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

Cook Inletkeeper, Requestor, v. Department of Environmental Conservation, Division of Water, Respondent.	)	OAH No. 08-0688-DEC CWA 401 Cert. of NPDES AKG-31-5000

DECISION ON TIMELINESS

I. Introduction

Cook Inletkeeper's adjudicatory hearing request regarding the Department of Environmental Conservation's Clean Water Act section 401 certification of a federal general permit is untimely. Cook Inletkeeper did not file its hearing request within the 30-day period allowed, even though it knew before the period expired that the Division of Water had issued the department's final section 401 certification.

On the evidence presented, Cook Inletkeeper failed to show that it allowed the 30-day appeal period to expire in reliance on a position asserted by the division, or that the division's subsequent actions or statements constituted a waiver of the deadline. Cook Inletkeeper, therefore, did not meet its burden of proving that the department should be estopped to strictly enforce, or has waived enforcement of, the deadline for equitable reasons. To the extent that the Commissioner of Environmental Conservation (and thus his delegee) has inherent discretion to waive the deadline, that discretion should not be exercised in the face of Cook Inletkeeper's long delay and lack of proof that agency action caused it to miss the filing deadline, especially when a waiver could prejudice third-party interests in continued finality of the section 401 certification.

Accordingly, Cook Inletkeeper will not be permitted to proceed to an adjudication of the mixing zone issues for which the commissioner granted the hearing request contingent upon a finding of timeliness. This decision, however, is not intended to preclude Cook Inletkeeper from raising the mixing zone issues, if the issues persist, in a hearing request regarding a future permitting decision reauthorizing the same discharges, or modifying/replacing the federal permit for which the certification challenged here was issued.

II. Facts

On May 31, 2007, the Environmental Protection Agency (EPA) published notice of the availability of the final general permit for discharges associated with Cook Inlet oil and gas exploration, development and production facilities, which EPA was then reissuing under the National Pollutant Discharge Elimination System (NPDES).[1] About two weeks earlier, on May 18, 2007, the division had issued its final Certificate of Reasonable Assurance for the permit, as required by section 401 of the Clean Water Act (33 U.S.C. § 1341).[2] Though representatives of Cook Inletkeeper participated in the public process on the NPDES permit,[3] the division did not send a copy of the final section 401 certification to Cook Inletkeeper at that time. The published EPA notice for the general permit described the section 401 certification, indicating that it had been issued on May 18.[4]

In mid-June 2007, two weeks after EPA's notice was published and about a month after the division's final section 401 certification was issued, Cook Inletkeeper and four other groups, all represented by the same law firm (Trustees for Alaska), petitioned the Ninth Circuit Court of Appeals for review of EPA's permit decision.[5] Cook Inletkeeper did not request an adjudicatory hearing from the department on the section 401 certification until October of 2008, sixteen months later.[6]

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1 72 Fed. Reg. 30377-378 (May 31, 2007) (Exhibit C to November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department)).

2 May 18, 2007 Letter from Stambaugh (division) to Gearheard (EPA) and attachment thereto (located in binder labeled "Cook Inletkeeper OAH No. 08-0688-DEC Cook Inlet 401 Certification"; *also* at Exhibit A to Cook Inletkeeper's October 21, 2008 request for adjudicatory hearing). The section 401 certification states that the department "certifies that there is reasonable assurance that the proposed activities [covered by the general permit], as well as any discharge that may result, are in compliance with the requirements of Section 401 of the Clean Water Act, which includes the Alaska Water Quality Standards (18 AAC 70), provided that [several] stipulations are adhered to[.]" *Id*. at Ex. A, p. 4.

3 *See* April 2007 Cook Inlet Oil & Gas NPDES General Permit and Environmental Assessment Response to Public Comments at Table of Contents (Exhibit B to November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department) at 2, 4 & 5, listing two sets of comments filed on behalf of the group and identifying Lois Epstein and Bob Shavelson as comment authors for the group).

4 72 Fed. Reg. 30378 (May 31, 2007) (Exhibit C to November 24, 2008 Letter Response from ConocoPhillips' to Mendivil (department)), stating the following under the "Other Legal Requirements" heading:

> *State Water Quality Standards and State Certification*. Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341, on May 18, 2007, the Alaska Department of Environmental Conservation (ADEC) certified that the conditions of the general permit comply with the Alaska State Water Quality Standards (Alaska Administrative Code 18 AAC 15, 18 AAC 70, and 18 AAC 72), including the State's antidegradation policy.

5 June 13, 2007 Docketing Statement and June 15, 2007 Petition for Review (Exhibit D to November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department)).

6 October 21, 2008 request for adjudicatory hearing.

The record suggests, but does not establish, that a representative of Cook Inletkeeper made a telephone inquiry to the division about notice regarding the section 401 certification around the time the group was filing its Ninth Circuit petition. Specifically, an email message printed January 16, 2008, by Justin Massey (counsel who signed the petition on behalf of Cook Inletkeeper) indicates that on June 14, 2007, at 5:14 p.m., Bob Shavelson of Cook Inletkeeper sent Sharmon Stambaugh of the division the following message:

> Just wanted to follow-up on our phone discussion today that you will be issuing a public notice for the 401 certification for the Cook Inlet oil and gas GP. I understand this has been a grey area for ADEC, but as discussed from our perspective, the 401 cert. is a distinctly state decision and it doesn't appear EPA's notice on the permit can satisfy state notice requirements too.
>
> Thanks and let me know if I misconstrued anything.[7]

The subject of the email is notice. It says nothing about challenging the section 401 certification through an adjudicatory hearing request to the department or about any statements by division staff regarding the deadline for such requests.

