

ATTACHMENT

Issues to be decided regarding DEC’s July 15, 2020 decision denying SBS’s waiver request, including supporting information and explanation

SBS seeks an adjudicatory hearing on a decision made by DEC in 2020 which the agency has never described as final or appealable, yet which has apparently become the basis of a compliance action by the agency against the company.

I. INTRODUCTION

Waivers are a critically important component of the NPDES General Permit #AKG520000 (the “General Permit”). While the General Permit sets baseline expectations and requirements that apply generally to all seafood processors, it also specifically acknowledges that a one-size-fits-all approach fails to account for different circumstances that certain processors may experience. To address these differing circumstances, the General Permit allows for the usual effluent limits to be waived so long as the processor is able to show that the additional discharge will not violate State water quality standards. The waiver provision thus allows – and *requires* – DEC to consider the relevant factual context when evaluating processor requests to exceed the effluent limitation.

II. FACTUAL BACKGROUND

On July 13, 2020, SBS requested a waiver of the 10-million-pound discharge limit under the AKG 520000 General Permit (Condition V.C.1.a – paragraph 1).¹ This request was made on behalf of SBS’s Naknek facility and submitted to the DEC Seafood Processing Permitting group. SBS explained that it required a waiver of the usual discharge limit, but that the anticipated excess discharge was not expected to have any ecological impacts due to the river current and hydrology of the Naknek River and the complete absence of a zone of deposit at SBS’s outfall terminus. SBS

¹ See Exhibit 1.

specifically asked whether DEC needed any additional information or documentation in order to approve the request so that SBS could supplement its waiver request if necessary.

DEC's Jackie Ebert responded that DEC would discuss the request later in the week.² Ms. Ebert noted that the request omitted discussion of additional potential source control measures, but did not state that any additional information or documentation was necessary for DEC to consider or approve the request. Instead, Ms. Ebert stated: "DEC has never granted a request for the 10 million pound limit since assuming primacy of the program from EPA, though many operators have requested one. We've only continued two waivers historically granted by the EPA."³

Two days later, on July 15, 2020, Ms. Ebert notified SBS that DEC was denying the waiver request.⁴ Ms. Ebert did not dispute that the anticipated excess discharge was unlikely to have any ecological impacts, nor did she indicate that SBS's waiver request was deficient in any way. The only explanation provided for DEC's decision was, "We don't currently issue waivers for the 10 million pound permit limit." Ms. Ebert then said SBS could contact her if it had any questions. Ms. Ebert did not indicate that this was supposed to be a final decision triggering SBS's appellate rights under 18 AAC 15, nor did she offer any explanation of what appellate rights (if any) SBS had to address this decision.

III. PROCEDURAL HISTORY

SBS's Naknek facility ultimately did exceed the discharge limit during the 2020 season. SBS promptly reported the exceedance to DEC in-season, while noting that no ecological impacts were expected to occur as a result. After the season, SBS reported the exceedance to DEC a second

² See Exhibit 2.

³ *Id.*

⁴ See Exhibit 3.

time through a disclosure in SBS's annual report for the Naknek facility. It was not until the 2021 season was underway that SBS learned about DEC's initiation of an investigation into the 2020 exceedance.

DEC's investigation of the 2020 exceedance suggests the agency is proceeding as though its denial of SBS's waiver request was its final decision. SBS seeks review of that decision, which has apparently become the basis of a compliance action with no prior notice that the decision was subject to appeal.

SBS began its appeal on July 30, 2021 by initiating a Request for Informal Review as to both the 2020 waiver denial and a similar denial of a waiver request that SBS submitted during the 2021 season.⁵ On August 6, 2021, DEC Division of Water Director Randy Bates granted informal review of the 2021 waiver decision but did not address (or even mention) the 2020 waiver decision, on which DEC's investigation depends. Director Bates invited SBS to let him know if SBS had any questions.⁶

On August 9, 2021, SBS responded to Director Bates's request and noted that he had not addressed the 2020 waiver denial.⁷ SBS asked whether the Director was still considering whether to grant informal review of the 2020 waiver denial, or whether SBS should interpret his August 6, 2021 letter to be a finding under 18 AAC 15.185(b) that the request did not merit informal review. If the August 6 letter was intended to be a finding that the request did not merit informal review,

⁵ See Exhibit 4.

