

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

Southern Southeast Regional Aquaculture Association,)	
Northern Southeast Regional Aquaculture Association,)	
Kodiak Regional Aquaculture Association,)	
Cook Inlet Aquaculture Association, and)	
Prince William Sound Aquaculture Corporation,)	
)	
Requesters,)	
)	
v.)	
)	
Alaska Department of Environmental Conservation,)	
Division of Water,)	
)	
Respondents.)	OAH No. 23-0553-DEC
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RECOMMENDED DECISION ON REQUEST FOR ADJUDICATORY HEARING

I. Introduction

On May 31, 2023, the Alaska Department of Environmental Conservation, Division of Water (Division) issued an APDES General Permit for Aquaculture Facilities (2023 Permit), which permits discharges from concentrated aquatic animal production facilities. Southern Southeast Regional Aquaculture Association, Northern Southeast Regional Aquaculture Association, Kodiak Regional Aquaculture Association, Cook Inlet Aquaculture Association, and Prince William Sound Aquaculture Corporation requested an adjudicatory hearing on the record and briefs regarding two provisions of the 2023 Permit. The Division opposed the hearing request. As discussed below, the request satisfies the requirements for a hearing request under 18 AAC 15.200 such that the hearing on the record and briefs should be granted on each of the four issues as articulated by the Requesters.

II. Factual and Procedural History

Aquaculture is the “rearing or cultivation of aquatic organisms, such as fish, shellfish and aquatic plants, under controlled condition in aquatic animal containment systems.”¹ Fish hatcheries are aquaculture facilities that typically “rely on a steady supply of water from seawater, surface water, or groundwater” to incubate and grow fish species “for use to enhance natural

¹ ADEC 0000025.

populations and to supplement recreational and commercial fisheries.”² The hatcheries generate pollutants from uneaten feed, fish feces, fish carcasses, parasites and pathogens, and other sources. Discharges of these pollutants have the potential to adversely impact water quality.³

The discharge of pollutants from a point source into waters of the United States in the state of Alaska is unlawful, except in accordance with an Alaska Pollutant Discharge Elimination System (ADPES) permit, which is a permit under section 402 of the Clean Water Act.⁴ In 2018, the Division issued an APDES general permit for aquaculture facilities, which permits discharges from concentrated aquatic animal production (CAAP) facilities (2018 Permit).⁵ Because general permits are valid for up to five years, the 2018 permit was set to expire in 2023.⁶

On May 31, 2023, following notice and public comment in which each of the Requesters participated, the Division issued the 2023 Permit to replace the 2018 permit.⁷ The 2023 Permit contains some provisions not in the 2018 Permit. Two of those provisions are relevant here. The first is Part 3.2.1, which requires permittees to monitor effluent discharges and develop a Quality Assurance Project Plan to ensure that effluent samples meet specified limits, including, for pH, a minimum daily effluent limit of 6.5 S.U. and a maximum daily effluent limit of 8.5 S.U.⁸ The second relevant portion is in Part 3.3.2, which requires visual assessment of the benthos (seafloor) under net pen facilities for detectable residues, defined as “any amount of observable residue deposits,” within 60 days of the last release of aquatic animals each season.⁹ Detectable residues would trigger the requirement for submittal of a noncompliance report absent an approved zone of deposit (ZOD).¹⁰

² ADEC 0000025 and 0000027.

³ ADEC 000002 and 000027.

⁴ 33 U.S.C. §1311(a) and 18 AAC 83.015. The United States Environmental Protection Agency (EPA) transferred authority to the State of Alaska to administer the National Pollutant Discharge Elimination System (NPDES) Program under the Clean Water Act, including the authority to permit wastewater discharges, in four phases beginning in 2008 and ending in 2012. Thus, the Alaska Department of Environmental Conservation has the authority to administer the NPDES program as a State “APDES” program, with oversight from the United States Environmental Protection Agency.

⁵ CAAP facilities “discharge aquatic animal rearing waste and wastewater to fresh or marine surface water (located throughout the state) or to a system that discharges to a surface water at least 30 days per year.” ADEC 0000028.

⁶ A general permit covers a group of dischargers with similar qualities within a given geographical location. General permits are effective for up to five years.

⁷ The parties’ briefs indicate that the Requesters participated in the public comment process and in several in-person meetings with the Division.

⁸ The effluent limits are set forth in Table 2 of the 2023 Permit. ADEC 0000070-71.

⁹ ADEC 0000072.

¹⁰ ADEC 0000072.

