and substantial questions on the merits

> of the department's decision in order for the commissioner to grant a stay. If the harm to the person requesting the stay is less than irreparable or if the rights of other persons cannot be adequately protected if the commissioner grants a stay, the person requesting the stay must meet the heightened standard of a clear showing of probable success on the merits in order for the commissioner to grant a stay.

18 AAC 15.210(d). In other words, DEC's regulations mandate a sliding-scale approach when considering the fifth factor: the greater the degree of harm, the lower the burden of proof. Because Requestors demonstrated irreparable harm, and because the rights of others can be adequately protected, Requestors need only raise "serious and substantial questions" on the merits of the Division's decision for this factor to weigh in favor of granting a stay.

i. pH Limits

With regard to the pH limits, Requestors argue that the Division "failed to evaluate whether the source waters are meaningfully distinct from the receiving waters, such that passing water with low pH through the regulated facilities cannot be considered an addition of a pollutant to the discharged water." (Req. at 6.) For support, Requestors cite *South Florida Water Management District v. Miccosukee Tribe*, a 2004 United States Supreme Court case. (Req. at 3.) In *South Florida*, the Supreme Court held that if two water bodies "are simply two parts of the same water body" then "pumping water from one into the other cannot constitute an 'addition' of pollutants'" triggering the need for an NPDES permit, because the water bodies are not "meaningfully distinct." 641 U.S. 95, 109 (2004).

The Division advances two responses to Requestors' reliance on *South Florida*. As a preliminary matter, however, both responses misstate the applicable burden of proof. Because Requestors have demonstrated that their harm is irreparable and the rights of other persons are adequately protected, the lower burden of proof under 18 AAC 15.210(d) applies. The relevant question is not whether Requestors have made a "clear showing" of likelihood of success on the merits, but whether they have raised "serious and substantial questions" on the merits of the Division's decision. With the appropriate, lower standard in mind, the Commissioner turns to the Division's two responses to Requestors' reliance on *South Florida.* (Div. Resp. at 18.)

The Division first argues that *South Florida* is inapposite because the facts there involved a flood control project that does not "use" waters, but merely returns temporarily captured waters "back to where they would be without human intervention." (Div. Resp. at 19.) But a myopic focus on this fact ignores that this fact was not dispositive to the Supreme Court's holding. While the district court in *South Florida* focused on that fact, and applied a without-human-intervention test to determine whether two waterbodies were "meaningfully distinct," the Supreme Court expressly refused to adopt that test, and therefore to consider that fact dispositive, in determining whether two bodies of water are "meaningfully distinct." *See S. Fla. Water Mgmt. Dist.*, 541 U.S. at 111 ("We do not decide here whether the District Court's test is adequate for determining whether C–11 and WCA–3 are distinct."). As the Supreme Court acknowledged, other tests potentially exist for determining whether two water bodies are meaningfully distinct: one may be based on "biological or ecosystem characters," and another based on "close hydrological connectivity." *Id.* at 110. The briefing in this matter does not indicate the appropriate test for determining when two bodies of water are "meaningfully

distinct" for NPDES/APDES permitting purposes, following *South Florida*. The Commissioner's Office thus disagrees, based on the briefing before it, that this case is inapposite.

The Division's second response to Requestors' reliance on *South Florida* is that EPA has codified an exemption to the requirement for NPDES permits for certain activities, which roughly tracks the without-human-intervention test used by the district court in *South Florida*. (Div. Resp. at 19.) Because EPA has codified this test, the Division continues, *South Florida* is now outdated. The Commissioner disagrees. One codified regulatory exemption does not represent the extent of possible exemptions or exclusions from Clean Water Act coverage based on the statutory requirement that there must be an "addition of any pollutant into a navigable water." And EPA cannot override the Supreme Court. This exemption does not render *South Florida* obsolete.

ii. Monitoring Requirements

Regarding the monitoring requirements, Requestors argue that the Division has "misinterpreted the requirements of its water quality standards and, even if its interpretation were correct, has imposed a monitoring regime that will falsely identify potential violations." (Req. at 6.) Specifically, Requestors dispute the Division's interpretation of 18 AAC 70.020(b)(2)(A)(ii), (C), and (D) as requiring that any presence of solids on the seafloor makes the water unfit or unsafe for the protected use. (Req. at 5.) Requestors secondly challenge the Division's exercise of its discretion in imposing a 60-day time limit for visually assessing the benthos, arguing that the Division should have exercised its discretion to impose a longer time limit. The Division contends that Requestors read 18 AAC 70.020 out of context (Div. Resp. at 22) and that the Division's exercise of its discretion in imposing the 60-day timeline was not arbitrary because visual inspections conducted within 60 days of the last release are more likely to catch violations than visual inspections conducted after that time. (Div. Resp. at 23.)

The Commissioner need not reach the first argument because resolution of the second argument is dispositive: generally, when a requestor challenges the Division's exercise of discretion, and colorably alleges significant consequential compliance costs, a "serious and substantial question" is raised as to whether the Division exercised the Department's discretion consistent with the Commissioner's view of how that discretion should be exercised.

This factor weighs in favor of granting a stay.

III. Conclusion

On balance, the factors listed in 18 AAC 15.210(c) weigh in favor of maintaining the status quo—coverage under the 2018 Permit—during the pendency of the OAH proceedings. Accordingly, the Request to stay the Division's May 31, 2023 issuance of AKG130000 is granted**.** Rather than staying only the challenged provisions, which could cause administrative challenges to Division staff, the stay granted by this Decision applies to stay the effective date of the 2023 Permit until such time as the adjudicatory hearing proceedings have concluded. This

stay applies to all facilities covered by the 2023 Permit, not just those who are parties to this proceeding.

Emma Pokon, Acting Commissioner

DATED: September 29, 2023

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