BEFORE THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

In the Matter of:	)	
	)	
CAMPAIGN TO SAFEGUARD AMERICA'S WATERS and FRIENDS OF THE EARTH CLEAN VESSELS CAMPAIGN,	)	
	)	
Requestors,	)	
	)	
v.	)	
	)	
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF WATER,	)	OAH No. 10-0284-DEC General Permit No. 2009DB0026
	)	
Respondent.	)	

ORDER DENYING ADMINISTRATIVE HEARING

Two organizations, the Campaign to Safeguard America's Waters (CSAW) and Friends of the Earth (FoE), seek administrative review of this department's Large Commercial Passenger Vessel Wastewater Discharge General Permit Number 2009DB0026, which was issued and became effective on April 22, 2010. The department's Division of Water and one potential intervenor, the Alaska Cruise Association, have urged that administrative review be rejected.

CSAW and FoE made their request in a short letter dated May 19, 2010 that purports to be both their request for administrative review and their brief on the ultimate issue.[1] They do not seek an evidentiary hearing, but instead rest their argument "solely on interpretation of Alaska statute." In their view, facts that are not in dispute show that the Division of Water has misapplied the law.[2] They have not requested a stay of decision.[3]

CSAW and FoE's hearing request has two defects, each of which independently makes it inappropriate to grant a hearing. First, the two organizations have not established that they are directly and adversely affected by the permit at issue. They have claimed a novel basis for

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[1] Request at 2 ("a judgment can be made . . . solely on the basis of this brief and a reasoned examination of State law").

[2] *Id*.

[3] The request does contain a prayer that the department "cease *further issuance* of the General Permit until this adjudication proceeding and/or subsequent legal challenges are settled." *Id*. at 1 (italics added). This is not a request for a stay of the permit already issued. Among the requestors' documents there is no identifiable request for stay under 18 AAC 15.210, nor has any attempt been made to meet the procedural requirements of that regulation. Accordingly, the department did not issue a notice of a request for stay under subsection (a) of the regulation.

standing, voter standing, to challenge this permit, but they have not adequately supported that basis. Second, CSAW and FoE seek adjudication of a disputed issue of law, but the issue they have articulated is not a "significant" one as is required to justify a hearing.

A. Nature of the Permit

The general permit at issue[4] is a limited-duration measure authorized by the Legislature's House Bill 134 in 2009. House Bill 134 effectively created a phase-in period for imposition of certain requirements of Ballot Measure 2, the cruise ship initiative approved by Alaska voters in 2006, because of concerns technology was not immediately available and economically feasible that would meet the ultimate target levels at the point of discharge.[5]

The permit authorizes the discharge of treated sewage and treated graywater from large commercial passenger vessels under a number of restrictions. Certain types of discharges are prohibited entirely. For allowable discharges, effluent limits are set for ten parameters. With respect to four of those parameters, the limits vary depending on the type of treatment system installed on the vessel. The permit was issued with findings to the effect that the current installed systems are, for purposes of this three-year permit, the most technologically effective economically feasible systems.[6]

B. Standing

A hearing request must clearly articulate "the nature and scope of the interests of the requestor, and . . . how and to what extent those interests would be directly and adversely affected by the decision."[7] In this case, the requestors primarily assert what might be called "voter standing:" they have defined the term "Requestors" in their hearing request to mean "[t]he tens of thousands of Alaskans from every corner of the State who voted to pass Ballot Measure 2 in 2006."[8] Both requestors are organizations, however; it is legally impossible that they could have been voters. The request also contains no explanation of how either of these non-voting requestors could be deemed a representative of these "tens of thousands of Alaskans."

The brief treatment of standing in the request also recounts that Dr. Gershon Cohen had a role in the development of the ballot measure and has been consulted in other contexts in

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4 The permit and the findings of fact that accompanied its issuance are most completely reproduced at Exhibits 1 and 2 of the Division Staff's opposition to the hearing request.

5 *See, e.g.,* Sponsor Statement for SCS for CS of HB 134 (RES) (2009).

6 Div. Ex. 2 at 10.

7 18 AAC 15.200(a)(3)(a).

8 Request at 2.

connection with the regulation of cruise ship discharges. Dr. Cohen is not a requestor, however. His activities as an individual cannot be attributed to a legally distinct entity.

Finally, the request avers that FoE has some members in Alaska and works in 77 countries "to create a more healthy, just world," including efforts to reduce the impact of cruise ship wastewater discharges. This general assertion does not make out a "direct[] and adverse[]" effect on DoE from the particular permit at issue.

The requirements of standing before this agency are not onerous, and few hearing requests have failed for lack of standing. The standing asserted here is essentially vicarious, however. The applicable regulation does not provide for vicarious standing.