Two inferences could fairly be drawn from the June 14 email: (1) Mr. Shavelson was interested in separate state and federal notices for a reason wholly unrelated to challenging the certification; (2) Mr. Shavelson was seeking assurance that a state notice was yet to be issued because he expected that would trigger the running of the state administrative appeal period at a later point. The timing of the email and the fact that it was copied to Cook Inletkeeper's attorney while he was working on the federal petition make the second inference more likely than the first.[8] Within the 30 days following the May 18 issuance of the certification, therefore, more likely than not, Cook Inletkeeper knew that a final certification had been issued and that the period in which to request an adjudicatory hearing was running unless tolled by the division's failure to provide notice separate from EPA.

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[7] June 14, 2007 Email from Shavelson to Stambaugh (Exhibit B to November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department)).

[8] The email was sent the evening before the petition for review was signed and the day after the docketing statement was signed by one of Cook Inletkeeper's attorneys, Mr. Massey of Trustees for Alaska. *Compare id. with* June 13, 2007 Docketing Statement and June 15, 2007 Petition for Review (Exhibit D to November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department)). It does not show Mr. Massey as an addressee or a person copied on the email, but the January 16, 2008 printout of the email displays Mr. Massey's name in the top left-hand portion of the printout, indicating it was printed from an email account in his name or from a computer containing his profile. The email gives no indication that it was forwarded to Mr. Massey. Thus, it is reasonable to conclude that the email was blind copied to Mr. Massey on June 14, the evening before he signed the Ninth Circuit petition.

What cannot be inferred from the email is the content of any conversation Mr. Shavelson may have had with Ms. Stambaugh on June 14, 2007. Standing alone, the email does not prove that they had a conversation or, if they did, what was discussed. The record contains no reply from Ms. Stambaugh to Mr. Shavelson's June 14 email and no testimonial or other evidence of the content of such a conversation was offered.

Cook Inletkeeper filed with its adjudicatory hearing request related-briefing to the commissioner an email exchange between Ms. Stambaugh and the group's engineering consultant that took place about six weeks later, on July 26, 2007.[9] The consultant's email reiterates his previous "July 16 request for the supporting analysis for the final Cook Inlet Oil & Gas Section 401 Certification …."[10] In response, Ms. Stambaugh's email states, in pertinent part:

> I will be resending our cert out to all who commented for a 30 day adjudicatory review plus the comments. For the most part, we partnered with EPA on their RTC [response to comments] that is posted on EPA's website, but not on DEC's --- an error I am trying to correct with a redesign of our webpage for the future![11]

This email is the only evidence in the record that the division communicated to Cook Inletkeeper (via the consultant) information that might have led the group to think the opportunity to request an adjudicatory hearing had not expired 30 days after the May 18 issuance of the final section 401 certification (i.e., on June 17) or after the May 31 *Federal Register* publication notice (i.e., on June 30).[12]

During the period between the above-described email communications and the point at which Cook Inletkeeper filed its adjudicatory hearing request, the group made a number of requests for public records from the division and an administrative appeal under the Public Records Act ensued.[13] Cook Inletkeeper attributed some of its delay in filing the hearing request

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[9] July 26, 2007 Emails between Stambaugh and LaLiberte (Exhibit A to November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department)). Mr. LaLiberte is an engineering consultant who prepared a May 31, 2006 report for Cook Inletkeeper on what was then EPA's draft general permit. *See generally* Exhibit H to October 21, 2008 request for adjudicatory hearing.

[10] July 26, 2007 (3:24 p.m.) Email from LaLiberte to Stambaugh.

[11] July 26, 2007 (3:47 p.m.) Email from Stambaugh to LaLiberte.

[12] In its November 30, 2008 reply in support of the adjudicatory hearing request (at page 3), Cook Inletkeeper asserted that "DEC, in several communications with CIK, indicated that it would independently issue a final decision to the public which would then commence the 30-day appellate statute of limitations." The reply, however, cited only the June 14 and July 26, 2007 emails. No other written communications were submitted, either with the record for the adjudicatory hearing request or with the supplemental briefing leading up to this decision, and no testimony about such communications was offered.

[13] *See generally* March 12, 2008 Commissioner's Decision on Appeal of a Denial of Written Requests for Public Records; July 8, 2008 Letter from Massey (Trustees for Alaska) to Stambaugh (division) (requesting on behalf of Cook Inletkeeper records concerning capabilities of dischargers using the NPDES general permit);

to its efforts to first obtain records, asserting that "there is a valid explanation for the delay in filing this appeal as [the department] unlawfully withheld public records and stalled the process for over a year."[14] The group explained that "[w]hen it became clear that [the department] would never issue a final decision on the 401 Certification, Trustees for Alaska, on behalf of [Cook Inletkeeper], appealed within 30 days of receiving the latest document request and the last correspondence from [the department]."[15]

After considering Cook Inletkeeper's request for an adjudicatory hearing and oppositions to it from the other parties,[16] including arguments that the request should be denied as untimely, the commissioner

> conclude[d] that it is best to refer this preliminary question of timeliness to the Office of Administrative Hearings [OAH] to determine whether, under the facts and law applicable to this case, [the department] should consider [Cook Inletkeeper's] October 21, 2008 request for an adjudicatory hearing to be timely.[17]