⁶ See Exhibit 5.

⁷ See Exhibit 6.

then SBS requested that the Director notify SBS in writing and include the reasons for that decision.⁸

As of today's date, SBS has not received definitive confirmation from DEC on whether or not Director Bates's August 6, 2021 letter amounted to a denial of SBS's request for informal review of the 2020 waiver denial. SBS understands that DEC may be working on such guidance, but the difficulty with continuing to wait is that end of the 30-day period for requesting an adjudicatory hearing is approaching if the August 6 letter were considered a denial of informal review.⁹ The ambiguity about the relevant timeframe for continuing with this appeal is forcing SBS to proceed to the next phase – an adjudicatory hearing – now. SBS remains open to discussion with DEC in the informal review setting if the agency concludes it wishes to engage in that process. SBS appreciates the information provided to date by the Director about this unusual procedural situation.

IV. SUMMARY OF ISSUES TO BE DECIDED

1. SBS's Request for an Adjudicatory Hearing Is Timely; DEC Has Not Satisfied Its Procedural Due Process Requirements.

SBS's request is timely. DEC has never notified SBS that Ms. Ebert's July 15, 2020 email is a final and appealable decision, leaving SBS unclear as to how to proceed. In similar circumstances, the Alaska Supreme Court has held that a private party cannot be deprived of an opportunity to pursue an internal administrative appeal due to timeliness concerns where the

⁸ This information is required under 18 AAC 15.185(b). The regulation further provides that any such denial must include a "statement that the requestor may seek a formal adjudicatory hearing under 18 AAC 15.200 or AS 44.62, if either of those options is available to the requestor."

⁹ 18 AAC 15.200(a).

administrative body failed to notify the party that the decision was final and appealable.¹⁰ To the extent that Ms. Ebert's July 15, 2020 email was intended to be a final and appealable decision, it failed to provide appropriate notice to SBS. DEC never notified SBS, even informally, of any applicable appellate process or any deadlines for pursuing that process.¹¹ The importance of this notice is underscored by DEC's own procedural requirements, which require the Director to notify SBS of its appellate rights if informal review was denied.¹²

Because DEC failed to provide SBS required notice regarding its appellate rights with respect to the July 15, 2020 email decision, the usual regulatory deadlines for seeking an adjudicatory hearing do not apply. SBS is entitled to have its appeal heard now.

2. DEC Improperly Denied SBS's Waiver Request.

DEC's denial of SBS's waiver request was wrong on two levels. First, DEC admitted that its policy and practice was not to grant *any* waiver requests, despite the fact that waivers were expressly contemplated in the General Permit. DEC's automatic rejection of SBS's waiver request was contrary to SBS's rights under the General Permit. Second, in the alternative, SBS's waiver should have been granted on its merits. There was and is no evidence of any ecological impact or violation of State water quality standards from the exceedance.

A. DEC cannot deny rights granted under the General Permit without notice and an opportunity to be heard.

¹⁰ See *Pruitt v. City of Seward*, 152 P.3d 1130, 1136 (Alaska 2007) ("The doctrine of fairness requires that an individual must be notified that the agency's decision is final and appealable, if the doctrine of exhaustion is to bar a claim in a later proceeding.").

¹¹ See *id.* at 1138 (finding, in part, that a private party was not barred from pursuing administrative appellate remedies where "there is no suggestion that the city ever told Pruitt, even informally of the applicable appellate process").

