

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM 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.)	
)	
DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF WATER)	
)	
Respondents.)	

OAH No. 23-0553-DEC

**ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
DIVISION OF WATER’S RESPONSE BRIEF**

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Department of Law, Civil Division
 1031 W. 4th Avenue, Suite 200
 Anchorage, AK 99501
 Phone: (907) 269-5232 Fax: (907) 276-3697

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Department of Law, Civil Division

1031 W. 4th Avenue, Suite 200

Anchorage, AK 99501

Phone: (907) 269-5232 Fax: (907) 276-3697

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INTRODUCTION

On November 13, 2023, the Commissioner of the Alaska Department of Environmental Conservation granted the Requesters an adjudicatory hearing on four issues identified by the requesters that relate to terms of the Alaska Pollutant Discharge Elimination System (“APDES”) General Permit AKG130000. On September 29, 2023, the Commissioner granted the Requesters a stay of the Permit including the two provisions in question.

The merits were, and continue to be, married to language of the Department’s regulations and the facts in the record. The Department’s regulations tolerate zero deposits on the seafloor for any length of time. The hatcheries deposit feed, excrement, and other sludge on the seafloor – sometimes inches deep, sometimes 90% of the seafloor under a pen. The Water Transfer Rule, a rule promulgated by EPA, does not provide safe refuge for intervening uses, like when thousands of fish hatch, are fed, die, decay, defecate and live in the water for years at a time. The Water Transfer Rule does not provide safe refuge for intervening uses that significantly change the pH of the water before it is discharged.

Neither do the cases cited by Requesters. *South Florida* and *LA County* do nothing to upend the explicit language of the Transfer Rule, do not purport to create new exceptions to the Clean Water Act, and generally, as stated previously, are inapposite. The Requesters appeal should be denied.

BACKGROUND

All of the Requesters' facilities at issue here are cold water concentrated aquatic animal production ("CAAP") facilities. A cold water CAAP contains cold water fish species and discharges aquatic animal rearing waste and wastewater at least 30 days per year.¹ It also produces at least 20,000 pounds of aquatic animals per year (harvest weight) or feeds animals more than 5,000 pounds of food on any given month.²

All of this production and feeding creates an equivalent amount of waste, and the CAAP facilities at issue here "rely on a steady water supply from seawater, surface water, or groundwater for production" of fish and removal of waste.³ During fish production, CAAP facilities produce numerous pollutants.⁴ 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 ADPES permit, which is a permit under section 402 of the Clean Water Act ("CWA"),⁵ or an exception such as those at 40 C.F.R. § 122.3.

APDES permits set limits on discharges based on technology-based effluent limitations and water quality based effluent limitations ("WQBEL"). Both limitations

¹ ADEC 000028

² *Id.*

³ ADEC 000027.

⁴ ADEC 000027.

⁵ 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. State Program Requirements; Approval of Application for Program Revision to the National Pollutant Discharge Elimination System (NPDES) Program; Alaska, 76 Fed. Reg. 52658 (Aug. 23, 2011). The Alaska Department of Environmental Conservation, therefore, has the authority to administer the NPDES program as a State APDES program, with oversight from the EPA.

are based in state and federal laws and regulations. The standards at issue here, WQBELs, are based in Section 303 of the CWA,⁶ and AS 46.03.710, among others. WQBELs are standards set by the State and are based on the designated usage of each waterbody. In Alaska, all waterbodies are designated for all uses, and are thus protected by all standards, with the most stringent requirements of all standards applying at all times.⁷

CAAP discharges, such as those at issue here, are governed under a general permit (e.g. AKG130000) that is issued approximately every five years.⁸ These permits are routinely updated on the basis of new information.⁹ The Requesters challenge two permit provisions: (1) pH limits; and (2) seafloor monitoring.¹⁰

I. pH Limits

The prior permit required permittees to routinely monitor the pH of their source water and discharge, as well as sample the pH of the waterbody into which they discharged at least once a year.¹¹ That information was then submitted to the Division and demonstrated that CAAP hatcheries undeniably have a statistically significant reasonable potential to cause or contribute to an exceedance of pH Water Quality

⁶ 33 USC § 1313.

⁷ 18 AAC 70.020, .040, .050

⁸ See ADEC000055.

⁹ 33 U.S.C. § 1342(a)(4), (b)(1)(c), 18 AAC 83.405(g), (i), 83.425(a), 83.435, 83.455.

¹⁰ Though given the Requester's broad claims it can also be read as a challenge to the WQS itself. An impermissible one given the WQS has been in effect for decades. Alaska Register 166, July 2003.

¹¹ ADEC 001066 – 67.

Standards (“WQS”) in the receiving water.¹² WQBELs, therefore, are required in the permit under 18 AAC 83.435 to achieve promulgated WQS for pH.¹³

Accordingly, when the Division issued General Permit AKG130000, it included pH limits based on the WQS for pH in 18 AAC 70.020(b).¹⁴ As outlined in Table 2, that standard imposes a minimum daily effluent pH limit of 6.5 standard units and a maximum daily effluent limit of 8.5 standard units.¹⁵ The pH of the discharge also cannot deviate more than .5 standard units from that of the receiving freshwater body, or more than .2 standard units from that of the receiving marine water body.¹⁶ The pH of the influent has no bearing on WQBELs; credits for intake pollutants are only available, upon application to the Division, for technology based effluent limits which are not at issue in this appeal.¹⁷

II. Seafloor Monitoring

The prior permit forbade permittees from depositing debris on the seafloor and required assessment of the seafloor within 15 days of release of animals each season.¹⁸ Those assessments demonstrated that hatcheries were depositing residue covering, in some cases, 90% of the seafloor under net pens.¹⁹ Accordingly, the new permit added

¹² ADEC 0000115; ADEC 0000006.