The commissioner also concluded that Cook Inletkeeper's "request does not raise an issue of law or policy sufficiently significant to warrant a hearing" on adoption of implementation guidance for the antidegradation policy.[18]

The commissioner decided, however, that if the request is found to be timely, or the tardiness to be excused, Cook Inletkeeper would be afforded an adjudicatory proceeding on "whether [the department] failed to comply with the regulation governing mixing zones by relying upon allegedly 'flawed and scientifically suspect assumptions.'"[19] He directed that if

> OAH decides the threshold issue of timeliness in favor of considering the merits of this request, then OAH should proceed to determine if this request does indeed raise any genuine issues of disputed fact material to the decision, so as to warrant a hearing under 18 AAC 15.220(b)(1)(B)[,

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September 3, 2008 Commissioner's Decision on Appeal of a Denial of Written Request for Public Records. These three documents were attached as Exhibits C, D & E to November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department).

[14] November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department) at 5.

[15] *Id.*

[16] In addition to Cook Inletkeeper and the Division of Water staff, the parties to the request proceedings before the commissioner were ConocoPhillips Company, Chevron Corporation (through its subsidiary Union Oil Company of California) and XTO Energy. November 24, 2008 Letter Response from Chevron's and XTO's Counsel to Mendivil (department); November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department); *also* January 5, 2009 Recording of Case Planning Conference (explaining relationship between Chevron and Union Oil by way of clarifying that Union Oil is the proper party to participate in the adjudication).

[17] December 22, 2008 Decision on Request for Adjudicatory Hearing at 2.

[18] *Id*. at 2-3.

[19] *Id*. at 3-5.

> and i]f OAH concludes that the request does raise such issues, it should proceed with a hearing on whatever factual issues it determines to have been properly raised ….[20]

He also delegated final decision making authority on the timeliness question to OAH.[21]

After the matter was referred to OAH, the parties participated in a case planning conference during which it was agreed

> that no additional factual information beyond that in the existing agency record is needed for adjudication of the timeliness question but that additional briefing to supplement that in the request for adjudicatory hearing, oppositions thereto, and reply may be useful.[22]

Cook Inletkeeper filed opening and reply supplemental briefs; the other parties filed supplemental response briefs. None of the parties sought to introduce extra-record factual information concerning the communications between Mr. Shavelson and Ms. Stambaugh.[23] The timeliness question was submitted on the existing record and arguments.

III. Discussion

To be considered timely filed, a request for an adjudicatory hearing must be served on the commissioner "[w]ithin 30 days after the department issues a permit decision reviewable under 18 AAC 15.195 – 18 AAC 15.340[,]" the department's administrative appeal procedure regulations.[24] The decision whether to certify an NPDES permit under section 401 of the Clean Water Act is reviewable under those regulations.[25] A Clean Water Act section 401 certification is a "permit" within the meaning of the regulations.[26]

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20 *Id*. at 5.

21 *Id*. at 2.

22 January 5, 2009 Order Scheduling Briefing on Timeliness; *accord* January 5, 2009 Recording of Case Planning Conference.

23 The division submitted a copy of Petitioners' Opening Brief from the Ninth Circuit appeal. *See* Exhibit A to January 30, 2009 Staff Response to Timliness [sic] Briefing. Cook Inletkeeper objected to this, arguing that the document "is irrelevant extra-record evidence that should be stricken from the record." February 4, 2009 Requestor's Supplemental Reply Brief on Timeliness at 2. Because the Ninth Circuit brief was not relied upon in making this decision, insofar as the request to strike was meant to be a motion under 2 AAC 64.270, that motion is denied, without prejudice to Cook Inletkeeper's right to renew the motion should this matter proceed to a further phase in which the brief might be considered. A motion to strike the brief, however, will not be granted without first affording opposing parties an opportunity to respond.

24 18 AAC 15.200(a).

25 18 AAC 15.010(b)&(e). Subsection (e) states that "[t]he provisions of 18 AAC 15.195 – 18 AAC 15.340 apply to the conduct of adjudicatory hearings to review (1) permit, approval, or certification decisions involving matters described in (a) or (b) of this section[.]" Subsection (b) describes Clean Water Act section 401certifications when designating the specific procedural regulations (18 AAC 15.130 – 18 AAC 15.180) that apply to such certifications.

26 18 AAC 15.920(10) (defining "permit" to mean "an approval, permit, certification, variance, exemption, delegation, or other authorization of the department subject to review under 18 AAC 15.195 – 18 AAC 15.340");

The department's section 401 certification was issued by the division on May 18, 2007. The 30-day appeal period, therefore, expired June 17, 2007, sixteen months before Cook Inletkeeper served the commissioner with its adjudicatory hearing request. Accordingly, if the timeliness of Cook Inletkeeper's request were judged solely on whether it was served within 30 days after issuance of the final decision, as the regulation suggests it should be, Cook Inletkeeper's request would be untimely without question. Under the circumstances here, however, the question becomes whether the department can, and should, forebear from strictly enforcing the 30-day appeal period (1) because the division did not send Cook Inletkeeper a copy of the final section 401 certification at the time of issuance or (2) because of statements by or actions of the division.