¹² See 18 AAC 15.185(B)

From all appearances, DEC automatically rejected SBS's July 13, 2020 waiver request. DEC did not indicate that SBS's waiver application was deficient in any way. DEC did not dispute that the proposed discharges would not cause a violation of State water quality standards in the receiving waters, nor did DEC contend that there was any evidence of *any* accumulation of seafood waste at the facility's outfall. DEC also did not indicate that any additional information was required for SBS's waiver application to be considered or granted. To the extent that DEC had any concerns about SBS's waiver request, DEC did not provide SBS an opportunity to address those concerns. Instead, two days after the waiver request was submitted, DEC flatly rejected it. The entirety of DEC's rationale for denying SBS's request was contained in a single sentence: "We don't currently issue waivers for the 10 million pound permit limit."¹³

DEC has adopted a blanket approach of denying all such waiver requests.¹⁴ Respectfully, DEC cannot simply decide that it will not issue any waivers when the General Permit specifically contemplates that waivers are available to processors under appropriate circumstances. DEC's approach has effectively eliminated the General Permit's waiver provision without any notice to the affected community, without any rulemaking, and without any opportunity for community members to comment and to explain why this policy is improper. SBS and all other processors have rights under the General Permit to a fair consideration of any waiver request. DEC's practice of uniformly rejecting such requests is in conflict with the General Permit's requirements. The General Permit is a "regulation,"¹⁵ and DEC may not unilaterally amend or repeal any portion of that regulation without notice and comment;¹⁶ DEC is required to follow the traditional rulemaking

¹³ Exh. 3.

¹⁴ Exh. 2.

¹⁵ AS 44.62.640(a)(3).

¹⁶ AS 44.62.280.

process or else its unilateral actions are invalid.¹⁷ Every amendment or revision of a rule, regulation, or standard adopted by DEC to implement, interpret or make specific the law enforced or administered by it is a “regulation.”¹⁸ This includes DEC’s blanket approach of uniformly denying waiver requests. Put differently, DEC may not implement the General Permit in such a way that the waiver provision is functionally discarded. DEC cannot routinely fail to grant any waivers, irrespective of the factual context and without considering whether the waiver at issue would violate Alaskan water quality standards.

Part V.C.1.a of the General Permit provides that a permittee may exceed the annual limit on the amount of seafood processing waste residues if authorized to do so through a waiver. The General Permit provides that “[a] shore-based permittee may request a waiver to discharge under this Permit in excess of the processing waste limit of 10 million pounds per calendar year at one location”¹⁹ and SBS did so, but DEC applied its blanket policy and rejected the waiver request out of hand.

Importantly, the regulatory history for the re-issuance of the General Permit repeatedly addressed the importance of the waiver provision.²⁰ Specifically, during the notice-and-comment period, a commenter requested a waiver provision that would allow discharges “as conditions allow” because, among other things, current speed and tidal action were more important than discharge volume alone for determining waste pile size. The EPA *agreed* that waivers were

¹⁷ See *Chevron U.S.A., Inc. v. State, Dep’t of Revenue*, 387 P.3d 25, 35 (Alaska 2016) (“Regulations that are not promulgated under APA procedures are invalid.”).

¹⁸ See *id.*

¹⁹ NPDES Permit AKG520000 Part V.C.1.a (page 22).

²⁰ Exhibit 7.

appropriate, depending on fact-specific circumstances, and added the waiver option.²¹ As long as the processor remained in compliance with the Alaska water quality standard for residues and the state-authorized one acre zone of deposit, EPA agreed that permittees should have the opportunity to apply for a waiver of the effluent limit on seafood processing waste:²²

The permit does provide for the option to apply for a waiver to this [10 million pound] limit. The waiver provision is conditioned upon an applicant's demonstration that its exceedance of a 10,000,000 lbs per calendar year limit does not violate Alaska's water quality standards nor degrade the environment of the receiving water. If an applicant can demonstrate that larger quantities can be discharged at a site without violating Alaskan water quality standards, this data will provide a site-specific demonstration that the limit is inapplicable to the currents, depths, and other characteristics of the receiving water at that site.

In such a case, EPA will waive the permit limit of 10,000,000 lbs seafood processing waste residues per calendar year and rely upon the permit requirements that discharges comply with Alaska water quality standards and that the permittee monitor the accumulation of seafood processing wastes on the seafloor.^[23]

EPA affirmatively stated that, under the General Permit, it “**will waive**” the 10 million pound limit if the applicant shows that larger quantities can be discharged at the site without violating Alaskan water quality standards. DEC should be implementing the General Permit in the same way.