On June 20, 2023, the Division received a request from various aquaculture facilities, including each of the Requesters here, for informal review of the Division’s issuance of the 2023 Permit.¹¹ Among the Requesters’ concerns were the pH limits and monitoring requirements for residues deposited on the seafloor. The Requesters challenged the inclusion of pH limits in the permit, arguing that the pH is not a pollutant of concern for hatcheries because there is no reasonable potential for them to cause or contribute to an exceedance of the water quality standards for pH. They claimed the hatcheries use source water with a pH that is below the minimum daily limit specified in the permit, such that the permit would require them to either raise the pH of their effluent prior to discharge or apply for mixing zones, which would be costly. They also argued that the Division has failed to evaluate whether source waters are meaningfully distinct from the receiving waters, such that passing water with a low pH through the facilities cannot be considered an addition of a pollutant to the water. Further, the Requesters argued that the monitoring requirements for residues are based on a misinterpretation of the applicable water quality standards for aquaculture facilities and would effectively force hatcheries to apply for ZODs, at significant expense. On July 21, 2023, the Division Director denied the request for informal review.

On August 21, 2023, the Requesters sought an adjudicatory hearing on the record and briefs, which the Commissioner conditionally referred to the Alaska Office of Administrative Hearings to determine (1) whether the request satisfies the requirements of 18 AAC 15.200, and (2) if so, the scope of the hearing.¹² On October 9, 2023, the Requesters were provided the opportunity to submit an amended hearing request that conforms with the Department’s regulation at 18 AAC 15.200, to help both the Requesters and the Commissioner evaluate whether the criteria for a hearing have been met, including whether an evidentiary hearing, or a hearing on the briefs and the existing record, is appropriate, and the appropriate scope of the hearing.

On October 16, 2023, reiterating many of the same issues in their request for an informal hearing, the Requesters filed an amended request for an adjudicatory hearing on the record and briefs on the following issues:

1. Whether the Division should have determined that the Requesters’ hatchery operations are not discharging pH as a matter of law because they are not “adding” pH (i.e., lowering the pH level) of water passing through their facilities;

¹¹ ADEC 0000107-113.

¹² The Requesters also asked for a partial stay of the effective date of the 2023 Permit. On September 29, 2023, the Commissioner granted a stay of the application of the permit until the adjudicatory hearing proceedings have concluded.

2. Whether the Division should have determined that the Requesters' hatchery operations do not have a reasonable potential to cause or contribute to an exceedance of the pH water quality standard;
3. Whether the Division, in condition 3.3.2.4, correctly interpreted the water quality standard in 18 AAC 70.020(b)(20) as prohibiting any accumulation of residues on the seafloor for any length of time;
4. Whether the requirement of condition 3.3.2 that permittees visually assess the benthos on the seafloor within 60 days after the last release of aquatic animals each season is arbitrary and capricious.

The Division opposed the hearing request, claiming that the 2023 Permit comports with the applicable regulations, and that the Requesters have failed to identify any misapplication of material fact or law by the Division. The Division asserted, however, that if the Commissioner believes a hearing would be beneficial, a hearing on the briefs on the following narrow issues would be sufficient: (1) Whether the Division's decision to implement pH limits in the General Permit complies with EPA's Water Transfer Rule; (2) whether the aquaculture facilities must comply with Alaska's Water Quality Standards in 18 AAC 70.020(b)(20)(A)(ii), (C), and (D) incorporated in the General Permit; and (3) whether the Division's decision to require monitoring for a zone of deposit (ZOD) within 60 days of the release, unless otherwise approved under the Division, is unreasonable.

III. Discussion

At the hearing request stage, it is not necessary for a requester to prove its case by a preponderance of the evidence. Rather, the requester must meet the requirements set forth in 18 AAC 15.200 to be entitled to an adjudicatory hearing: the requester must have participated in the public review process, the request must be timely, the request must include specific information, and the requester must have standing.¹³

A. The requirements of 18 AAC 15.200(a) (prior participation and timeliness)

To meet the requirements of 18 AAC 15.200(a), the Requesters here must have actively raised the issues through participation in the public review process. In their amended hearing request, the Requesters state that they individually and collectively submitted written comments on the draft permit during the public comment period, and they met with the Division to discuss

¹³ 18 AAC 15.200(a), (c), and (d).

their concerns multiple times. The Division does not dispute that the Requesters met the requirement of prior participation in the public review process.

With regard to timeliness, 18 AAC 15.200(a) requires a hearing request to be submitted within 30 days of the challenged decision, which in this case was the Division's July 21, 2023 denial of the Requesters' informal hearing request. The Requesters filed their hearing request on August 21, 2023. This was within the 30-day timeframe because the thirtieth day (August 20) fell on a Sunday, meaning the hearing request was due the next day, and the amended hearing request was filed on the October 16, 2023 due date for submittal of the amended request. The request for a hearing in this case was timely.

B. The requirements of 18 AAC 15.200(c) (required content)

To meet the requirements of 18 AAC 15.200(c) regarding the content of the request, the hearing request must contain the following information: (1) a description of the decision to be reviewed; (2) contact information for the requester; (3) a clear and concise statement of the contested issues, including disputed issues of fact and law and their relevance to the decisions at issue, and an explanation of how the decision was in error with respect to the contested issues; and (4) information on the interests and issues at stake and why the hearing request should be granted. Here, it is clear that the decision under review is the Division's May 31, 2023 issuance of the 2023 Permit, and that the Requesters have provided their information.

