

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

KAWERAK, INC.	)	
	)	
Requestor,	)	
	)	
v.	)	
	)	
ALASKA DEPARTMENT OF	)	
ENVIRONMENTAL CONSERVATION,	)	
DIVISION OF WATER,	)	
	)	
Respondent.	)	OAH No. 24-0757-DEC
	)	Permit Number AK0062295
	)	

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**RULING ON REQUEST FOR ADJUDICATORY HEARING**

**I. Introduction**

This department’s Division of Water (the “Division”) issued a permit allowing IPOP, LLC (“IPOP”) to discharge water from a silt curtain containment system in connection with a planned placer mining project located approximately 24 miles east of Nome in an area known as the Bonanza Channel.<sup>1</sup> Kawerak, Inc. (“Kawerak”) opposes issuance of this permit, and has requested an adjudicatory hearing under 18 AAC 15.200 where it may present two distinct arguments challenging the Division’s decision for the Commissioner’s consideration.

Under the department’s regulations, at this stage the Commissioner has the option of (1) granting or denying Kawerak’s request in full or in part; (2) vacating the challenged decision and returning it to the Division for further consideration; or (3) granting a hearing on briefs submitted by the parties that is limited to the existing agency record.

Kawerak’s entitlement to a hearing is not seriously contested by either the Division or IPOP, though the Division contends that the scope of the hearing should be limited to only one of the two arguments that Kawerak wants to present. The more disputed point is whether an evidentiary hearing is required to supplement information in the agency record, or if a hearing on written briefs is sufficient. Since it appears the issues presented here are primarily legal in nature, Kawerak is granted a hearing on briefs submitted by the parties based on the agency

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<sup>1</sup> See APDES Permit No. AK0062295.

record as to both issues identified in its hearing request. Because the Division is still working to assemble what is anticipated to be a voluminous agency record, Kawerak may renew its request for an evidentiary hearing if, following a review of that record, it can clearly identify disputed questions of fact that require an evidentiary hearing to resolve.

## **II. Legal and Procedural Background**

Under 18 AAC 15.200, a party who participates in the public review process for a discharge permit application may, within thirty days of a reviewable decision, request an adjudicatory hearing as to that decision. In response, the commissioner may (1) deny the request for reasons provided in law; (2) vacate the decision and remand back to the Division of Water; or (3) conditionally approve the request and refer it to the Office of Administrative Hearings (“OAH”) for a proposed determination of whether it meets the requirements of 18 AAC 15.200, and whether the requester has demonstrated that an evidentiary hearing should be held.<sup>2</sup> This review requires OAH to evaluate, and the Commissioner to determine, if the party making the request has standing to request an appeal, and whether the request complies with the strict requirements set out in the regulation.

Here, IPOPOP holds placer mining claims on the Bonanza Channel that it plans to develop through a multi-year phased dredging project.<sup>3</sup> In connection with this proposed project, IPOPOP applied to the Division in 2020 for a permit to discharge water from a silt curtain containment system into the Bonanza Channel. Following an extended review process, the Division issued Permit Number AK0062295 to IPOPOP on October 10, 2024. While that process was ongoing, IPOPOP secured a permit from the Army Corps of Engineers allowing it to discharge fill from its dredging operations into the Bonanza Channel.<sup>4</sup>

On November 12, 2024, Kawerak submitted its request for an adjudicatory hearing in which it asserts that (1) the Division’s antidegradation analysis was inadequate; and (2) the Division failed to adequately consider pollutants of concern. The Commissioner conditionally approved this request on November 21, 2024, and referred it to OAH to prepare a recommended decision whether the request meets the requirements of 18 AAC 15.200, and the scope of any hearing on the request.

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<sup>2</sup> 18 AAC 15.220(a)

<sup>3</sup> See Exhibit A to IPOPOP Response.

<sup>4</sup> *Id.* This permit was issued on March 20, 2024.