SBS submitted an appropriate waiver request and confirmed that the excess discharge was not expected to have any ecological impacts here. DEC did not dispute that the excess discharge would have no ecological impact, and did not request any additional information from SBS, but still dismissed the waiver request just two days later. DEC's rejection of SBS's waiver request – and DEC's policy of never approving any waiver request that was not previously granted by EPA – is inconsistent with the General Permit's plain meaning and regulatory history. Under the

²¹ See *id.* at 4-5 (Comment 7 and Response).

²² See *id.* at 5; see also *id.* at 6-7 (Comment 9 and Response).

²³ *Id.* at 19 (Measure 28 and Response).

approach that EPA described for how waivers were to be handled, DEC should have granted SBS's waiver.

At a bare minimum, however, DEC was required to give SBS's waiver request a careful review in order to determine whether additional quantities could be discharged at the Naknek site without violating Alaskan water quality standards. DEC did neither.

B. DEC should have granted SBS's waiver request on its merits.

SBS's waiver request confirmed that the proposed exceedance was not expected to cause any violation of State water quality standards in the receiving waters. It appears that DEC automatically rejected SBS's request without considering any evidence or any of the factors listed in the General Permit. Fairly considered, the waiver request should have been granted on its merits because SBS was complying with water quality standards (even with the proposed exceedance).

Most importantly, there is no evidence to suggest that Alaskan water quality standards are impacted by SBS's waiver request.²⁴ DEC has explained that the annual discharge limit serves two water quality purposes: (1) addressing discharges to Excluded Areas; and (2) mitigating "the probability that greater than a 1.0 acre deposit of seafood waste will form on the seafloor . . . [of] a single waterbody."²⁵ Neither water quality concern is implicated here. SBS's Naknek facility does not discharge into an Excluded Area, and there is no indication that the exceedances described in the waiver requests would cause a seafood deposit of *any* size, for several reasons. First, the Naknek River's large volume and strong currents leave no residual deposit of seafood waste at the outfall of SBS's facility.²⁶ This is acknowledged by DEC through its annual waivers of seafloor

²⁴ NPDES Permit AKG520000 Part V.C.1.a (page 22) (factor 5).

²⁵ Exhibit 8 § 1.11.1, p. 27.

²⁶ Exhibit 9. SBS provided additional argument and evidence in connection with a subsequent waiver request. The same core information applies to both periods. If DEC had notified SBS that

surveys at SBS's facility.²⁷ Second, the proposed exceedances are a small fraction of the total annual discharge of 53 million pounds that ADEC has already authorized from all processing facilities into the Naknek River, according to permitting records reviewed by SBS. We are aware of no evidence that the requested exceedances at SBS's facility did or would cause that overall amount to be exceeded. Third, a 2017 NOAA study characterized Bristol Bay as "pristine" even while noting the tens of millions of pounds of seafood waste that are discharged annually.²⁸

The absence of any water quality concerns at this particular location from this proposed exceedance has been acknowledged by DEC staff in their communications with SBS personnel. During a wastewater audit at the SBS facility in Naknek on July 16, 2021, a supervisor for DEC's compliance and enforcement team suggested that SBS could simply deliver any excess seafood waste to a neighboring facility so that the other facility could dispose of the waste through its own outfall and under its own permit, rather than under SBS's permit.²⁹ By advising that the same

additional information was required for consideration of the July 13, 2020 waiver request, or that it had questions about water quality issues, SBS would have provided this information in connection with July 13, 2020 waiver request. SBS believes that all of this information was and is already known by DEC in any event, so there is no prejudice to including it here.

²⁷ One of the criteria for a waiver is a seafloor survey showing that any waste deposits are consistent with Alaska water quality standards and objectives. NPDES Permit AKG520000 Part V.C.1.a (page 22) (factor 6), Part VI.C.3 (page 31). DEC's annual waivers of seafloor monitoring requirements demonstrates that the discharges meet the Alaska water quality standards. *See id.*, Part VI.C.10 (page 35). SBS had already provided its Notice of Intent (factor 1) and, in its waiver request, explained that there were no reasonable alternatives to discharging an exceedance in 2020 (factor 2) and described the nature, magnitude, and duration of its seafood processing operation and discharges (factor 3). Alaska law recognizes that waiver applications that substantially comply with the General Permit's requirements should be accepted. *See, e.g., Adamson v. Municipality of Anchorage*, 333 P.3d 5, 13-14 (Alaska 2014); *Zenk v. City & Borough of Juneau*, 2017 WL 2825797, at *6 (Alaska, June 28, 2017). At a minimum, SBS's waiver request substantially complied with the General Permit and afforded DEC the same protection that strict compliance would have provided.

