

**BEFORE THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

In the Matter of: )  
SOUTHEAST ALASKA CONSERVATION )  
COUNCIL and COOK INLETKEEPER, )  
Requestors, ) General Permit No.  
v. ) 2013DB0004  
ALASKA DEPARTMENT OF )  
ENVIRONMENTAL CONSERVATION, )  
DIVISION OF WATER, )  
Respondent. )  
\_\_\_\_\_ )

**Decision**

This request for an adjudicatory hearing involves the Marine Discharge of Treated Sewage, Treated Graywater, and Other Treated Wastewater from Large Commercial Passenger Vessels Operating in Alaska, General Permit No. 2013DB0004 (General Permit). The General Permit was issued on August 29, 2014. The Southeast Alaska Conservation Council and Cook Inletkeeper (SEACC) timely filed a request for informal review under 18 AAC 15.185 and subsequent request for adjudicatory hearing under 18 AAC 15.200.

**I. Facts**

On August 29, 2014 the Department of Environmental Conservation, Water Division (Division) issued the final General Permit in this case. The permit authorizes the discharge of treated sewage, treated graywater, and other treated wastewater in accordance with the permit's terms and conditions and was effective on issuance. 18 AAC 15.200(a). Prior to issuance, the Division issued a proposed draft General Permit which was subject to public comment from April 8, 2014 through May 23, 2014. During this comment period, SEACC, as well as other parties, provided comments to the Division on the draft decision. When the Division issued the final General Permit, it also issued a Fact Sheet which set out the process undertaken by the Division in issuing the permit and the rationale for various decisions in the permit. The Division also issued a document responding to comments made during the public comment period.

SEACC requested an informal review of the General Permit under 18 AAC 15.185. Director Hale, Director of the Water Division, granted the request for informal review and subsequently issued a preliminary decision on November 12, 2014 which upheld the Division's findings on almost all of the issues raised, except that she remanded two issues to the Division for further review. The Division provided an analysis of these two issues in a Revised Fact Sheet, effective November 26, 2014. In her final decision on the informal review, based on the Division's analysis and her other findings of November 12, 2014, Director Hale declined to make changes to the General Permit.

SEACC requested an adjudicatory hearing "on the final remand decision issued on November 26, 2014" pursuant to 18 AAC 15.200(a). SEACC asserts, and the Division disputes, that the General Permit, upheld by Director Hale, raises "serious legal and program issues regarding implementation of the State's mixing zone regulation and antidegradation policy..." SEACC Request for Adjudicatory Hearing Brief at 1. SEACC seeks a hearing on the existing agency record and written briefs regarding disputed and significant issues of law and policy, not an adjudicatory hearing on disputed factual issues.

On March 16, 2015, after considering SEACC's request for adjudicatory hearing, the Division's opposition, and SEACC's reply, I issued a Request for Additional Information (Request). In that Request, I did three things: 1) I set out what I believed were SEACC's appeal points 2) I requested clarification for some of the points on appeal as to what legal issue was raised in the request for hearing, and 3) I requested that SEACC, for the majority of the identified points on appeal, describe where they, or any other commenting party, provided comments to the Division during the public comment period for the General Permit. This last request sought information as to where the issues raised in the appeal had been raised during the public comment period in order to satisfy 18 AAC 15.245.<sup>1</sup> I received responses to this Request from both SEACC and the Division.

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<sup>1</sup> 18 AAC 15.245 states, in pertinent part, that "[a] party may not raise an issue of fact or a question of law that was not raised timely to the department before the department's issuance of the contested decision unless the party shows good cause for the failure to raise each matter."

