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Refer To File # 504738-0001

August 21, 2023

Via Electronic Mail

Emma Pokon
Acting Commissioner
Alaska Department of Environmental Conservation
P.O. Box 111800
Juneau, AK 9981101800
DEC.Commissioner@alaska.gov

Randy Bates
Director, Division of Water
Alaska Department of Environmental Conservation
P.O. Box 111800
Juneau, Alaska 99811
Randy.bates@alaska.gov

Re: Request for Adjudicatory Hearing and
Request for Partial Stay
APDES General Permit – Aquaculture Facilities – AKG130000

Dear Acting Commissioner Pokon:

This request for an adjudicatory hearing, pursuant to 18 AAC 15.200, of the Department of Environmental Conservation's (the "Department") APDES General Permit for Aquaculture Facilities, AKG130000, dated May 31, 2023 (the "Aquaculture General Permit") is submitted on behalf of the following private nonprofit hatchery operators, most of which also operate state-owned hatcheries:

Southern Southeast Regional Aquaculture
Association, Inc. (SSRAA)
Susan Doherty, General Manager
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Northern Southeast Regional Aquaculture
Association, Inc. (NSRAA)
Scott Wagner, General Manager
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Kodiak Regional Aquaculture Association,
Inc. (KRAA)
Tina Fairbanks, Executive Director
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Cook Inlet Aquaculture Association, Inc.
(CIAA)
Dean Day, Executive Director
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(907) 283-5761

Prince William Sound Aquaculture
Corporation (PWSAC)
Geoff Clark, General Manager
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This request for an adjudicatory hearing is timely, in accordance with 18 AAC 15.200(a). These parties made a request for informal review of the Aquaculture General Permit to Water Division Director Randy Bates, which was denied on July 21, 2023.

Standing

Any party requesting an adjudicatory hearing must identify their interests and how those interests are adversely affected by the Department's action. 18 AAC 15.200(c)(4)(A) and (B) and 15.200(d).

The parties making this request for an adjudicatory hearing are private nonprofit hatchery operators. The Alaska hatchery system has been in operation for over 40 years. The hatchery and net pen facilities operated by the requesting parties are subject to the requirements of the Aquaculture General Permit, AKG130000. Their facilities were subject to the prior version of the Aquaculture General Permit, issued in 2018, and to the prior version issued in 2008.

- SSRAA has been operating for 47 years and manages 7 facilities, two of which are state-owned.
- NSRAA has been operating for 44 years and manages 4 facilities, one of which is state-owned.
- CIAA has been operating for 47 years and manages 4 facilities, two of which are state-owned.
- KRAA has been operating for 40 years and manages two facilities, both state-owned.
- PWSAC has been operating for 49 years and manages 5 facilities, three of which are state-owned.

These facility numbers do not include the remote release sites used by the hatchery operators. The contested provisions of the Aquaculture General Permit would impose significant and unreasonable

costs on the operation of these facilities, and in some cases it may not be practical to comply with these requirements.

Issues Warranting Review

pH Limits

The Aquaculture General Permit imposes limits on the pH of water discharged from the facilities, without regard to whether the facility has diverted its source water from water that would otherwise discharge into the same receiving waters.

Whether the movement of a pollutant from one body of water to another constitutes a “discharge” depends on whether the water bodies are “meaningfully distinct.” *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004). In *Miccosukee*, the Supreme Court considered whether pumping water between a canal and a reservoir constituted a discharge of pollutants from one to the other. *Id.* at 102. The Court held that pumping water between “two parts of the same water body” cannot constitute a “discharge.” *Id.* at 109-112. The regulated facilities have provided the Department with a substantial amount of factual information regarding source waters and the presence of low pH in those waters. If the source water has low pH and would discharge to the same receiving waters if not diverted through the regulated facility, the source water and receiving water are not meaningfully distinct, the pollutant (low pH) is already present, and the facility’s release to the receiving water is not a discharge of a pollutant.