¹³ *See also*, 33 U.S.C. § 1311; 40 C.F.R. § 122.44; AS 46.03.710; 18 AAC 70.020, .040, .050.

¹⁴ ADEC 0000115; ADEC 0000006.

¹⁵ 18 AAC 70.020(b)(6), (18).

¹⁶ 18 AAC 70.020(b)(6), (18).

¹⁷ *See*, 40 C.F.R. § 122.45(g); 18 AAC 83.545 and 83.430(b)(1).

¹⁸ ADEC 0001067.

¹⁹ *See, e.g.*, ADEC 0003836 (Benthos Monitoring Tab, “Bacterial Mats Estimated %”).

additional reporting requirements and gave permittees a larger time window in which to conduct their assessments. The changed provision is contained in Part 3.3.2, which provides:

[w]ithin 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].²⁰

Subparts to Part 3.3.2 elaborate that detectable residues on the seafloor trigger the requirement for a noncompliance report and that “detectable” means “any amount of observable residue deposits.”²¹ It further clarifies that, “in general,” deposits “must be greater than 2% coverage in a 3-foot by 3-foot sample plot to be detected.”²²

This permit condition is based on the WQS found in 18 AAC 70.020(b)(20)(A)(ii), (C), and (D).²³ According to (C), the broadest restriction that also encompasses (A) and (D), “human activities”

[m]ay not, alone or in combination with other substances or wastes, make the water unfit or unsafe for the use, or cause acute or chronic problem levels as determined by bioassay or other appropriate methods; **may not**, alone or in combination with other substances, cause a film, sheen, or discoloration on the surface of the water or adjoining shorelines; cause leaching of toxic or deleterious substances; or cause a sludge, solid, or emulsion to be deposited beneath or upon the surface of the water, within the water column, on the bottom, or upon adjoining shorelines.²⁴

²⁰ ADEC 0000072.

²¹ ADEC 0000072.

²² ADEC 0000072.

²³ Req. Opening Br. at 13; 18 AAC 70.040.

²⁴ 18 AAC 70.020(b)(20)(C) (emphasis added).

The plain language used in this standard includes numerous prohibitions.

The commands and the punctuation in the provision set out each prohibition and this standard is was included in the General Permit AKG130000.

STANDARD OF PROOF

Requesters carry the burden of proof, and the standard of proof is a “preponderance of the evidence.”²⁵ “To prove a fact by a preponderance of evidence, a party with the burden of proof must show that the fact more likely than not is true.”²⁶

Requesters have the burden of proving they are eligible for an exemption to the CWA.²⁷ This includes application of the water transfer rule or intake credit for existing pollutants.²⁸ Claims of an exemption must be narrowly construed from the “permitting requirements of the [CWA's] broad pollution prevention mandate ... to achieve the Act's purpose.”²⁹

ARGUMENT

I. Requesters Subject Withdrawn Water to Intervening Use that Causes Statistically Significant Change in pH

Requesters argue that the 2023 Permit’s pH limit is contrary to law because: (1) their hatcheries do not change the pH of the water they use and any exceedances of pH

²⁵ 2 AAC 64.290.

²⁶ *Id.*

²⁷ *Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1108 (D. Haw. 2019) (citing *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967)).

²⁸ *Id.*

²⁹ *Id.* (quoting *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007) (alteration in original)).

limits are solely caused by the pH of the influent; and (2) they are merely pumping water between two parts of the same water body in a manner that cannot constitute a discharge under *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004). The first argument is factually incorrect. The second is legally unsupported.

a. CAAP Facilities Significantly Impact pH Levels

The basis of the requesters' pH argument is the false premise in the very first sentence of their statement of facts: "[h]atcheries do not materially change the pH of the water that passes through their facilities."³⁰ As support, they cite a proposed effluent limitation in a draft of an EPA permit for a single hatchery that is not a facility at issue here.³¹ Requesters ignore that the standard that is the basis of the limitation they dispute is a state WQS, not an EPA standard.³² Since state law defines the standards, and the Division of Water is the agency that administers the APDES Program under the Clean Water Act, including the authority to permit wastewater discharges,³³ Requesters citation to an EPA permit for a hatchery not at issue in this appeal is hardly compelling evidence of an error by the Division.

Moreover, Requesters seem to imply that the Commissioner should skip right past the Division's factual findings that "hatchery discharges do have a statistically

³⁰ Requesters Opening Br. at 3.

³¹ *Id.* (citing ADEC 003680).

³² See 40 C.F.R. § 122.44(d) (NPDES permits must contain any requirements necessary to achieve state water quality standards).