A. FAILURE TO SEND THE FINAL CERTIFICATION DOES NOT BAR STRICT ENFORCEMENT OF THE APPEAL DEADLINE.

A permit procedure regulation specific to certification of NPDES permits commits the department to

> serve upon the applicant, EPA, and each person who submitted timely comments upon the application or testified at a hearing held under 18 AAC 15.150, the decision of the appropriate division director or designee regarding certification [and] a summary of the basis of the department's decision.[27]

This requirement is better suited to certification of an individual NPDES permit than a general NPDES permit such as at issue in this matter. A general permit is not necessarily issued in response to an application by a single applicant for a specific discharge; instead, EPA initiates a general NPDES permit review process to authorize like discharges in a geographic area or by discharge type, allowing prospective discharges to, in effect, sign up to operate under the general permit by filing a Notice of Intent, not an application seeking issuance of a unique-to-the-operator individual permit.[28] Prospective dischargers and others who comment are reacting not to an application but to the permit EPA proposes to issue. EPA's own notice requirements acknowledge that general permits necessarily must be treated differently.[29]

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also supra note 2 (illustrating that a Clean Water Act section 401 certification is subject to review under those regulations).

[27] 18 AAC 15.160.

[28] *See generally* 40 C.F.R. § 122.28.

[29] *E.g.*, 40 C.F.R. § 124.10(c)(1)(i) (exempting general permits from the requirement to mail notice to applicants); *also* 40 C.F.R. § 124.10(c)(2)(i) (making publication in the *Federal Register* the method of notice for EPA's issuance of general NPDES permits).

Ill-suited though it is to general permits, the NPDES certification regulation found in 18 AAC chapter 15, article 4, does not purport to exempt section 401 certifications of general permits from the department's commitment to serve decisions on entities or people who timely comment. But neither does it purport to tie that particular required service to running of the period for adjudicatory hearing requests under the administrative appeal procedure regulations appearing later in the chapter, in article 6. The period runs from issuance of the permit decision, not from service of the decision.[30] Nothing in the certification or appeal procedure regulations indicates that the certification decision is not considered "issued" until copies are provided to prospective dischargers and other commenters. Accordingly, if the running of the 30-day filing period in 18 AAC 15.200 applicable to all adjudicatory hearing requests is contingent upon notice to affected parties, the source of that notice requirement lies not in a separate regulation on distribution of a particular type of authorization but rather in the need for finality.

In effect, the requirement to provide notice flows from the agency's desire to achieve finality in decision making without forgoing the opportunity correct errors through administrative adjudications while the matter remains with the executive branch. An agency need not provide for a higher level adjudicatory review of a decision within the executive branch, but if it does so and then fails to provide adequate notice, finality might be frustrated. This is the lesson learned from the Alaska Supreme Court's opinion in the *Pruitt* case[31] on which Cook Inletkeeper relied. The *Pruitt* opinion does not dictate how, or even whether, an agency must give notice of a permitting decision. Instead, it illustrates that a party might not be precluded under exhaustion of administrative remedies principles from raising issues before the courts if the party did not receive clear notice of the finality and appealability of the decision at the agency level.[32]

Pruitt was an appeal from a zoning enforcement action in which the executive branch agency-equivalent (a municipality) tried to invoke exhaustion based on Pruitt's failure to file an administrative appeal.[33] The Supreme Court, in effect, required that the matter be returned to the agency with subject matter expertise, to give Pruitt the opportunity he had missed to raise zoning

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30 *See* 18 AAC 15.200 (allowing a person authorized to request an adjudicatory hearing to do so "within 30 days" after issuance of the decision challenged).

31 *Pruitt v. City of Seward*, 152 P.3d 1130 (Alaska 2007).

32 *Pruitt*, 152 P.3d at 1140 (instructing superior court to hold enforcement action in abeyance to allow appellant in zoning matter an "opportunity to obtain the ruling from the [planning] commission that he could have sought with a timely appeal had he been told the city had reached a final, appealable decision").

33 *Id*. at 1132-1135.

code issues at the agency level because he had not received adequate notice.[34] The Supreme Court explained:

> 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.[35]

Thus, *Pruitt* teaches that if an agency gives no notice, or only inadequate notice, of issuance of a decision which, absent appeal, will be the final agency action, the desired finality might not be achieved.

Pruitt and like cases excuse a party from exhausting administrative remedies if the party was not aware of the availability of the remedies due to an agency's failure to provide adequate notice. This, coupled with Alaska Appellate Rule 602, puts an agency that gives no notice, or inadequate notice, at risk that an interested party might succeed in bringing an appeal before a court months or even years after the agency intended its decision to be final, and that the agency will have missed the opportunity to consider the issues itself while the matter was still with the executive branch. The court might remand the matter to the agency with subject matter expertise, as happened in *Pruitt*, but it might not, especially if the court views the issues as not implicating agency expertise.

Pruitt, therefore, demonstrates that giving adequate notice is crucial for an agency that wants to exercise its error correction function through the adjudicatory hearing process and to achieve finality in decision making. The Supreme Court, however, stopped short of dictating that a particular kind of formal notice be given. To the contrary, the court's opinion implies that if Pruitt had been told informally of the administrative appeal process and the finality of the decision he would have been barred by exhaustion from raising issues before the court.[36] This is consistent with the rule that actual notice (knowledge) acquired through participation in the permitting process may be adequate even if notice via prescribed procedures is lacking.[37]

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34 *Id*. at 1140-1141.

35 *Id*. at 1136.