For example, SSRAA has two facilities that receive water from lakes that are controlled by hydroelectric dams. The pH of the water in those lakes is naturally low. The water from those lakes flows to the same estuarine or marine waters as the discharges from SSRAA’s facilities. And yet, for a marine discharge, the Aquaculture General Permit would require SSRAA to raise the pH of its effluent to an unnatural level prior to discharge. NSRAA likewise has facilities that discharge water that is below the permit’s pH range because of the pH of the source water.

Hatcheries do not materially change the pH of the water that passes through their tanks. In separate permit actions, EPA recently determined that pH was not a pollutant of concern for hatchery operations and that there is no reasonable potential for those operations to cause or contribute to an exceedance of the water quality standard for pH. The same is true for the Alaska hatcheries that are subject to the Aquaculture General Permit. Their operations do not cause a material change in the pH of the water that they use.

The Department has failed to evaluate whether facility source waters are “meaningfully distinct” from the receiving waters, such that the passage of the waters through these facilities and discharge to the receiving waters does not constitute a discharge of a pollutant (pH). The Department cannot legally impose a discharge limit on a facility where that facility is not adding a pollutant to the water.

Additionally, a few facilities discharge into freshwater receiving waters from the same source as the effluent and have pH levels below the proscribed new limit. Whether or not their discharge is within .5 unit of the receiving water has not been documented; an appropriate step would be to require monitoring for discharges to freshwater during this permit cycle, rather than impose a limit, and gather the necessary information to inform a reasonable path forward.

The same legal issue noted for marine discharges applies with greater force to these freshwater discharges. As the Supreme Court held in *Miccosukee*, pumping water between “two parts of the same water body” cannot constitute a “discharge.” *Id.* at 109-112. Where the facility is taking its water from the same water body that receives its discharge, it cannot be required to change the naturally occurring pH levels.

The Department’s responses regarding the pH issue have ignored the facts that the hatcheries do not cause a noticeable change to the pH of the water passing through their facilities and that their influent source waters – the source of the low pH – also flow into the same receiving waters. Regardless of the pH readings observed in their effluent, the hatcheries are neither causing nor contributing to an exceedance of pH in the receiving waters.

Having been presented with a situation in which the regulated facilities are clearly not the source of the potential water quality concern, the Department entirely failed to proactively engage with the facilities and try to identify solutions during development of the permit. Instead, as reflected in its response to comments, the Department put the burden on the nonprofit hatchery operators to try to identify solutions, and then simply dismissed their ideas as inconsistent with the Department’s interpretation of regulatory requirements.

Monitoring for Zone of Deposit

Last year, ADEC abandoned efforts it has pursued since 2003 to obtain EPA approval for a common-sense water quality standard applicable to residues deposited on the ocean floor. As a result, the Aquaculture General Permit imposes limits based upon a water quality standard requiring that regulated activities not cause sludge or solids to be deposited on the bottom of a water body.

The Aquaculture General Permit effluent limitations for larger net pens (condition 2.3) contains several narrative conditions to implement this water quality standard. Sec. 2.3.1 requires feed management to minimize the accumulation of uneaten food beneath the pens. Sec. 2.3.6.2 requires cleaning nets in ways that minimize bottom settling. Sec. 2.3.9 requires siting net pens to avoid degradation of water quality and benthic conditions.

These are reasonable conditions for assuring compliance with the water quality standard. Documenting compliance with these requirements should be sufficient to demonstrate compliance with the permit and the water quality standards.

However, the additional monitoring methods the Department has adopted to determine compliance with these conditions is arbitrary and capricious. There are two issues with the Department's approach:

- 1) Whether the Department has correctly interpreted its water quality standard – 18 AAC 70.020(b)(20) – as prohibiting any accumulation of residues on the seafloor, for any length of time.

The Department appears to be interpreting the standard to literally prohibit any solids from touching the seabed. But this ignores the clause that states the water quality standards that refer to deposition on the sea bottom: “May not, alone or in combination with other substances or wastes, make the water unfit or unsafe for the use.” 18 AAC 70.020(b)(2)(A)(ii), (C) and (D). The prohibition on causing sludge, solid, or emulsion to be deposited on the bottom must be interpreted consistent with that opening clause. The standard is not that there cannot be a transient presence of solids on the bottom, but rather that the deposition of solids cannot be allowed to make the water unfit or unsafe for the protected use.