³³ State Program Requirements; Approval of Application for Program Revision to the National Pollutant Discharge Elimination System (NPDES) Program; Alaska, 76 Fed. Reg. 52658 (Aug. 23, 2011).

significant reasonable potential to cause or contribute to an exceedance of pH WQS in the receiving water.”³⁴ For example, one of the Hatchery Operators (SSRAA) operates the Crystal Lake, Neets Bay, and Whitman Lake Hatcheries. From 2019 to 2022, there were 55 months during which the influent at these hatcheries was within the permissible range for pH³⁵ but during 17 of those months those facilities’ use of the water made the effluent impermissibly acidic.³⁶ Thus, almost a third of the time that Requesters’ source water would be within the permissible range of the WQS, the Requesters’ use of that water altered the pH to a degree that caused it to violate WQS.

These are not *de minimis* changes either. Neets Bay, for example, changed their pH by .72 Standard Units.³⁷ This is anything but “quite close” as Requesters’ claim.³⁸ The pH scale is logarithmic and a change of .72 Standard Units is a 525% change in acidity. By comparison to the Division’s regulations for discharges to marine waters, any variation beyond .2 Standard Units unacceptable.³⁹ Requesters’, therefore, cannot credibly argue that a .72 Standard Unit change is somehow insignificant.

Moreover, a review of the Requester annual reports shows that in 2022, every single hatchery that complied with pH reporting requirements changed the pH of the

³⁴ ADEC 000115.

³⁵ ADEC 005375.

³⁶ ADEC 005375. Because some hatcheries did not perform the required monitoring, it is likely more facilities violated the pH WQS.

³⁷ ADEC 5375.

³⁸ Requesters’ Opening Br. at 5.

³⁹ 18 AAC 70.020.

water they used by at least .45 S.U during one or more reporting periods.⁴⁰ The 2022 Annual Report for the Solomon Gulch Aquaculture Facility demonstrates just how large of an impact hatcheries can have.⁴¹ That report demonstrates that in August 2022, the pH of the influent at that facility was 8.5, at the very top of the permissible range. After the hatchery was done using the water its effluent had a pH of 6.4 – below the entire permissible range.⁴² This hatchery had such an immense impact on the pH of the water they used that it came in as basic as was permissible and left more acidic than it was allowed to be. This is a change of 2.1 Standard Units representing a 12,589% increase in acidity. This facility is not a major outlier either. Of the 17 hatcheries that complied with pH reporting requirements in 2022, 5 further hatcheries also made their discharge more than an entire unit of pH more acidic, meaning 1000% more acidic, than their intake water.⁴³

The Departments decision to include pH limitations in the Requester’s permit is, therefore, required by the law and based on substantial evidence that Requesters’ operations do in fact change the pH. Because Requesters’ facilities change pH, this

⁴⁰ See EDMS Map Explorer, Mar. 20,2024, <https://dec.alaska.gov/Applications/Water/EDMS/nsite/map/help> for 2022 annual reports for Permit Numbers akg130002 – 11, akg130013, akg130015 – 19, akg130021 – 27, akg130029 – 31, and akg130033. (Enter permit number in search, click “show more information,” go to the “documents” tab, and find their 2022 Annual Report, also sometimes called “AR.” Skipped numbers either were inactive in 2022 or did not discharge). These materials, and facts therein, may be considered by this Tribunal pursuant to Alaska R. Evid. 201(b) (requiring judicially noticed fact “be one not subject to reasonable dispute”).

⁴¹ 2022 Annual Report for VFDA Solomon Gulch Aquaculture Facility, EDMS Map Explorer, Mar. 20, 2024, <https://dec.alaska.gov/Applications/Water/EDMS/nsite/map/results/detail/4705094749087568136/documents>. (go to page 3 of EDMS viewer results and select “akg130029 AR 2022.pdf.”)

⁴² *Id.* at 32.

⁴³ Follow instructions in footnote 26 for Annual reports from AKG130018, AKG130011, AKG130022, AKG130016, and AKG130021.

tribunal has no need to address their claim of an exception under the CWA as they are demonstrably adding pollutants to the Waters of the United States.

b. Discharge of Waters Used to Raise, Feed, and Sustain Fish is an Addition of All Contained Pollutants to WOTUS

Even assuming arguendo that hatcheries have no impact on pH, Requesters' argument still fails as a matter of law. WQBELs under State regulations apply regardless of the pH of the influent water withdrawn and used by the hatcheries.

i. A Permit is Necessary to Convey Intake Pollution to WOTUS

First, we begin with the actual holding of *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Like the Requesters here, in *South Florida* the petitioner's argued that the "NPDES program applies to a point source only when a pollutant originates from the point source, and not when pollutants originating elsewhere merely pass through the point source."⁴⁴ Requesters either miss, or misrepresent, that the Supreme Court held that such an argument is "untenable" and said that the "definition makes plain that a point source *need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'*"⁴⁵ Thus, for example, wastewater treatment plants that "treat and discharge pollutants added to water by

⁴⁴ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104 (2004) (quotes omitted)

⁴⁵ *Id.* at 105 (emphasis added).

others” require APDES permits.⁴⁶ The Requesters, therefore, require an APDES permit because they gather, treat, and discharge to Waters of the United States (“WOTUS”).⁴⁷

Instead of acknowledging this holding, Requesters cite *South Florida* for secondary issues on which the court did not make a final judgment. They claim, for example, that the Supreme Court “recognized” the unitary water theory—an idea that all WOTUS are the same—as if to imply that the Supreme Court endorsed it. That is not correct. The Supreme Court may have acknowledged the existence of the unitary water theory, however they refused to rule on it as a previously unraised matter. If the theory were true, the Supreme Court found this “approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body”⁴⁸ – not, for example, when it is discharged after animal rearing waste, cleaning chemicals, and medications have been added to the water.⁴⁹ The Court also noted that the existence of state water quality standards for individualized water bodies demonstrated that the CWA “protects individual water bodies as well as the waters of the United States as a whole.”⁵⁰

⁴⁶ *Id.* at 105.