C. Significant Issue of Law

Even if CSAW and FoE had standing to pursue this appeal, they would not be entitled to a hearing unless they could show that there is a disputed "issue of disputed fact material to the decision" needing resolution or, alternatively, a "disputed and significant issue of law or policy."[9] CSAW and FoE make it clear that "[t]here are no disputed issues of fact related to this request" and that "there is no need for an evidentiary hearing."[10] What they seek instead is a hearing on written briefs under 18 AAC 15.220(b)(3) to resolve a purely legal issue. Their legal issue is fully articulated in the document they have already filed; they do not desire any further opportunity to brief the matter.[11]

The requestors acknowledge that AS 46.03.462(e)—enacted by the Legislature after the Ballot Measure 2 had passed—authorizes the department to include in a permit, for up to three years, effluent limits or standards less stringent than those that were required under the Ballot Measure through AS 46.03.462(b)(1). However, the requestors point out that such stepped-down requirements are contingent on a finding that "a permittee is using economically feasible methods of pollution prevention, control, and treatment the department considers to be the most technologically effective in controlling all wastes and other substances in the discharge but is unable to achieve compliance . . . at the point of discharge."[12] Echoing this contingency, the Legislature also provided that in developing such a stepped-down limits the department must

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9 18 AAC 15.220(b).
10 *Id.*
11 *Id.* ("a judgment can be made . . . solely on the basis of this brief and a reasoned examination of State law").
12 AS 46.03.462(e).

"require the use of economically feasible methods of pollution prevention, control, and treatment the department finds to be the most technologically effective."[13]

The requestors note that the Rochem reverse osmosis system in use on some vessels produces lower effluent levels for certain parameters than other treatment systems that are also allowed by the General Permit. This can be seen in the permit's text itself: Tables 2 through 7 on pages 10 and 11 of the permit show lower maxima for Rochem systems on three parameters than the corresponding maxima for other systems. (Rochem systems have a higher daily maximum than Marisan systems for one parameter (zinc),[14] and the same maxima as all systems for a number of parameters.)[15]

The requestors' argument flows from the above observation and is very simple:

- "The fact that some cruise ships have installed and currently operate [Rochem] systems proves they are . . . economically feasible for use by the fleet."[16]
- Since the Rochem systems are feasible and are superior on three criteria, it follows that by permitting the use of other systems the permit fails to comply with the statute's mandate for " the most technologically effective" of feasible methods.[17]

The requestors' argument rests on two non-sequiturs. First, the fact that some vessels use a Rochem system does not show, as a matter of law, that these systems are economically feasible for different vessels. As a factual matter, this assertion might be possible to prove with evidence about the different vessel types and the nature of the system, but the requestors do not want to present evidence. They want a ruling that it is *inherently* true, as a legal matter, that if some vessels can use a Rochem system, all must be required to do so. In other words, they do are not seeking to prove that the Division used erroneous scientific or technical judgment in exercising its discretion to define the systems and performance limits that would be permitted; instead, they contend that there is no such discretion to permit multiple systems.

There is nothing in the law that makes it inherently true, in all conceivable circumstances, that if a particular system is economically feasible in one context it is economically feasible in

[13] AS 46.03.462(f)(1).
[14] *Compare* Tables 3 and 4 on page 10 of the permit.
[15] *See* Table 1 on page 9 of the permit.
[16] Request at 3.
[17] *Id*.

all. On the contrary, the legislative history of HB 134 shows that the bill's proponents and the Legislature understood that compliance requirements might differ from ship to ship.[18]

The second non-sequitur is the requestors' assumption that superiority on three effluent criteria establishes, as a matter of law, that the Rochem system is "the most technologically effective." Again, one might prove, by presenting evidence, that a system with these elements of superiority is, overall, the most effective system, but the requestors propose no such presentation. Instead, they ask the Commissioner to determine that it is *inherently* a violation of AS 46.03.462(e) to find that a system with lower results on these three criteria is as "technologically effective" as a Rochem system. Again, the law being applied does not make these criteria inherently paramount over all other possible considerations, and thus the conclusion does not follow from the premise.

Under the department's regulations, a hearing on a question of law is only to be ordered if there is a "significant issue of law" to be resolved.[19] Here, the requestors indicate that they have finished their briefing and their evidentiary presentation. The only additional proceedings that would be required were this matter to move forward would be to solicit responsive briefing from the Division and any intervenors. The ultimate result the requestors seek, however, is a legal conclusion that simply does not follow from what they have presented: that allowing a system other than the Rochem system on any vessel is inherently irreconcilable with AS 46.03.462(e). Since the result the requestors seek is not supported by the record they ask the Commissioner to rely on, there is no "significant" legal issue requiring further proceedings.

D. Conclusion

Because the requestors have not met the requirements for standing and because they have presented no significant legal issue meriting further proceedings, the request for hearing is denied pursuant to 18 AAC 15.220(b)(4).

This is the final decision of the Department of Environmental Conservation. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in

[18] *E.g.*, colloquy between Rep. Tuck and Commissioner Hartig, House Resources Committee, March 25, 2009 (2:25:58 p.m.); colloquy between Rep. Seaton and Commissioner Hartig, House Resources Committee, March 25, 2009 (2:52:30 p.m.); remarks of Lynn Tomich Kent before House Resources Committee, March 2, 2009 (1:32:10 p.m.).

[19] 18 AAC 15.220(b)(3).

accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st day of July, 2010.

By: *Signed*
Dan Easton
Deputy Commissioner
Department of Environmental Conservation
(acting by delegation from the Commissioner)

Certificate of Service: The Undersigned hereby certifies that on the 22nd day of July, 2010, a true and correct copy of this document was mailed to the following: Gershon Cohen, representative for Campaign to Safeguard America's Waters; Marcie Keever, representative for Friends of the Earth Clean Vessels Campaign; Richard Elliott, counsel for Alaska Cruise Association; Ruth Hamilton Heese, AAG. A courtesy copy was provided to Gary Mendivil, DEC.

By: *Signed*
Kim DeMoss/Linda Schwass

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