36 *Id*. at 1138 (distinguishing Pruitt's situation from that in another case in which the appellant had been barred from proceeding due to failure to exhaust administrative remedies, stating that "[h]ere there is no suggestion that the city ever told Pruitt, even informally, of the applicable appellate process or that it notified him that a final decision had been made").

37 *See Sun Enterprises, Ltd., v. Train*, 532 F.2d 280, 285-286 & 290-291 (2nd Cir. 1976) (finding petition challenging NPDES permit filed more than a year after the permit's issuance untimely, in part, because petitioners "received actual notice of the permit's issuance" through participation in process some six weeks before a letter formally notifying the petitioner of the permit's issuance was sent).

The parties disagree about what kind of notice was required under these circumstances. They all appear to agree that notice of some kind to the effect that a final certification had been issued was a prerequisite to the running of the appeal period. The division argued that publication through EPA's *Federal Register* notice describing the section 401 certification decision was sufficient. The industry parties argued that actual notice is sufficient. Cook Inletkeeper argued that notice must be through service of the final certification decision under 18 AAC 15.160 and that actual notice was insufficient in this case because of the difficulty the group had obtaining records to file a detailed appeal.

The division may or may not be correct that the *Federal Register* publication notice is sufficient when the subject is certification of an EPA-issued general NPDES permit for which applicable federal regulations make *Federal Register* publication the required method of notice and exclude mail notice.[38] It will be unnecessary to determine whether such notice is sufficient, however, if Cook Inletkeeper received actual notice notwithstanding the division's failure to send commenters copies of the final certification.

Certainly, one way for Cook Inletkeeper and others who commented to receive notice that a final section 401 certification had been issued would have been through service of the decision under 18 AAC 15.160. Had they actually received the documents, actual notice would have been achieved; had the documents been mailed to them and the division retained proof of mailing, constructive notice would have been achieved. Being sent those documents, however, is not the only way an interested party could acquire actual or constructive notice.

The evidence in the record establishes that Cook Inletkeeper, more likely than not, had actual notice (knowledge) of the division's May 18 issuance of the final section 401 certification before the appeal period expired. Within 30 days after May 18, and just two weeks after EPA's *Federal Register* notice was published, Cook Inletkeeper signed papers petitioning the federal court for review of EPA's general NPDES permit for which the state certification was a prerequisite. Specifically how Cook Inletkeeper learned that a final permit decision had been issued (whether from the May 31, 2007 *Federal Register* notice, by receiving a copy of that notice signed May 21, by obtaining a copy of the final permit signed May 25, or all three), was not conclusively established in the record. Cook Inletkeeper, however, could not have prepared the petition on the strength of the *Federal Register* notice alone because the petition papers

[38] *See supra* note 29.

include information not in that notice.[39] Moreover, the June 15 petition (at page 2) recites that "[a] copy of the Permit is attached to this petition."

By mid June, therefore, Cook Inletkeeper knew that EPA had issued a final permit and had obtained a copy. The group necessarily knew that this meant the division had issued a final section 401 certification. EPA cannot issue an NPDES permit without the affected state first having issued such a certification, unless certification is waived by the state.[40] Alaska did not waive certification and Cook Inletkeeper acknowledged this in the June 14, 2007 email in which Mr. Shavelson identified the difference of opinion between the group and the division about whether a notice separate from EPA's notice was required. Though that email foreshadowed the subsequent legal dispute about whether the certification decision should be treated as final absent the division issuing a notice separate from EPA's, the email also plainly demonstrated that Cook Inletkeeper knew of the division's section 401 certification no later than June14, 2007.

The certification transmittal letter (page one, first paragraph, lines three to four) states "the Department of Environmental Conservation issues the enclosed final Certificate of Reasonable Assurance …." (Emphasis added.) The intent is clear; this was the final certification decision. Cook Inletkeeper's argument that the decision never became final because it was not served on the commenters is a legal position which does not negate the fact that the document gives notice of the agency's intent that it be the final decision. The final certification decision does not explain who may request an adjudicatory hearing or how and by when to do so. This shortcoming, however, does not undermine the conclusion that Cook Inletkeeper had sufficient notice through actual knowledge of the certification's issuance and the opportunity to request a hearing. The group's own filings demonstrate that it knew about the opportunity to file an adjudicatory hearing request but chose not to file until it had obtained more information from the agency's records.[41]

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[39] *Compare* June 13, 2007 Docketing Statement and June 15, 2007 Petition for Review (Exhibit D to November 24, 2008 Letter Response from ConocoPhillips' Counsel to Mendivil (department)) (reciting the nominal "June 14, 2007" permit issuance date) *with* 72 Fed. Reg. 30377-30378 (noting only the July 2, 2007 effective date but remaining silent as to the permit issuance date). EPA's NPDES permit itself recites that it "is issued on June 14, 2007[,]" though the permit was signed on May 25, 2007, and given the July 2, 2007 effective date.

[40] 33 U.S.C. § 1341(c)(1) (providing that EPA may not issue an NPDES permit if the state denies certification but that certification can be waived through failure of the state to act in a timely fashion); 40 C.F.R. § 124.53(a) (stating that "EPA may not issue a permit until a [Clean Water Act section 401] certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate").