⁴⁷ *Id.*

⁴⁸ *Id.* at 107–08 (emphasis added).

⁴⁹ Division Opp. Stay at 19 (citing Affidavit of Director Gene McCabe).

⁵⁰ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104 (2004) (Internal quotes omitted). It should be noted, as the Eleventh circuit said, “[t]he unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate.” *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (collecting cases in First, Second, Ninth, and Eleventh Circuits that have historically taken a dim view of the unitary waters theory). This persisted until the EPA adopted the WTR, a regulation the circuit held—in regards to the *South Florida* case—to be “addressing this specific matter.” *Id.* at 1213, 1216–17.

Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc. does not modify the central holding of *South Florida*. In *LA County*, polluted water was carried through a concrete-lined portion of a river and then returned to unlined portions of the river.⁵¹ In that case, “rather than being removed and then returned to a water body” as in *South Florida*, the water in that case “simply flow[ed] from one portion of the water body to another” and was not an “addition” of pollutants to a navigable water because those portions were not meaningfully distinct.⁵² In either *South Florida* or *LA County*, if the water had been diverted, used, altered, and returned, the Court would have found the addition of a pollutant requiring an NPDES permit.

That’s exactly what the Court did in *Na Kia’i Kai v. Nakatani*.⁵³ In that case, the court held that a system of drainage ditches that gathered polluted waters and ultimately discharged those waters to the Pacific could not be exempted because pollutants from the drainage ditches themselves were collected and discharged to a WOTUS.⁵⁴ The waters, once they were gathered into the drainage ditches, were not protected as WOTUS, and thus could not be transferred to a WOTUS without an NPDES permit.⁵⁵ The “unsound premise” that Requesters implicitly offer, and that *Na Kia’I Kai* rejects, is that the hatchery facilities are WOTUS when in reality, the hatcheries are altering the pH, adding other pollutants, and fundamentally affecting the quality of the water.

⁵¹ 568 U.S. 78, 82 (2013).

⁵² *Id.* at 83.

⁵³ *Na Kia’i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1106 (D. Haw. 2019).

⁵⁴ *Id.*

⁵⁵ *Id.*

ii. EPA and ADEC Regulations Demonstrate that Water Quality Standards Must be Met Notwithstanding Intake Pollution

Requesters argue that *South Florida* means intake pollutants are exempt from CWA requirements because they do not add pollution to WOTUS.⁵⁶ However, in addition to *South Florida*'s plain holding that dischargers do not need to be the source of a pollutant, the Supreme Court cites regulations that explicitly describe the specific circumstances under which discharges of intake pollution do not require NPDES permits.⁵⁷ These regulations allow technology based effluent limitations, but not the WQBEL at issue in this appeal, to be adjusted to compensate for intake pollution. If the Requesters' view of *South Florida* was correct, those regulations—which the Supreme Court cites without issue—would be impermissible as they limit the circumstances under which intake pollutant variances are allowed.

The Supreme Court cites 40 C.F.R. § 122.45, *Calculating NPDES permit conditions*. It provides at (g)(1) that “[u]pon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger’s intake water if: ...the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made.”⁵⁸ These are known as “Intake Allowance” or “Net/Gross Variance” regulations.⁵⁹ As the language

⁵⁶ Requesters’ Opening Br. At 11 – 12.

⁵⁷ See e.g., 40 C.F.R. § 122.45; 40 C.F.R. § 129.6; 40 C.F.R. § 403.15; 40 C.F.R. § 436.122(b).

⁵⁸ 40 C.F.R. § 122.45(g) (emphasis added).

⁵⁹ U.S. EPA NPDES Permit Writers Manual, p. 5-42 (September 2010) (available at https://www.epa.gov/sites/default/files/2015-09/documents/pwm_2010.pdf).

indicates, only technology-based limitations may be adjusted; WQBEL such as the ones here, however, may not be adjusted. Similar regulations exist under Alaska law, such as 18 AAC 83.545 and 83.430(b)(1), and just like the federal regulations they do not apply to WQBELs like the ones at issue here.

The Court in *South Florida* was very aware of these regulations when making their decision but identified no conflict between them and their holding.⁶⁰ This is because their holding only applied to situations where the water was not being put to an intervening use and did not entirely exempt intake pollution from CWA requirements in the manner Requesters wish.

iii. The Water Transfer Rule Demonstrates Reintroduction of Withdrawn Intake Pollutants is an Addition to WOTUS

Requesters ignore *South Florida's* citation to these intake variance regulations to claim it created an exception to the CWA for all intake pollution no matter the nature or extent of the intervening use so long as waters were meaningfully indistinct.⁶¹ Yet, Requesters fail to identify any test that was established on remand for determining when waters were meaningfully indistinct. This is because of the enactment of the Water Transfer Rule, a rule the Eleventh Circuit held was addressing the specific questions left from *South Florida* and found worthy of deference.⁶² The Water Transfer Rule

⁶⁰ 541 U.S. 95 at 107.