- 2) Whether the monitoring method selected by the Department – specifically, the requirement that visual observation be made within 60 days of the last release for each season – is arbitrary and capricious.

The Department recognizes that the hatchery net pens subject to this requirement are not subject to EPA's effluent limitation guidelines, as they do not rear fish for more than four months at a time. Response to Comment Summary 4.12. Accordingly, the only issue here is compliance with water quality standards. Even the overly restrictive water quality standard now in place is simply attempting to prevent the accumulation of debris on the bottom over time.

The burden of demonstrating compliance with this standard could be significantly reduced by changing the monitoring regime imposed by condition 3.3.2. Rather than requiring a visual assessment within 60 days of the last release each season, the Permit should be revised to require the assessment be completed at any time before the net pen is put in service the next year.

The Department's response to comments rejected this suggestion, asserting that the water quality standard does not have a temporal component. Response to Comment Summary 6.4. However, the permit's requirement to sample within 60 days of fish release does, in fact, have a temporal component. Where the apparent objective of the water quality standard – and of the monitoring required by the permit -- is to prevent the accumulation of debris on the bottom, then the Department should formulate a less burdensome monitoring program that is more likely to avoid triggering the far more expensive Zone of Deposit requirement for facilities that at most have occasional, transitory deposits on the seafloor. This provision should be changed to simply require assessment at any time before fish are put in net pens the next year.

The Department has effectively acknowledged that its objective is to prevent accumulation over time in its Response to Comment Summary 6.3, which relates a survey observing an organic matter layer two inches thick, with an overlaying white fibrous mat. This is a far cry from the “no detectable residues” monitoring standard imposed by the permit. If a layer two inches thick has accumulated under a net pen, then a Zone of Deposit is clearly needed. But if there is no accumulation year-to-year, then the resources of the facilities and the Department should not be wasted on that exercise.

As explained in comments to the Department, the dive surveys for Zones of Deposit required by the Aquaculture General Permit would impose enormous costs and it would not be technically feasible to accomplish all of the required surveys on the schedule imposed by the Permit because there are not enough trained divers available to serve all of the regulated facilities. The surveys required by the permit’s Zone of Deposit provisions will cost \$4.4 million annually. This is an unjustifiable cost to address condition that do not actually indicate violation of the Permit’s effluent limitations.

The net pens regulated under this permit have been in use at the same locations for many years, and in some cases for decades. If there were an issue with accumulation of debris below the nets, the condition would be obvious. If a visual benthic survey conducted before the next season’s use finds that residues are accumulating, then that condition can and should be addressed. Avoiding unnecessary triggering of Zones of Deposit would save enormous, unnecessary costs for the hatcheries and enormous and unnecessary administrative burden for the Department.

Request for Partial Stay

A stay of the Aquaculture General Permit’s pH limits and its requirements for monitoring of the sea floor below net pens is requested pursuant to 18 AAC 15.210.

- Requestors are likely to prevail on the merits of their claims.
 - As to the pH limits, the Department has 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.
 - As to the sea floor monitoring requirements, the Department 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, imposing extreme and unreasonable costs for unnecessary zones of deposit.
- The requestors will suffer irreparable harm if required to change the pH of their water discharges, as that would likely affect the behavior of the fish that they release from the net pens.

- If a stay is not granted, the regulated facilities would incur significant costs, outlined above and in comments previously submitted to the Department, if required to obtain mixing zones or zones of deposit.
- There is no potential for harm to the public interest. These facilities have operated for decades without these new requirements, with no noticeable impact on the receiving waters.

Conclusion

The appellants request that you make an initial determination that they have raised valid objections to the Aquaculture General Permit and remand the permit to the Division with instructions to correct these errors. Alternatively, appellants request that you determine that an adjudicatory hearing is warranted on the issues they have raised.

Sincerely,



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