[41] February 4, 2009 Requestor's Supplemental Reply Brief on Timeliness at 2-3 (stating that "it was impossible to file a sufficient appeal" without information sought through Public Records Act requests); January 20, 2009 Requestor's Supplemental Brief on the Timeliness of the Request for Adjudicatory Hearing at 2 (attributing delay in filing hearing request to efforts "to diligently prepare for a legal challenge in the interim by submitting

Difficulty obtaining records a party would like to examine before filing an appeal does not prevent the appeal period from running. The administrative appeal process provides for the parties to have access to the agency record and for the exchange of documents.[42] If necessary, discovery can be ordered and subpoenas can be issued to compel witnesses to provide testimony and produce documents.[43] If a party has good cause for raising an issue not previously raised, the party is allowed to raise the new issue.[44]

Though an adjudicatory hearing request pursuant to 18 AAC 15.200 needs to clearly and concisely identify issues and a full exposition of the issues might be more easily done by reference to the entire agency record, the appeal procedure regulations do not contemplate that the requestor will have access to all of the records that might be material to resolution of the matter before filing the request within 30 days after the permit decision is issued. Cook Inletkeeper was free to make Public Records Act requests before filing its adjudicatory hearing request, but the making of such requests or delays in resolving them does not itself prevent the 30-day appeal period from running.

In sum, the division failed to serve the final section 401 certification on Cook Inletkeeper, but this did not prevent the group from acquiring actual notice that a final decision had been issued. Though the group's representative, Ms. Shavelson, contacted the division within the first 30 days after the final certification decision was issued about the difference of opinion regarding notice requirements, the group did not file the hearing request within 30 days after the decision was issued, or even within 30 days after the EPA's notice was published in the *Federal Register*. Instead, Cook Inletkeeper waited to file until 30 days after its quest for additional information was complete, some sixteen months after the final decision was issued. Irrespective of whether this was due to neglect or deliberate design meant to elevate the difference of opinion regarding notice requirements, the conclusion is the same: the filing was untimely. If the untimely filing was due to misdirection by the agency, however, it could be excused on equitable grounds.

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public record act request…"); *id*. at 3 (indicating that more rationale for the agency's decision and more information on the bases for the earlier draft section 401 certification were desired before filing a hearing request); November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department) at 5 (stating that Cook Inletkeeper "appealed within 30 days of receiving the latest document request and the last correspondence" resulting from the series of Public Records Act requests).

[42] 18 AAC 15.237; 2 AAC 64.240; 18 AAC 15.240.

[43] 2 AAC 64.240; 18 AAC 15.247.

[44] 18 AAC 15.245. "Good cause" includes a showing that "the party could not reasonably have ascertained the issues or made the information available within the time required by [the 18 AAC chapter 15 regulations]." *Id*. at subpara. (1).

B. EQUITY DOES NOT PRECLUDE STRICT ENFORCEMENT OF THE APPEAL DEADLINE UNDER THE FACTS COOK INLETKEEPER'S EVIDENCE ESTABLISHED.

Cook Inletkeeper asked that if its hearing request was untimely, the late filing be excused on equitable grounds. Specifically, Cook Inletkeeper asked that the doctrine of equitable estoppel be applied. Implicitly, the group also argued that the doctrine of waiver be applied. For the reasons explained below, the evidence presented was insufficient to support Cook Inletkeeper's assertion of these equitable defenses against strict enforcement of the deadline.

1. The department is not estopped from strictly enforcing the deadline.

The doctrine of equitable estoppel applies against a government agency under some circumstances.[45] The test for estoppel against the government consists of four elements:

> (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.[46]

The four-element test for estoppel against the government is conjunctive. Use of the word "and" between the third and fourth elements confirms what would otherwise be intuitive in context—that a party invoking estoppel against the government must prove that all four elements are met.

For estoppel against the government, the fourth element is different from the corresponding one in the test for estoppel between private parties. Both share the feature of being an "interest of justice" element. In cases of estoppel between private parties, the fourth element provides that "the estoppel will be enforced only to the extent that justice requires[.]"[47] When a private party seeks to estop the government, however, the "interest of justice" element precludes application of the estoppel doctrine altogether when the private party cannot or does not show that applying the doctrine would "limit public injury."

The first three elements of the test are inextricably linked. Prejudice must flow from reliance; reliance must be reasonable; reliance must be on the government's asserted position, not on something else. Reliance on the person's own understanding of the law is not reliance on

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[45] *See, e.g., Crum v. Stalnacker*, 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government in a retirement benefits case to correct an inequity resulting from the agency not providing the retiree with the form needed to secure the benefit sought); *Municipality of Anchorage v. Schneider* 685 P.2d 94, 96-98 (Alaska 1984) (applying estoppel in land use permitting context).

[46] *Crum*, 936 P.2d at 1256; *accord Wassink v.Hawkins*, 763 P.2d 971, 975 (Alaska 1988) (applying the same four-element test in a case asserting an estoppel defense against government enforcement action).

[47] *Tufco, Inc., v. Pacific Environmental Corp.*, 113 P.3d 668, 671 (Alaska 2005).

the government entity's asserted position. Something more in the form of words or conduct by the government entity is required.