## II. Issues Raised by SEACC in Their Request for Adjudicatory Hearing

In their request for adjudicatory hearing, SEACC is not requesting a factual hearing, but rather a hearing on the existing agency record and written briefs because the only issues raised are issues of law. SEACC's issues on appeal are as follows:<sup>2</sup>

Issue 1 as stated in SEACC's Hearing Request – *“Extrapolation of Determination about the Size of Mixing Zones for Discharges at Speeds Less Than 6 Knots in all Marine Waters of the State of Alaska from the Results of the Reasonable Potential Analyses for Juneau and Skagway Harbors is Arbitrary.”*

1(a) – The Division acted arbitrarily in establishing the mixing zone by failing to classify the harbors as “ocean” rather than “coastal/estuary.”

1(b) – The Division acted arbitrarily in setting the mixing zone by making Juneau and Skagway harbors representative of all other Alaska marine waters for purposes of the permit.

1(c) – The Division acted arbitrarily in setting the size of the mixing zone by modeling the Skagway Harbor as a uniform (non-stratified) environment rather than a stratified environment.

1(d) – For ships that cannot meet the acute aquatic life water quality criteria within 15 minutes, the Division states that it will not authorize a mixing zone. The Division's decision to allow a mixing zone based on the information provided in a Notice of Intent is arbitrary because the Notice of Intent will not provide the information necessary to make this determination.

Issue 2 as stated in SEACC's hearing request – *“Failure to Consider Cumulative Effects of Multiple Discharges on Uses of Receiving Waters.”*

2(a) – The Division arbitrarily failed to consider cumulative effects of multiple discharges on uses of receiving waters. Specifically listed are the Juneau Wastewater Treatment Plant, the Skagway Municipal Wastewater Treatment Plant and Pullen Creek.

Issue 3 as stated in SEACC's hearing request – *“Mixing Zones Impermissible if Discharge Forms a Barrier.”*

3(a) – The Division arbitrarily failed to consider available evidence before authorizing a mixing zone at Pullen Creek.

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<sup>2</sup> Using the section headings provided by SEACC, I set out my understanding of the issues raised by SEACC in my Request for Additional Information. The listing in this Decision incorporates “corrections” to the statement of issues as provided by SEACC in their response to my Request for Additional Information.

Issue 4 as stated in SEACC's hearing request – *“The Division Failed to Mitigate Adverse Effects of Mixing Zones in Juneau Harbor.”*

4(a) – The Division acted arbitrarily in setting the mixing zone by modeling the Juneau Harbor ambient ammonia level differently than it did for the Juneau/Douglas Wastewater Treatment Facility permit.

4(b) – The Division acted arbitrarily in establishing the mixing zone by setting the ambient copper level by considering both Gastineau Channel data collected by Echo Bay Mines and data collected from Hawk Inlet and by averaging the data.

4(c) – The Division acted arbitrarily in setting the mixing zone by modeling the Juneau Harbor ambient tide velocity differently than it did for the Juneau/Douglas Wastewater Treatment Plant permit.

Issue 5 as stated in SEACC's hearing request – *“CORMIX Modeling Errors Dooms (sic) DEC's Mixing Zone Determination.”*

5(a) – The Division's mixing zone determination was arbitrary because the Division modeled the harbors as ocean rather than coastal/estuary.

5(b) – The Division's mixing zone determination was arbitrary because the Division failed to consider available data to run unsteady state modeling in Juneau Harbor.

5(c) – The Division's mixing zone determination was arbitrary because it modeled the discharge of wastewater while docked as an unbounded environment rather than a bounded environment.

5(d) – The Division's mixing zone determination was arbitrary because it failed to model wind speed using available data for the Juneau Harbor.

5(e) – The Division's mixing zone determination was arbitrary because it modeled density distribution of ambient water in Skagway and Juneau differently.

Issue 6 as stated in SEACC's hearing request – *“Allowing Large Cruise Ships to Degrade Tier II Waters without Notifying the Public about the Nature and Location of Specific Discharges Violates Alaska's Antidegradation Policy.”*

### **III. Applicable regulations**

The commissioner will grant a request for a hearing on the existing agency record and on written briefs “if the commissioner finds that the request does not raise a genuine issue of disputed fact material to the decision but does raise a disputed and significant issue of law or policy....” 18 AAC 15.220(b)(3).

