

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re:	)	
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Alyeska Seafoods, Inc.	)	
Unalaska Seafood Facility	)	NPDES Appeal No. 03-03
	)	
Permit No. AK-000027-2	)	

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**ORDER DENYING REVIEW**

**I. INTRODUCTION**

In a timely petition dated February 28, 2003, Petitioner, Alyeska Seafoods, Inc. ("Alyeska"), seeks review of two permit conditions<sup>1</sup> in a National Pollutant Discharge Elimination System ("NPDES") permit<sup>2</sup> issued by U.S. Environmental Protection Agency ("EPA") Region 10 (the "Region") on February 5, 2003 (the "2003 Permit"). The 2003 Permit regulates discharges from Alyeska's facility to receiving water bodies, South Unalaska Bay and Outer

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<sup>1</sup> Alyeska originally challenged five permit conditions but, as explained more fully in Part II below, subsequently withdrew its challenge to three of these conditions. See Partial Withdrawal of Issues on Appeal (April 18, 2003).

<sup>2</sup> Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. See CWA § 402, 33 U.S.C. § 1342.

Unalaska Bay, both located in Unalaska, Alaska. Alyeska argues that the two conditions, which both involve seafloor monitoring requirements, are arbitrary and capricious and unsupported by the administrative record. See Alyeska's Petition for Review ("Petition") at 4-8 (Feb. 28, 2003); Partial Withdrawal of Issues on Appeal at 2 (April 18, 2003).

More specifically, Alyeska challenges permit conditions IV.A.1.a and IV.A.9. Alyeska requests remand of the permit to remove the requirement in condition IV.A.1.a that Alyeska measure waste deposits on the seafloor to a depth of one-half inch, and to remove condition IV.A.9, which requires Alyeska to conduct a far-field sediment survey. Petition at 6 ¶22, 8 ¶29. In support of its request, Alyeska argues that: (1) the requirement that seafood processing waste deposits on the seafloor be monitored down to a depth of one-half inch (condition IV.A.1.a) is unnecessary, unreliable, and arbitrary and capricious;<sup>3</sup> (2) the Region's authority to impose the far-field sediment survey requirement (condition IV.A.9) is questionable, given that the requirement bears no clear relationship to any effluent

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<sup>3</sup> Petition at 5-6.

limitation or water quality standard;<sup>4</sup> and (3) the far-field sediment survey serves no purpose and is unnecessary.<sup>5</sup>

The Region's response is that "review should be denied because Petitioner has not alleged any clear error of fact or law." Respondent's Brief in Opposition to Petition for Review ("Region's Response") at 4 (April 18, 2003). The Region further alleges that the disputed provisions are authorized by law, supported by the administrative record, and necessary to protect Alaska's water quality standards. *Id.* at 5-12.

For the reasons set forth below, we conclude that Petitioner has failed to sustain its burden of showing that review is warranted. We therefore deny review.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Alyeska owns and operates a seafood processing facility located on southeast Amaknak Island in the city of Unalaska, Alaska. Petition at 2 ¶3. Alyeska processes over 140 million pounds of raw seafood each year. *Id.* at ¶4. Water used in butchering and processing at the facility passes through a

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<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.*

screening system before being discharged into the South Unalaska Bay. *Id.* at ¶6. Screened water discharges go into the Bay through a single outfall. The outfall is located 50 to 60 feet underwater and contains a multi-port diffuser designed to improve initial dilution. *Id.* NPDES Permit Number AK-000027-2, issued on April 29, 1996 (the "1996 Permit"), authorizes discharges from the facility. See Administrative Record ("AR") 9 (Authorization to Discharge under the NPDES). The 1996 Permit expired on May 30, 2001. *Id.*; see also AR 10 at 6 (Fact Sheet for Proposed NPDES Permit AK-000027-2 (Sep. 14, 2001)).