The Requesters have also provided a sufficient description of the contested issues and why they believe the Division's position on those points is in error. The first issue presents a discreet question as to whether the waters moving through the hatchery facilities constitutes a discharge of pollutant (pH). The second issue is related to the first and raises a factual question as to whether the operations have a reasonable potential to cause the water quality standard for pH to be exceeded. The third issue raises the important legal question of whether the discharge of residues on the seafloor for any length of time is prohibited by 18 AAC 70.020(b)(20). The fourth issue presents a question about the basis for the 60-day observation period for assessing benthos at the end of the season.

The Division maintains that the Requesters are merely trying to rehash arguments already raised and rejected by the Division during the public comment and informal review process. According to the Division, the first issue turns on the application of the EPA's Water Transfer Rule to the hatcheries' operations – not the U.S. Supreme Court decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004), as the Requesters

claim. On the second issue, the Division asserts that the Requesters have ignored data collected by the Division over the previous five years, which shows that hatchery dischargers do have a reasonable potential to cause or contribute to an exceedance of pH water quality standards. Regarding the third issue, the Division contends that 18 AAC 70.020(b)(20) does not allow any deposition of residues on the seabed at all. For the fourth issue, the Division maintains that the Requesters' position is unsupported by the facts or the law. In sum, the Division argues that the Requesters failed to identify any material fact or material law *that would change the Division's decision*. But these arguments go to the merits of the issues – not whether the issues been properly presented at the hearing request stage. Indeed, the parties' disagreement on the factual and legal issues raised by Requesters demonstrates why a hearing is appropriate to resolve them.

Finally, the Requesters explain how the permit conditions regarding pH and monitoring for detectable residues on the seafloor could render them in immediate noncompliance, and trigger the to apply for mixing zones and ZODs – a costly process, that would impact their ability to operate economically. The Requesters provided the necessary information for a hearing request.

C. The requirements of 18 AAC 15.200(d) (standing)

Finally, the hearing request needs to demonstrate a basis for standing under 18 AAC 15.200(d). Specifically, the request must show (1) that the Requesters are directly and adversely affected; (2) the nature of the Requesters' interest; and (3) whether that interest is protected by the applicable statutes and regulations; and (4) the extent to which the decision directly and substantially impairs those interests.

Here, hearing request explains how the pH limits and monitoring requirements at issue could affect their ability to operate their economically. As members of the regulated aquaculture industry subject to the 2023 Permit, there can be no doubt that their interests are directly and substantially impacted by the disputed permit provisions here.

Because the Requesters submitted a timely hearing request containing the required information and made a sufficient showing of standing, the Commissioner should grant the request for a hearing.

IV. Recommendation for Hearing

A hearing may take the form of either briefs or an evidentiary hearing to gather additional evidence through testimony.¹⁴ The Requesters asked for a hearing on the record and briefs. The Division did not oppose a hearing in that form, if in fact the hearing request is granted.

Accordingly, the Administrative Law Judge recommends the Commissioner grant a hearing on the record and briefs.¹⁵ Although the Division characterized the issues for hearing differently than the Requesters, they provided no explanation for why the issues presented by the Requesters should be altered. Thus, the briefs should address the four issues as presented in the Requesters' hearing request.

The ALJ will set a schedule for the provision of the record to the parties and a briefing schedule after the time to intervene has expired.

DATED: November 2, 2023.

By: _____
Lisa M. Toussaint
Administrative Law Judge

¹⁴ 18 AAC 15.220(b)(1).

¹⁵ The declaration and associated exhibits accompanying the Requesters' reply brief are not relevant to the limited issue of whether the request for an adjudicatory hearing is warranted, and they were not properly part of the record for the present ruling. Those materials were not considered in the decision here, and the Division's motion to strike the materials from the Requesters' reply brief is granted. However, if the Division elects not to include these materials in the agency decision record subsequently produced pursuant to 18 AAC 15.237(b) regarding the issuance of the 2023 Permit, the Requesters will have the right to move that the record be supplemented with those materials in accordance with 2 AAC 64.310. While the Division may oppose such a motion, the fact that the materials were stricken in this context will not dictate a particular result in that broader context.

Adoption

A. The undersigned, in accordance with 18 AAC 15.220(c)(1), GRANTS the request for an adjudicatory hearing and returns the matter to the Office of Administrative Hearings to schedule and hold appropriate proceedings.

DATED this 13th day of November 2023.

By:

Emma Pokon
Acting Commissioner

Non-Adoption Options

B. The undersigned, in accordance with 18 AAC 15.220(c)(2), DENIES the request for an adjudicatory hearing as not satisfying the requirements of 18 AAC 15.200, as follows:

Under AS 44.64.060(b), judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2023.

By: _____
Emma Pokon
Acting Commissioner

C. The undersigned, in accordance with 18 AAC 15.220(c)(3), VACATES the underlying decision and remands this matter to the Division for further action, as follows:

DATED this _____ day of _____, 2023.

By: _____
Emma Pokon
Acting Commissioner