In addition to the requirement that the request raise a disputed and significant issue of law or policy, 18 AAC 15.245 states, in part, that “[a] party may not raise an issue of fact or a question of law that was not raised timely to the department before the department’s issuance of the contested decision unless the party shows good cause for the failure to raise each matter.” See *Trustees for Alaska v. State, Department of Natural Resources*, 865 P.2d 745 (Alaska 1993)(party must raise issue during administrative proceeding to preserve issue for appeal – here Trustees did raise the relevant issue before DNR in their comments), citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978) (“incumbent upon intervenors who wish to participate [in agency proceedings] to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors’ position and contentions.”); see also *Cook Inlet Keeper v. State*, 46 P.3d 957, 966 (Alaska 2002)(party must meaningfully raise an issue in administrative proceedings so as to preserve it for appeal by alerting agency to party’s position and contentions – here Cook Inletkeeper appropriately commented during public comment period). The Division must have been provided with notice of the issue raised so that the Division had an opportunity to consider the issue and address it in its final decision and/or the accompanying decision documents.

In its response to my Request for Additional Information, SEACC argues that it is appealing the decision on the informal review, and all of the issues it raised in the informal review should be considered in the instant review even if they were not raised during the public comment period. I don’t agree. There is no provision in the applicable regulations for an appeal of the decision coming out of an informal hearing. A dissatisfied party may timely request a formal adjudicatory hearing, but that review process is subject to the requirements of 18 AAC 15.245, which as noted above, limits issues of fact or law to those raised in the public process before the department’s issuance of the contested decision, which in this case is the General Permit itself. 18 AAC 15.010(e).

#### IV. Issues Appropriate for a Hearing on the Briefs

After careful review of the briefs, the cited material and the caselaw, I find that the only issue appropriately raised by SEACC during the public comment period, and therefore meeting the requirements of 18 AAC 15.220 and 18 AAC 15.245, is the following:

Does allowing large cruise ships to degrade tier II waters without notifying the public about the nature and location of specific discharges violate Alaska's Antidegradation Policy?<sup>3</sup>

#### **Order**

The hearing on this matter is referred to the Office of Administrative Hearings pursuant to AS 44.64.030(b).

I have made a determination that only one point on appeal was raised before the Division during the public comment period. This determination does not foreclose the opportunity for SEACC to, by motion, argue good cause as to other issues under 18 AAC 15.245.

Dated: May 15, 2015  
Anchorage, Alaska

  
Larry Hartig, Commissioner

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<sup>3</sup> SEACC Request for Adjudicatory Hearing Brief at 12-13. With respect to cumulative impacts, SEACC raised the following issue: The Division arbitrarily failed to consider cumulative effects of multiple discharges on uses of receiving waters. Specifically listed are the Juneau Wastewater Treatment Plant, the Skagway Municipal Wastewater Treatment Plant and Pullen Creek. SEACC did not raise cumulative impacts or the Juneau Wastewater Treatment Plant, Skagway Municipal Wastewater Treatment Plant or Pullen Creek during the public comment period. While two comments did raise the issue of cumulative effects related to Skagway harbor generally and Sitka harbor specifically, the Division explained how it accounted for cumulative impacts in its response to comments (response to comments 103 and 104). These responses describe how the Division considered cumulative impacts in making its mixing zone determination. SEACC has not disputed *how* the Division considered cumulative impacts but *whether* the Division considered cumulative impacts. The specific appeal issue set forth by SEACC was not raised during the public comment period and is therefore not ripe for appeal. Even if the issue of cumulative impacts generally was raised during the public comment period, the Division considered it in setting the mixing zone and therefore this issue is not appropriate for a hearing on the briefs, as requested by SEACC.