⁶¹ Requesters' Opening Br. at 11 – 12.

⁶² *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1213 (11th Cir. 2009).

conclusively demonstrates that any pollutants in water withdrawn from WOTUS and reintroduced after use are an addition of pollutants and require a permit.

The Water Transfer Rule does not attempt to undermine *South Florida*, it is just on the precise questions remaining on remand.⁶³ *South Florida* was not about what happens when water is used before it is discharged, it was about a plain water transfer from WOTUS to WOTUS.⁶⁴ It left two questions unanswered for remand. First, whether the Unitary Waters Theory applied so that all water transfers between WOTUS were permissible. And second, what is meant by meaningfully distinct, because even if the Unitary Waters Theory does not apply, a transfer between meaningfully indistinct water bodies did not need a permit.⁶⁵ The judicially deferred to Water Transfer Rule resolved both those questions by formalizing how the Unitary Waters Theory applies and ensuring that no meaningfully distinct analysis is necessary. Thus, when the Division is arguing that the Requesters “use” of the water makes *South Florida* inapposite, it is not because of anything to do with the human intervention test for meaningful distinction, but because that withdrawal of the water for use makes it no longer a WOTUS or eligible for the Unitary Water Theory, Water Transfer Rule, or meaningful distinction analysis.

⁶³ *Id.*

⁶⁴ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) (“What the Tribe disputes is the accuracy of the District’s factual premise; according to the Tribe, C-11 and WCA-3 are two pots of soup, not one.”).

⁶⁵ *Id.* at 109 – 112.

EPA has expressly stated in its Proposed Water Transfer Rule that the addition of a pollutant into WOTUS includes physical reintroduction of withdrawn water and any associated pollutants when water is put to an intervening use.⁶⁶ To avoid any ambiguity and resolve any doubt, EPA’s discussion of the scope of the rule as it relates to reintroduction of pollutants is set out below:

This proposed rule would not affect EPA’s longstanding position that, **if water is withdrawn from waters of the U.S. for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an ‘addition’ subject to NPDES permitting requirements.** EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 CFR 122.2 (definition of process wastewater); 40 CFR 125.80-125.89 (regulation of cooling towers); 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Moreover, a discharge from a waste treatment system, for example, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 CFR 122.2. These situations are distinguished from the water transfers that are the subject of this notice because if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of that intake water and associated pollutants physically introduces pollutants from the outside world into navigable waters and, therefore, is an “addition” subject to NPDES permitting requirements. **The fact that some of the pollutants in the discharge may have been present in the source water does not remove the need for a permit,** although, under some circumstances, permittees may receive “credit” in their effluent limitations for such pollutants.⁶⁷

As the EPA explained further in its Final Rule:

⁶⁶ National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (June 7, 2006).

⁶⁷ See National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (June 7, 2006) (referring to credit from intake allowance regulations discussed supra at ____).

if the water is withdrawn to be used as cooling water, drinking water, irrigation, **or any other use** such that it is no longer a water of the U.S. before being returned to a water of the U.S., the water has been subjected to an intervening use. In contrast, a water pumping station, pipe, canal, or other structure **used solely to facilitate the transfer of the water** is not an intervening use.⁶⁸

Thus, water *cannot* be discharged from the hatcheries without a permit because the water has lost its status as “waters of the United States” due to the intervening use and addition of various materials to raise fish prior to being discharged.⁶⁹ This means it is not part of the Unitary WOTUS and any pollutants it contains, even what it drew from WOTUS originally, are added to WOTUS on discharge.

Thus, whether and to what extent the waters involved in the Requesters appeal are “meaningfully distinct” is irrelevant – the inquiry is not whether there is one or two pots, but what happens to the soup when it is withdrawn by the hatcheries.⁷⁰ To borrow Requesters’ favorite analogy, it is as if someone ladled some soup into a bowl, raised fish in it, fed and medicated fish in it, and then poured their bowl back into to the pot as if nothing had occurred.

Even if a meaningfully distinct analysis was appropriate here, some of the requesters’ own examples from the supplemental record, such as Whitman Lake hatchery, demonstrate that the waters here are meaningfully distinct. As Requesters state, the Whitman Lake Hatchery draws water from Whitman Lake which drains to the

⁶⁸ National Pollutant Discharge Elimination System (NPDES) Water Transfers Final Rule 73 Fed. Reg. 33697 at 33704 (June 13, 2008) (emphasis added).

⁶⁹ 73 Fed. Reg. at 33701.