The Division and IPOP submitted their responses to Kawerak’s request on December 17, 2024. While IPOP did not offer any arguments opposing the Kawerak’s hearing request, it requested that any hearing granted in this matter be conducted through briefs.<sup>5</sup> The Division did not oppose a hearing as to the second issue raised by Kawerak (i.e., consideration of pollutants of concern), while arguing that Kawerak failed to raise a material question of law entitling it to a hearing regarding its challenges to the Division’s antidegradation analysis.<sup>6</sup>

In replies submitted on December 26, 2024, Kawerak argued that a material question of law exists that entitles it to a hearing regarding the Division’s antidegradation analysis,<sup>7</sup> and that a full evidentiary hearing is needed to provide Kawerak an opportunity to supplement the record with information and testimony which, in its view, was not properly considered by the Division.<sup>8</sup>

### **III. Discussion**

#### **A. Entitlement to Hearing under 18 AAC 15.200**

To meet the requirements of 18 AAC 15.200(a), Kawerak must show that it participated in the public review process of the draft decision, and that its request was timely. Both the Division and IPOP concede that Kawerak has satisfied these requirements.

As to the contents of Kawerak’s hearing request, 18 AAC 15.200(c) provides that a hearing request must include the following information: (1) a description of the decision to be reviewed; (2) contact information for the requester and persons they represent; (3) a clear and concise statement of the disputed issues of material fact and law proposed for review; and (4) information on the interests and issues at stake and why the hearing request should be granted.

As noted above, neither IPOP nor the Division contends that Kawerak has failed to satisfy these criteria as to the Division’s consideration of pollutants of concern. While the Division contends that Kawerak should not be granted a hearing as to adequacy of its antidegradation analysis under 18 AAC 70.015(a)(2), Kawerak contends that the Division has misconstrued the regulation by focusing solely on the resulting economic benefits of the project without considering corresponding impacts to “pre-existing economic and social interests.”<sup>9</sup> In

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<sup>5</sup> IPOP Response at p. 2.

<sup>6</sup> Division Response at p. 9.

<sup>7</sup> Kawerak Reply to Division Response at pp. 2 – 4.

<sup>8</sup> Kawerak Reply to IPOP Response at pp. 5 – 6.

<sup>9</sup> Kawerak Reply to Division Response at pp. 3 – 4.

response, the Division notes that IPOP has provided ample information indicating that the proposed project would generate substantial economic benefits for surrounding communities, and that the type of comparative economic analysis urged by Kawerak is not mandated by the regulatory language at issue here.<sup>10</sup>

Without addressing the merits of the parties' respective positions, granting Kawerak an opportunity to more fully brief this issue is appropriate under the circumstances presented here. Since the Division is not opposing Kawerak's request for a hearing as to other pollutants of concern, allowing Kawerak an opportunity to fully brief its proposed interpretation of 18 AAC 70.015(a)(2) is unlikely to delay the outcome of this administrative proceeding.

In conclusion, since Kawerak has satisfied the requirements set out in 18 AAC 15.200, its request for a hearing as to the two issues raised in its hearing request is granted.

B. Kawerak's Request for an Evidentiary Hearing

Kawerak has requested an evidentiary hearing where it can present testimony from subsistence users in the project area, and possibly offer expert testimony from economic and ecological experts regarding the economic and ecological impacts of the project. Kawerak does not specifically allege that it was denied the opportunity to offer this information to the Division during the years that have passed since IPOP applied for this permit in 2020.

The agency record is still in the process of being prepared, and counsel for the Division has indicated that it will be tens of thousands of pages in length. Kawerak has clearly contributed to this record, as noted in the following text from its hearing request:

From the outset, Kawerak has strenuously opposed the Project. On July 20, 2024, Kawerak submitted its Public Comment and Request for Public Hearing . . . and has persistently objected over the past six years to IPOP's repeated applications the [Corps of Engineers] in addition to the resultant individual permit.

\* \* \* \* \*

With this request, Kawerak adopts in full and incorporates by reference: its May 24, 2021 Comments to USACE regarding IPOP's Corps Permit application, and its Joint Correspondence of April 12, 2024 alongside the Village of Solomon, Solomon Native Corporation, Bering Straits Native Corporation, Sitnausuak Native Corporation, and Norton Sound Economic Development Corporation.