The inquiry, therefore, begins with whether the department (through the division) asserted a position specific to this permitting matter about the deadline for adjudicatory hearing requests on which Cook Inletkeeper relied in delaying its filing. Cook Inletkeeper offered just two documents—Mr. Shavelson's June 14 email and Ms. Stambaugh's July 26 email—in support of its assertion that the department had "in several communications with [the group], indicated that it would independently issue a final decision to the public which would then commence the 30-day appellate statute of limitations" and that the group had relied on those communications in not immediately filing the hearing request.[48] It offered no testimony, affidavit or otherwise, to corroborate the assertion or elaborate on the particulars of any communications not memorialized in the two emails.[49]

The only evidence offered by Cook Inletkeeper that the division asserted a position possibly bearing upon the appeal deadline before that deadline expired is the June 14 email. That email was not authored by a division or department employee; it was authored by a representative of Cook Inletkeeper, Mr. Shavelson. Thus, the email itself is not an assertion of agency position. The email is sufficient to raise a question about whether a conversation took place between Mr. Shavelson and a division representative, Ms. Stambaugh, in which the division representative may have asserted a position regarding the notice requirements for the section 401 certification. Such a conversation might have included remarks about the appeal deadline, but the email does not say that the deadline was discussed or that Ms. Stambaugh indicated the appeal period had been or would be extended. Instead, the email (first sentence) simply suggests that Mr. Shavelson construed something Ms. Stambaugh said as indicating that she would "be issuing a public notice for the 401 certification …."[50]

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[48] November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department) at 3.

[49] When scheduling the supplemental briefing counsel for Cook Inletkeeper specifically stated that there was no need to develop additional facts or submit affidavits. *See* January 5, 2009 Recording of Case Planning Conference at minute 11. The supplemental briefs were filed without any attempt or request by Cook Inletkeeper to submit additional documents or adduce testimonial evidence.

[50] June 14, 2007 Email from Shavelson to Stambaugh (Exhibit B to November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department)) at para. 1, first sentence.

Standing alone, the June 14 email proves nothing about what Ms. Stambaugh actually said that could constitute an assertion of agency position on which Cook Inletkeeper may have relied. Even under the less formal rules of evidence that typically apply in administrative adjudications, a one-sided email from a person purporting to confirm the fact of and generally characterizing the content of a conversation is unreliable evidence.[51] Without corroboration—for instance, testimony from the parties to the conversation—a one-sided email is sufficient only to raise questions, not to prove what was in fact said by anyone, or even that a conversation took place.

The July 26 email from Ms. Stambaugh to Cook Inletkeeper's engineering consultant is not corroboration or direct evidence of an agency position asserted on which the group might have relied in allowing the deadline to expire without filing a hearing request. The July 26 email was sent weeks after the 30-day appeal period had already expired. It was a reply to the engineering consultant, not to Mr. Shavelson. It was responding to an email from the consultant of the same day referencing a July 16 request by the consultant. Neither the consultant's original message nor Ms. Stambaugh's reply says anything about a June14 conservation with Mr. Shavelson. The July 26 email might have factored into a credibility determination had testimony been offered about the June 14 conversation, and the email does give rise to the waiver issue addressed below. Because it post dates the running of the appeal period, however, it does not prove assertion of an agency position on which Cook Inletkeeper could have relied in deciding to let the deadline pass.

The June 14 email, therefore, is the only evidence Cook Inletkeeper offered of a possible pre-deadline assertion of an agency position on which the group might have relied. To the extent, if at all, that the group relied on the lack of a response to that email as a signal that Mr. Shavelson's understanding of the conversation was correct, it has failed to prove that such reliance was reasonable. Cook Inletkeeper offered no evidence that the email was received by Ms. Stambaugh. Nothing in the record indicates whether or when she did receive it and, if she did receive it, why she did not reply. She was not called to testify. Though Mr. Shavelson may have intended that the email elicit a confirmation from Ms. Stambaugh about the division's position on issuing a separate public notice for the certification, apparently it did not. Reliance

[51] Under 2 AAC 64.290(b), "[t]he rules of evidence used in the courts of the state do not apply to an administrative hearing except as a guide, unless the parties stipulate to the application of those rules." The administrative law judge can exclude (and by extension need not give any weight to) evidence that is not "the type on which a reasonable person might rely in the conduct of serious affairs[.]" *Id*. at subsec. (a).

on silence is not reasonable under circumstances in which an email addressee might not have even received or read the email and, in any event, was not obliged to respond.

In sum, the two emails are insufficient to establish assertion of an agency position on which the group could have relied in not filing during the 30-day appeal period. Any reliance on the lack of a response to the June 14 email was not reasonable. Cook Inletkeeper, therefore, has failed to meet its burden of proving the first two elements of an equitable estoppel defense. Accordingly, it is unnecessary to reach the prejudice and interests of justice elements of an estoppel defense against enforcement of the deadline, but examination of a waiver defense is in order.

2. Timely filing of the hearing request has not been waived.

Cook Inletkeeper's arguments and the July 26 email raise the question, has timeliness been waived and, if not, should it be waived at the commissioner level. An administrative agency generally has the discretion to waive strict enforcement of deadlines established in its procedural rules, provided that doing so would not cause substantial prejudice to a party who objects to the waiver.[52] Though an agency could curtail that discretion through a regulation, nothing in 18 AAC 15.200 supports a conclusion that the department intended to do so regarding enforcement of the 30-day appeal period.