²⁸ Exhibit 10, p. 45.

²⁹ Affidavit of Tiffany Hanson.

amount of waste could be discharged into the same river at virtually the same location, DEC staff confirmed that there is no water quality issue and that the waiver should have been granted. Denying the waiver while suggesting that excess waste be discharged through *a neighboring facility's outfall* improperly elevates form over substance and demonstrates that the rejection of the waiver was wrong. DEC's denial of the requested waiver was in error.

DEC's approach is directly contrary to the EPA guidance about how the waiver provision should be interpreted and applied. While SBS understands that DEC is in the process of seeking to modify the applicable general permit to omit the waiver provision in the future, that process is not complete. The General Permit in effect in 2020 contained a waiver provision that DEC was required to administer properly. DEC should reconsider its past policy and practice and grant the requested waiver. The requested exceedance was discharged at the site without violating Alaskan water quality standards. DEC got it procedurally and substantively wrong when it denied the waiver without properly taking the circumstances of the specific location into account.

3. Disputed Issues of Material Fact and Questions of Law.

DEC failed to provide SBS with adequate notice that its July 15, 2020 email was a final and appealable decision.

DEC failed to notify SBS at any time that SBS must appeal the July 15, 2020 email decision within a certain time period pursuant to 18 AAC 15.

DEC improperly denied SBS's July 13, 2020 waiver request because DEC has a policy and practice of denying all requests for waivers of the 10-million-pound discharge limit under the General Permit (aside from two grandfathered EPA waivers).

DEC's policy and practice of denying all waiver requests for the 10-million-pound discharge limit is in contravention of the General Permit's terms and EPA's direction (as outlined in Exhibit 7).

Through its policy and practice of denying all waiver requests, DEC effectively modified the General Permit's terms (i.e., deleting the waiver provision) without proper notice and comment or rulemaking.

SBS's July 13, 2020 waiver request met the requirements for a waiver of the discharge limit set forth in the General Permit.

The exceedance proposed in SBS's July 13, 2020 waiver request did not violate State water quality standards, and there is no evidence that it did.

When denying SBS's July 13, 2020 waiver request, DEC failed to consider or recognize that the proposed exceedance did not violate State water quality standards.

4. Good Cause Exists for Supplementing the Record.

Pursuant to 18 AAC 15.245, there is good cause for allowing SBS to supplement the record here, including but not limited to Ms. Hanson's affidavit which explains DEC's stated position on how discharging material into the same river through a neighboring facility would satisfy the General Permit's requirements. Further, SBS submitted its waiver request and affirmatively requested feedback from DEC if any additional facts or information was required to evaluate his request. DEC did not indicate that the waiver request was deficient and instead issued its decision just two days later (without requesting or permitting SBS to provide any additional information).

SBS could not reasonably have ascertained that DEC was categorically rejecting waiver requests, in contravention of EPA guidance, when SBS filed its initial waiver request. Nor could SBS have known that DEC would reject SBS's waiver request when there appeared to be no dispute that the additional discharge will not violate State water quality standards. Likewise, SBS was not aware (at the time of the original waiver request) that DEC believed SBS could comply with the General Permit by discharging the same material into the same river from a neighboring facility. If SBS was aware of DEC's position, it would have provided additional information and evidence regarding why DEC's approach made no sense: If SBS could discharge the same waste into the river through a neighboring facility's outfall without impacting water quality standards,

then obviously discharging that excess waste through SBS's outfall would also not impact water quality standards and the waiver should therefore have been granted.³⁰

³⁰ See 18 AAC 15.245(1), (2).