This shows that Kawerak has had several years in which to gather and present information in opposition to IPOP's permit application, and that it has provided substantial information to state

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<sup>10</sup> Division Response at 8 – 9.

and federal agencies that will presumably be a part of the agency record here. Kawerak does not point to any specific facts regarding alleged impacts to subsistence users that it was unable to present to the Division during the public comment process. While Kawerak contends that it might present expert testimony if granted an evidentiary hearing, it does not offer specifics as to the experts it wants to present, the conclusions on which they will opine, or how that testimony ties to the relatively narrow questions presented in its hearing request.<sup>11</sup>

An additional consideration here is that Kawerak's arguments are primarily legal in nature. Kawerak's challenge to the Division's antidegradation analysis appears to hinge on the extent to which the Division was obligated to consider or prioritize "countervailing Native social and economic activity already present in the area, and how IPOP's project will disrupt that activity"<sup>12</sup> when making findings for purposes of 18 AAC 70.015(a)(2).<sup>13</sup> With regard to pollutants of concern, Kawerak alleges that the Division should have insisted on more data regarding the possible disturbance of pollutants such as arsenic, mercury, copper and lead in the materials IPOP plans to dredge.<sup>14</sup> These issues focus on allegations that the Division misapplied applicable statutes or regulations during the course of its permitting analysis, as opposed to presenting disputed questions of fact. If the Division did not seek enough data, the remedy would likely be to remand the case for it to do so, rather than take the data into the record for the first time at this level.<sup>15</sup>

Given these considerations, at present it appears unlikely that an evidentiary hearing would meaningfully add to the substantial volume of information that will be included in the agency record. The problem presented here, however, is that the Division is still working to assemble and produce that record. It would be unfair to completely close the door on Kawerak's request for an evidentiary hearing before the agency record has been produced.

Accordingly, Kawerak is granted a hearing to be conducted through written briefs based on the agency record as to the two issues identified in its hearing request. Within thirty (30) days following production of the agency record, Kawerak may renew its request for an evidentiary

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<sup>11</sup> Kawerak Reply to IPOP's Response at p. 6. Whether Kawerak could permissibly offer such testimony and information under 18 AAC 15.245 is an issue that will not be addressed here.

<sup>12</sup> Kawerak Hearing Request at p. 3.

<sup>13</sup> Kawerak Reply to Division's Response at p. 3.

<sup>14</sup> Kawerak Hearing Request at p. 4.


<sup>15</sup> With that said, it is at least conceivable that limited evidence might be needed to appreciate the range of data that may have been available, had the Division insisted on it.

hearing if it can demonstrate the existence of a disputed question of fact that is appropriately addressed through an evidentiary hearing. This request must clearly describe the perceived factual question and explain how it relates to the two issues Kawerak identified in its hearing request. If such a request is made by Kawerak, IPOP and the Division will have seven (7) days in which to submit responses.

#### IV. Conclusion

Kawerak's request for a hearing on the two issues identified in its hearing request is granted, but this hearing will be conducted through written briefs based on the agency record subject to Kawerak's right to submit a renewed request for an evidentiary hearing as detailed above. The ALJ is directed to set a schedule for production of the agency record, and briefing deadlines.

RECOMMENDED: January 6, 2025; slightly amended after deliberations January 16, 2025.

By:   
Max Garner  
Administrative Law Judge

#### Adoption

The undersigned, in accordance with 18 AAC 15.220(c)(1), GRANTS the request for an adjudicatory hearing and returns the matter to the Office of Administrative Hearings to schedule and hold appropriate proceedings.

DATED this 16 day of January, 2025.

By:   
Emma Pokon  
Commissioner

**Certificate of Service:** I certify that on January 16, 2025, a true and correct copy of this order was distributed as follows: Melanie Bahnke, Kawerak (by email); Peter Caltagirone, Attorney (by email); AAG Thomas Mooney-Myers (by email); AAG Jennifer Seely (by email); AAG Cameron Jimmo (by email); Jessalyn Rintala, DEC (by email); Julia Schweminski (by email); Dept. of Law Central Email (by email).

By:   
Office of Administrative Hearings