On November 21, 2000, Alyeska applied for renewal of its existing NPDES permit. See AR 13 (Alyeska Application for Reissuance of NPDES Permit AK-000027-2). On September 14, 2001, the Region issued a draft permit for Alyeska's discharges. AR 11 (Draft NPDES Permit AK 000027-2). Immediately thereafter, on September 21, 2001, the Region provided public notice and requested public comment on the draft permit. AR 9 (Public Notice of and a Request for Public Comment on the Reissuance of NPDES Permit AK-000027-2). Petitioner submitted timely comments on October 16, 2001, questioning, among other things, the need for and scientific reliability of conditions IV.A.1.a and IV.A.9. See AR 2 at 8, 10 (Response to Public Comments on NPDES Permit AK-000027-1 ("RTC") (Feb. 2, 2003)).

On April 16, 2002, the Alaska Department of Environmental Conservation ("ADEC") issued a Certificate of Reasonable Assurance pursuant to section 401 of the CWA, 33 U.S.C. § 1341.<sup>6</sup> AR 6 (State Certification of NPDES Permit AK-000027-2). The Region issued the final permit decision on February 5, 2003.

On March 3, 2003, Alyeska filed a petition for review seeking review of five permit conditions: (1) condition I.E.3; (2) condition IV.A.1.a; (3) condition IV.A.9; (4) condition IV.C.1.b; and (5) condition IV.D.<sup>7</sup> Petition at 1 ¶2. Alyeska and the Region eventually negotiated a resolution regarding conditions I.E.3, IV.C.1.b, and IV.D, and Alyeska proceeded to withdraw these conditions from its petition for review. See Partial Withdrawal of Issues on Appeal (April 21, 2003).<sup>8</sup>

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<sup>6</sup> Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the appropriate state agency indicating that the permit will comply with all applicable federal effluent limitations and state water quality standards. See CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulatory provisions pertaining to state certification provide that EPA may not issue a permit until a certification is granted or waived by the state in which the discharge originates. 40 C.F.R. § 124.53(a).

<sup>7</sup> In addition, in a footnote on page 3 of its petition Alyeska identified various "clerical errors" in the final permit and requested their correction. See Petition at 3 n.1.

<sup>8</sup> Alyeska and the Region also resolved the "clerical errors" as shown by the May 2003 modified permit. See NPDES Permit No. AK-000027-2 (modified May 5, 2003).

We now address the remaining issues in the Petition, Alyeska's challenges to permit conditions IV.A.1.a. and IV.A.9.

### III. DISCUSSION

In appeals under 40 C.F.R. § 124.19(a), the Board ordinarily will not grant review unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board should review in its discretion. 40 C.F.R. § 124.19(a); see *In re Avon Custom Mixing Serv., Inc.*, NPDES Appeal No. 02-03, slip op. at 5-6 (EAB, Aug. 27, 2002), 10 E.A.D. \_\_\_. While the Board has broad power to review decisions under section 124.19, it exercises such authority sparingly, recognizing that Agency policy favors final adjudication of most permits at the Regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); see *Avon Custom*, slip op. at 6, 10 E.A.D. \_\_\_. The burden of demonstrating that review is warranted rests with the petitioner, who must state any objections to the permit and explain why, notwithstanding the permit issuer's previous response to those objections, the permit condition is clearly erroneous, an abuse

of discretion, or otherwise warrants review.<sup>9</sup> See 40 C.F.R. § 124.19(a); *In re City of Moscow*, NPDES Appeal No. 00-10, slip op. at 9-10 (EAB, July 27, 2001), 10 E.A.D. \_\_\_\_; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998).

With these considerations as background, we will now proceed to analyze Alyeska's claims.

**A. Condition IV.A.1.a - The One-Half Inch Thickness Requirement**

Permit condition IV.A requires the permittee to conduct a seafloor monitoring program to determine compliance with the Alaska water quality standard for settleable residues in marine

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<sup>9</sup> In addition, parties seeking review must demonstrate to the Board, *inter alia*, "that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations \* \* \*." 40 C.F.R. § 124.19(a). See *In re New England Plating*, 9 E.A.D. 726, 730 (EAB 2001). The regulations require that a person seeking review of a permit "must raise all reasonably available arguments supporting their position by the close of the public comment period \* \* \*." 40 C.F.R. § 124.13; *New England*, 9 E.A.D. at 731. