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May 23, 2014

Larry Hartig, Commissioner  
Alaska Department of Environmental Conservation  
410 Willoughby Avenue  
Juneau, AK 99811-1800

RE: Large Commercial Passenger Vessel Wastewater Discharge Draft Permit No. 2013DB0004

Dear Commissioner Hartig:

## I. Introduction

These comments are submitted by the Southeast Alaska Conservation Council (SEACC) and Cook Inletkeeper (“commenters”) on ADEC’s proposed draft permit No. 013DB0004.

As a threshold matter, we’re deeply concerned the State of Alaska is not taking seriously its responsibilities to protect Alaska’s magnificent waters and fisheries. During the primacy debate over Alaska’s assumption of the Clean Water Act’s NPDES program, we argued the state was ill-prepared to adequately protect Alaska’s water and fisheries resources, and the current proposed permit – through the state’s domestic wastewater discharge authority - simply reinforces those concerns.<sup>1</sup>

Furthermore, the draft permit belies the will of a strong majority of Alaskans, who voted in 2006 to put reasonable controls on cruise ship pollution. Unfortunately, the Parnell Administration worked closely with various cruise ship corporations to rollback these common-sense safeguards. Now, the proposed general permit allows ships to dump partially treated waste water far above Alaska’s water quality standards into designated sacrifice zones alongside each ship – even those at dockside.

## II. Comments

### A. Permit Coverage

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<sup>1</sup> Commenters note that had this draft permit fallen within the jurisdiction of the Clean Water Act’s NPDES program, it would clearly violate the law because it is so much weaker than the previous permit, and thus would run afoul of the CWA’s prohibition against back-sliding. However, as noted herein, the state’s water quality standards, including its anti-degradation policy, prohibit many of the discharges envisioned here anyway.

A significance difference between the draft permit and the 2010 General Permit is the geographic coverage of the Draft Permit. See Draft General Permit at 2.2. The proposed permit encompasses all marine waters of the state. The 2010 General Permit (Part 1.1) specifically excluded the waters of Glacier Bay National Park and Preserve from the scope of the permit, in addition to any waters listed on “impaired” or “water quality-limited” designation. Under existing agency precedent, it is impermissible to use a state general permit “to authorize activities that cannot be carried out, subject to the terms and conditions of the permit, throughout the geographic area covered by the permit.” See Hearing Officer’s Final Decision in Adjudication of EPA General Permits AK-G70-1000 and AK-G70-0000 at 16 (May 10, 2002)(activities “threaten” water quality under 18 AAC 72.900(a)(5) “when they could result in the in the discharge of pollutants into a waterbody that is listed as impaired under CWA §303(d) . . .”).

We recommend also excluding from coverage those waterbodies classified as Category 3 in Alaska’s Final 2012 Integrated Report. According to that report, ADEC classifies waters as Category 3 when it lacks sufficient information to make an attainment or impairment determination. The list includes Gastineau Channel in Juneau. Amazingly, despite years of monitoring cruise ship effluent, ADEC still can’t determine whether authorized discharges in Gastineau Channel fully protect existing uses of this water body. Consequently, ADEC lacks a reasonable basis or substantial evidence to support a conclusion that mixing zones proposed in the draft general permit will in fact fully protect existing uses of Gastineau Channel.

## **B. Special Areas**

The draft permit also ignores legislatively-created “Special Areas” – which includes Alaska’s most prized critical habitat area, wildlife sanctuaries and fish and game refuges.<sup>2</sup> The legislature created critical habitat areas “to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose.” 5 AS 16.20.500. Special area permits are required for, among other things, waste disposal. 5 AAC 95.420(a)(8). Yet ADF&G fails to provide public notice for special areas permit applications, and cruise ships discharging under the proposed general permit would be under no obligation to inform local governments, Tribes, fishermen or other Alaskans about the timing, location, volume or content of sewage and other wastes discharged into large, transient mixing zones. Furthermore, because mixing zones – by definition – fail to meet water quality standards designed to protect fish habitat and other uses, they cannot be deemed a compatible use to protect and preserve fish and wildlife habitat.<sup>3</sup> Accordingly, ADEC should adopt a common-sense rule that creates zero waste discharge in all special areas around the state. This basic safeguard would lend predictability to the regulated community and provides Alaskans with certainly our special areas will receive the protections envisioned by the Legislature. If

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<sup>2</sup> See ADF&G special areas locator at: <http://www.adfg.alaska.gov/index.cfm?adfg=conservationareas.locator>

<sup>3</sup> For example, the draft permit allows mixing zones for Kachemak Bay, contrary to federal law. 33 U.S.C. § 1901 note.

nothing else, mariners, fisherman and other users have a right to know about pollution discharges in their local waters, and VHF radio or similar real-time announcements about cruise ship discharges – with timing, location, volume, etc. - would provide a practical and low cost way to ensure Alaskans know about cruise ship discharges.

### **C. Anti-Degradation & Mixing Zones**

ADEC is applying the mixing zone requirements contained in 18 AAC 70.240, Register 202, July 2012. These regulations have not been approved by EPA. Consequently, ADEC cannot determine that the discharges meet all the requirements under P.L. 106-554, *codified at* 33 U.S.C. § 1901 note (2012), including compliance with the Federal Water Pollution Control Act, as amended. See AS 46.03.462(j)(2).

Appendix H of the Fact Sheet for the Draft Permit purports to provide the analysis and a rationale to support ADEC's antidegradation determinations. Significantly, ADEC presumes that all marine waters affected by the proposed general permit are high quality or Tier 2 waters and concludes there is a potential for additional lowering of water quality because the general permit allows cruise ships to make use of authorized mixing zones. See Fact Sheet for Draft Permit No. 2013DB0004 at 67-68. The draft Permit also "includes effluent limits that are less stringent than some 2010 general permit limits because of the allowance of mixing zones for ammonia, dissolved copper, dissolved nickel, and dissolved zinc." *Id.* at 7.

Alaska's antidegradation policy, however, only allows ADEC to authorize lowering the quality of Tier 2 waters if it finds it "is necessary to accommodate important economic or social development in the area where the water is located." See 18 AAC 70.015(a)(2)(A) (emphasis added). This standard, by its terms, is location-specific. Under this proposed general permit, ADEC simply does not know the specific locations a cruise ship will discharge before a ship seeks authorization under the general permit to discharge. ADEC may not use a general permit to authorize activities that require site-specific review. See Hearing Officer's Final Decision in Adjudication of EPA General Permits AK-G70-1000 and AK-G70-0000 38- 43 (May 10, 2002); see also *Ohio Valley Environmental Coalition, et al., v. Horinko*, 279 F.Supp.2d 732, 761-62 (S.D.W.Va. 2003).

Consequently, before DEC authorizes the lowering of water quality via a mixing zone pursuant to this general permit, it must provide for public notice and conduct an antidegradation review at the site-specific level. Nothing in AS 46.03.462 allows ADEC to do otherwise. In fact, the Alaska Legislature specifically recognized ADEC's authority to "(1) restrict the areas in which discharges permitted under this section may occur; or (2) impose additional terms and conditions on the manner in which discharges permitted under this section may be made in a specific area." See AS 46.03.462(h). The referenced authority encompasses ADEC's responsibilities under Alaska's Antidegradation Policy.

### **D. MMPA & ESA**

Section 312 of the Clean Water Act (33 U.S.C. § 1322) requires vessels – such as cruise ships - with installed toilet facilities to be equipped with an operable marine sanitation device (MSD), certified by the Coast Guard to meet EPA performance standards, in order to operate on the navigable waters of the United States. This federal authorization creates a federal nexus requiring consultation with USFWS and NOAA on species listed under the federal Marine Mammal Protection Act and the federal Endangered Species Act. Unfortunately, the draft permit and fact sheet make no effort to understand potential impacts to listed or otherwise protected species; for example, the fact sheet makes the baseless blanket assertion that “[t]hreatened or endangered species are not expected to be adversely affected. MZ size and location ensures no toxicity to these species,” with zero explanation or analysis. Fact Sheet, p. 64. Yet mixing zones – and the violation of water quality criteria within them – likely constitutes a “take” or other adverse impact on protected species which ADEC has chosen to ignore. As a result, ADEC should require zero discharge zones in and around any critical habitat or similarly protected areas for listed species.

### III. Conclusion

With the demise of the Alaska Coastal Management Program – and in the wake of efforts to push through numerous ill-advised provisions in HB 77 – our groups have had front-row seats as Alaska’s once proud permitting regime unravels. The proposed permit is a big step backward from the previous permit, and essentially allows cruise ships to discharge large volumes of partially treated wastes whenever and wherever they chose in Alaskan waters and fisheries.

Accordingly, we urge you to take the current draft permit back to the drawing back, and to convene a truly balanced panel to come up with some reasonable compromises. Otherwise, if this permit proceeds as drafted, it will lock Alaska into a failed permitting regime that will ensure ever-increasing pollution to our magnificent fisheries as time unfolds.

Best Regards,



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