To the contrary, the regulation is couched in permissive terms that allow a person to request an adjudicatory if the request is timely filed. The regulation does not expressly state that untimely requests must be rejected. It does not state, or even imply, that the commissioner has given up the discretion to engage in the error correction function inherent in providing for an executive branch adjudication of a subordinate's decision if the person requesting a hearing files the request late. Running of the 30-day appeal period established by 18 AAC 15.200 does not deprive the commissioner of jurisdiction to review a subordinate's decision.[53] Though a good cause extension of the filing deadline is not authorized by the regulations under the powers of the

[52] *Forquer v. Commercial Fisheries Entry Comm'n*, 677 P.2d 1236, 1243 (Alaska 1984), citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970).

[53] The division's argument at pages 2-4 of its undated Staff Opposition to Request for Hearing that jurisdiction to consider the merits of Cook Inletkeeper's adjudicatory hearing request is lacking because of the group's failure to file within 30 days mistakenly treats this type of executive branch adjudication as if it were the same as, for instance, a claim for workers' compensation benefits or wages regarding which subject-matter jurisdiction may be limited. A request to adjudicate issues flowing from a permit decision is more akin to an appeal (even if supplementation of the record through an evidentiary proceeding is possible) than to an original action-type claim. None of the cases cited by the division suggest that the agency head loses jurisdiction to exercise oversight authority and error correction over subordinates through an administrative appeal because the hearing request is late.

adjudicator,[54] a waiver of timeliness by the department arising from actions occurring outside the adjudication context is not precluded.

In short, 18 AAC 15.200 leaves the commissioner with sufficient discretion to allow a late appeal if the division's actions constituted a waiver of timeliness. It is not an abuse of that discretion to deny a waiver to someone who seeks relief months after the deadline has passed, especially if prejudice to third-party interests could result.[55]

Cook Inletkeeper filed its hearing request sixteen months after the deadline. The group attributes the delay, in part, to reliance on the July 26 email, which contains the following statement by Ms. Stambaugh: "I will be resending our cert out to all who commented for a 30 day adjudicatory review plus the comments."[56] It is undisputed that the division did not resend the certification decision or restart the appeal period. Nothing in the record indicates why Ms. Stambaugh predicted she would resend the certification to commenters and restart the review period but then did not follow through. Cook Inletkeeper did not ask to have Ms. Stambaugh testify.

The question, therefore, is whether the quoted statement from Ms. Stambaugh's July 26 email, standing alone, without any evidence that she or the division took steps thereafter to send commenters copies of the section 401 certification and notify them that the adjudicatory hearing request period was restarted, should be treated as a waiver of timeliness as to Cook Inletkeeper. Reasonable though it may have been for Cook Inletkeeper's engineering consultant, and by extension the group, to believe for some portion of the ensuing fourteen months that the division would act as Ms. Stambaugh predicted, construing the statement as a waiver presents problems.

First, it would require a strained reading of the email's language. The words did not purport to reset the deadline; they merely predicted a future event that never occurred. Had there been evidence that the division took steps to restart the appeal period for all interested parties, for instance, to re-notice the section 401 certification, the conclusion would be different. No such evidence was presented or found in the record.

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[54] *See* 18 AAC 15.310 (allowing adjustment of deadlines in 18 AAC 15.240 – 18 AAC 15.300, but not 18 AAC 15.200).

[55] *Forquer*, 677 P.2d at 1243-1244 (finding no abuse of discretion in agency's denial of waiver to a party who waited five months to seek relief, even though the agency had waived strict enforcement of the deadline as to two parties who asked for extensions shortly after the deadline passed).

[56] Email July 26, 2007 Emails between Stambaugh and LaLiberte (Exhibit A to November 30, 2008 Letter Reply from Cook Inletkeeper (counsel Anderson of Trustees for Alaska) to Mendivil (department)).

Second, the interests of third parties (other commenters, including entities operating under the general NPDES permit, or planning to) would be impacted by the disruption of settled expectations regarding the section 401 certification if a waiver were granted to Cook Inletkeeper after that group's long delay. The general NPDES permit is meant to authorize discharges until July 2, 2012. Unless the Ninth Circuit petition leads to a change in the permit that also requires re-certification by the department, the expectations of other participants in the public process for the section 401 certification would be upset by reopening the certification decision in response to a hearing request filed sixteen months after the decision was issued.

In sum, the division may have intended to re-notice the section 401 certification decision and re-start the appeal period, but it never did so. The July 26 email evidences an inchoate intent to waive the deadline that never materialized. Waiving it at this point, after Cook Inletkeeper's long delay in filing the hearing request, which was not the fault of other interested parties, could be an abuse of discretion, depending upon the degree of prejudice suffered by others. For that reason, and because Cook Inletkeeper had actual notice of the section 401 certification before the deadline expired but chose to delayed filing a hearing request for sixteen months while endeavoring to obtain information that could have been obtained through the hearing process, the undersigned declines to exercise the commissioner's inherent discretion to waive the deadline.

IV. Conclusion

Cook Inletkeeper's adjudicatory hearing request was untimely. The group had actual notice of the section 401 certification before the deadline expired but waited sixteen months to file. It need not have waited sixteen months. Resolution of Public Records Act requests was not a prerequisite to challenging the section 401 certification.

Cook Inletkeeper failed to prove facts sufficient to support an equitable defense against strict enforcement of the deadline. Neither estoppel nor waiver bars strict enforcement of the deadline under the circumstances here. The untimely filing, therefore, is not excused.

DATED this 27th day of March, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

Adoption

The undersigned, acting under a delegation from the Commissioner of Environmental Conservation, adopts this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22 day of April, 2009.

By: ___*Signed*_____
Terry L. Thurbon
Chief Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]