⁷⁰ *Id.*

ocean. However, it discharges its pollution to Herring Cove Creek and its estuary, a totally separate river system.⁷¹ Requesters attempt to ignore that discrepancy by saying that both river systems discharge to the ocean, like the majority of other river systems in the world. There is no data in the record whatsoever to suggest that Whitman lake and Herring Cove Creek are related in any way. The mere fact that all water ends up in the ocean is not sufficient to say that all waters are indistinct. This inconsistency in their argument is why requesters falsely imply *South Florida* approved the unitary waters theory. They appear to argue that, because all WOTUS are one, even if they discharge into a totally different river system than their source water comes from, they were simply pumping water between two parts of the same water body. This direct undermining of the purposes of the CWA is one of the reasons the Supreme Court expressed skepticism of the Unitary Waters Theory, and all the courts that have considered the Unitary Waters Theory outside of the context of the WTR have rejected it. *See, South Florida*, 541 U.S. at 107–08, *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

II. State Water Quality Standards Prohibit the Deposition of Any Material on the Sea Floor and Permit Protocols for Monitoring and Surveys Do Not Negate or Nullify Those Standards

Requesters argue that the monitoring methods the Department has adopted to determine compliance with feed management conditions and net cleaning are arbitrary

⁷¹ Requesters' Opening Br. at 5.

and capricious.⁷² Requesters identify two issues: (1) whether 18 AAC 70.020 prohibits any solids from touching the seabed; and (2) whether visual observation that must be made within 60 days is arbitrary and capricious.

a. 18 AAC 70.020(b)(20) Prohibits Deposition of Any Residues on the Seafloor for Any Length of Time

Requesters claim that that the Division ignores “one element of the applicable WQS in favor of a different element” and when read together, “it is apparent that the WQS does, indeed, tolerate *de minimis* or transient deposition, so long as it does not make the water (or seafloor) unfit or unsafe for the protected use.”⁷³ To deconstruct this straw man, let us begin, as we must, with the plain language of the regulation.⁷⁴

Permit Condition 3.3.2.4 says that detectable residues on the seafloor trigger the requirement for a noncompliance report, and that “detectable” means “any amount of observable residues deposits.” This permit condition is based on the water quality standard found in 18 AAC 70.020(b)(20)(A)(ii), (C), and (D).⁷⁵ According to (C), the broadest restriction that encompasses (A) and (D), “human activities”

⁷² As a preliminary matter, the arbitrary and capricious standard is inappropriate here. Courts “review an agency’s interpretation and application of its own regulations using the reasonable basis standard of review” and will defer to the agency’s interpretation “unless its ‘interpretation is plainly erroneous and inconsistent with the regulation.’” *N. Slope Borough v. State*, 484 P.3d 106, 113 (Alaska 2021) (quoting *Davis Wright Tremaine LLP v. State, Dep’t of Admin.*, 324 P.3d 293, 299 (Alaska 2014)). The Commissioner’s determination in this matter is obviously the final agency interpretation deserving deference, but review should be completed with the appropriate review standard in mind instead of the Requesters’ nebulous uncited and undefined arbitrary and capricious standard.

⁷³ Requesters’ Opening Br. at 13-14.

⁷⁴ *Barton v. JMS Assoc. Mktg., LLC*, No. 21-35836, 2023 WL 2009925, at *2 (9th Cir. Feb. 15, 2023) (“A regulation is interpreted according to the natural and plain meaning of its words. If the language is clear and unambiguous, our inquiry ends.” (Internal quotations and sources omitted)).

⁷⁵ Requesters’ Opening Br. at 13; 18 AAC 70.040.

[m]ay not, alone or in combination with other substances or wastes, make the water unfit or unsafe for the use, or cause acute or chronic problem levels as determined by bioassay or other appropriate methods; **may not**, alone or in combination with other substances, cause a film, sheen, or discoloration on the surface of the water or adjoining shorelines; cause leaching of toxic or deleterious substances; or cause a sludge, solid, or emulsion to be deposited beneath or upon the surface of the water, within the water column, on the bottom, or upon adjoining shorelines.⁷⁶

Here the WQS says an activity “[m]ay not . . . make the water unfit or unsafe for the use . . . may not, alone or in combination with other substances . . . cause a sludge, solid, or emulsion to be deposited. . .” on the bottom. The Requesters argue that the first command (“[m]ay not . . . make the water unfit”) must be read together with the second commands (“may not . . . cause a sludge, solid, or emulsion”) such that deposition of solids, sludge, or emulsions are only unacceptable if they make the water unfit for the use.⁷⁷ This reading is absurd.

First, there are two entirely independent prohibitions in this section—two commands beginning with the words “may not” separated by a semi colon.⁷⁸ Those commands are “grammatically independent, though closely related in thought” and provide two independent requirements.⁷⁹ Thus, by its structure alone, a discharge may not either make the water unfit or cause a sludge, solid or emulsion to deposit on the seafloor.

⁷⁶ 18 AAC 70.020(b)(20)(C) (emphasis added).

⁷⁷ Requesters’ Opening Br. at 13-14.

⁷⁸ *Elgin Nursing & Rehab. Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 718 F.3d 488, 494 (5th Cir. 2013) (“Clauses separated by a semicolon are presumed to be independent clauses.”).

⁷⁹ *See McLeod v. Nagle*, 48 F.2d 189, 191 (9th Cir. 1931); § 21:15. Punctuation, 1A Sutherland Statutory Construction § 21:15 (7th ed.).

Second, setting aside the most basic linguistic attributes of the provision, other provisions in the same chapter, in the same article, provide the coherent and symmetrical regulatory structure that Requesters appear to ignore.⁸⁰ Mainly, pursuant to 18 AAC 70.040(1), “if a waterbody is protected for more than one use class . . . the most stringent water quality criteria for all the included use classes will apply.”⁸¹ The most stringent water quality criteria is found in 70.020(b)(20)(C). This provision is more stringent because it includes prohibitions that (b)(20)(A) and (b)(20)(B), (C), and (D) do not. If 18 AAC 70.040(1) is to be given effect, then each of the commands in (b)(20)(C) must apply lest the language that makes it more stringent is struck so that (C) and (A) or (D) are identical, making (b)(20)(C) meaningless.⁸²

Third, because both commands in 70.020(b)(20)(C) apply, there is no *de minimis* tolerance for the deposition of “a sludge” on the seafloor. Indeed, the language of the standard makes clear that “a” must be read as an indefinite article used before a singular countable noun to indicate that “any” sludge, solid or emulsion would violate the standard.⁸³ Converted to the affirmative, no sludge, solid or emulsion may be deposited on the sea floor.

⁸⁰ Requesters’ Opening Br. at 13 (*citing Sierra Club v. U.S. E.P.A.*, 762 F.3d 971, 978–79 (9th Cir. 2014)).

⁸¹ See also 18 AAC 70.050(a)(3) (protecting marine waters for “water supply,” “water recreation,” “growth and propagation of fish,” and “harvesting for consumption of raw mollusks or other raw aquatic life”).

⁸² Compare 18 AAC 70.020 (b)(20)(A)(ii) with 18 AAC 70.020 (b)(20)(C) (using the exact same words in each: “[m]ay not, alone or in combination with other substances or wastes, make the water unfit or unsafe for the use.”).

⁸³ *Niz-Chavez v. Garland*, 593 U.S. 155, 163 (2021) (“Normally, indefinite articles (like ‘a’ or ‘an’) precede countable nouns. The examples above illustrate the point: While you might say ‘she wrote a manuscript’ or ‘he sent three job applications,’ no one would say ‘she wrote manuscript’ or ‘he sent job application.’”).

b. Seafloor Surveys for Zones of Deposit Do Not Nullify State Water Quality Standards

Requesters argue permit conditions related to seafloor monitoring and separate conditions related to seafloor surveys are both inconsistent with other provisions in the permit itself, indicate that the Division has incorrectly interpreted the appropriate WQS and, therefore, the terms are arbitrary and capricious.⁸⁴ Requesters make the same mistake back-to-back: monitoring and survey protocols and methods do not abrogate or nullify the State’s water quality standards. Rather, permit conditions give effect to the standards.

i. Monitoring Requirements Are Designed to Protect Water Quality Standards

Permit condition 3.3.2.4 requires the reporting of any detectable residues observed during an assessment, unless a Zone of Deposit (“ZOD”) has been approved.⁸⁵ “Detectable” is defined at Section 3.3.2.4.1 as “any amount of observable residues deposits,” and Section 3.3.2.4.2 provides site-specific guidance of when residue deposits have been detected.⁸⁶ “In general, seafloor surveyors have reported that deposits must be greater than 2% coverage in a 3-foot by 3-foot sample plot to be detectable.”⁸⁷ The previous permit contained a similar prohibition against deposits.⁸⁸ The changes to the permit, therefore, are: (1) reporting the results of a visual assessment

⁸⁴ Requesters’ Opening Br. at 14.

⁸⁵ ADEC0000072.

⁸⁶ ADEC0000072.

⁸⁷ ADEC 0000072.

⁸⁸ See, e.g., ADEC 001068.

to the Division; (2) including estimates of the extent of the debris; and (3) requiring a noncompliance notification report when residues are detected.

The Requesters draw tension between Condition 3.3.2.4 and Condition 3.3.2.4.2 when there is none.⁸⁹ As is made obvious by the language of the permit, “any amount of observable residues deposits” is a violation of the controlling water quality standard at 18 AAC 70.020(b)(20)(C). The following language provided at Condition 3.3.2.4.2 does exactly what it purports: it provides clarifying information about what has been detectable in the past – it does not narrow, qualify, or alter the water quality standard in 18 AAC 70.020(b)(20)(C) incorporated in Section 3.3.2.4.1. Contrary to Requesters argument, the general observation in Section 3.3.2.4.2 *works with* the standard in Section 3.3.2.4.1.

Requesters next assert that the portions of permit condition 3.3.2 are internally inconsistent because they claim 3.3.2.4 is an instantaneous standard, while 3.3.2.2 and 3.3.2.3 are longitudinal standards because 3.3.2.2 is an estimate of the area of debris, and 3.3.2.3 requires reporting growth mats under pens.⁹⁰ Once again, these provisions work together. Part 3.3.2.2 requires informing the Division of deposited debris and its area, Part 3.3.2.3 requires reporting on the presence of any mats and their area, and Part 3.3.2.4 requires submitting a noncompliance notification if residue is detectable on the seafloor. Part 3.3.2.4.1 prohibits any deposits on the seafloor, but the permittees are not

⁸⁹ Requesters’ Opening Br. at 14.

⁹⁰ *Id.* at 14 – 15.

assessing this fact daily. They must assess it within 60 days of releasing animals each season. If there is any detectable residue, Part 3.3.2.4 goes into effect, the *amount* of residue must be estimated pursuant to Part 3.3.2.2, and if *growth* mats are observed, the *extent* of those mats must be estimated pursuant to Part 3.3.2.3. Reporting requirements do not somehow abolish the purpose of the observations which is, of course, whether the standard at 18 AAC 70.020(b)(20)(C) is being violated. Certainly, the division would prefer daily inspection, but the Division agreed to provide Requesters 60 days for visual monitoring at their request.⁹¹

ii. Survey Requirements for Zones of Deposit Are Designed to Protect the Water Quality Standard

The Requesters argue that once a ZOD is triggered, the monitoring conditions for the seafloor of ZOD demonstrate that a ZOD was not required in the first place⁹² because the “ZOD program was developed for [sic] to address impacts that fall within the first element of the WQS – deposition that interferes with the protected use of the bottom.”⁹³ This argument is identical to Requesters argument with regard to Conditions 3.3.2.4 and an identical response quashes their quibble.

Seafloor survey reports are indeed required pursuant to Part 6.3.3.2.⁹⁴ Moreover, certain parameters must be followed when conducting the seafloor survey under both

⁹¹ ADEC0000018 (Division response to comments).

⁹² *Id.*

⁹³ Requesters’ Opening Br. at 15.

⁹⁴ ADEC000078.

Part 6.3.3.1 and 6.3.3.2.⁹⁵ But, of course, those survey methods and basic parameters to conduct the survey does not suddenly eviscerate the water quality standard that the survey is designed to protect. Rather, the conditions at Part 6.3.3 provide protocols, bases of measurement, and accepted units of measurement that make observations useful to the management of the permit.⁹⁶ Without a basic observational structure by which to administer the permit, observations and data lack credibility, repeatability, and utility.

Moreover, despite Requesters' alleged concerns about the subjectivity of compliance when violations occur when something is "observable," their own reports demonstrate their hatcheries cause significant deposition despite their claims to the contrary.⁹⁷ In 2022, for example, the vast majority of SSRAA hatcheries had debris under their nets and hatcheries had bacterial mats covering up to 90% of the seafloor.⁹⁸ Other surveys during the previous permit term demonstrated that some net pen sites accumulate organic matter several inches thick under the pens.⁹⁹

iii. Water Quality Standards Apply to Facilities Regardless of Cost of Compliance

The heart of the Requesters complaint is that 18 AAC 70.020(b)(20)(C) will be costly to implement with little benefit. Requesters allege that hatcheries are not typically

⁹⁵ *Id.*

⁹⁶ ADEC000078 (surveys must be completed using a 50 foot by 50-foot grid pattern to select a 3 foot by 3 foot square where photos will be taken of the seafloor, mats, residues, etc.).

⁹⁷ Requesters' Opening Br. at 7.

⁹⁸ ADEC 0003836.

⁹⁹ *See, e.g.*, ADEC0002914.

a significant source of deposition and they are being swept up in an overly broad permit.¹⁰⁰ As outlined *supra* **, this is false, but more importantly, it is the WQS itself that prohibits deposition and the WQS applies to all facilities. Despite Requesters arguments throughout that the standards are to protect them,¹⁰¹ that this will have little benefit on the environment,¹⁰² and that compliance will be costly,¹⁰³ the Division does not have the discretion to selectively apply plainly written state and federal laws and regulations.¹⁰⁴ To the extent the requesters challenge the water quality standards themselves, the time for that challenge has long passed.¹⁰⁵

CONCLUSION

The Requesters have failed to meet their burden of demonstrating by a preponderance of the evidence that the Division made fundamental factual and legal mistakes in devising the 2023 Permit and this appeal should be dismissed.

DATED March 26, 2024.

TREG TAYLOR
ATTORNEY GENERAL

By: /s/ Cody B. Doig
Cody B. Doig
Senior Assistant Attorney General
Alaska Bar No. 2109091

¹⁰⁰ Requesters' Opening Br. at 7.

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 15.

¹⁰³ *Id.* at 7.

¹⁰⁴ *See, e.g.*, 33 USC § 1311; 40 C.F.R. § 122.44; AS 46.03.710; 18 AAC 70.020, .040, .050.

¹⁰⁵ 18 AAC 70 Water Quality Standards, Alaska Register 166, June 26, 2003 (*available at* http://pebblescience.org/pdfs/DECWaterQ_StdAK.pdf).

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5232 Fax: (907) 276-3697

By: /s/ Garrison Todd
Garrison Todd
Assistant Attorney General
Alaska Bar No. 2011097

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

Southern Southeast Regional Aquaculture)
Association, Northern Southeast Regional)
Aquaculture Association, Kodiak Regional) OAH No. 23-0553-DEC
Aquaculture Association, Cook Inlet)
Aquaculture Association, and Prince)
William Sound Aquaculture Corporation,)
)
Requesters,)
)
v.)
)
DEPARTMENT OF ENVIRONMENTAL)
CONSERVATION, DIVISION OF)
WATER)
)
Respondents. _____)

CERTIFICATE OF SERVICE

I certify that on March 26, 2024, true and correct copies of the **Alaska Department of Environmental Conservation, Division of Water’s Response Brief** and this **Certificate of Service** were served on the following via email:

Svend Brandt-Erichsen
Email: sbrandterichsen@nossaman.com

A courtesy copy was served by email on the following:

Emma Pokon, Acting Commissioner
Gene McCabe, Division of Water, Acting Director
Gary Mendivil, Hearing Liaison
Julie Pack, Assistant Attorney General

By: /s/ Christian S. Faatoafe 3/26/2024
Christian S. Faatoafe Date
Law Office Assistant II

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5232 Fax: (907) 276-3697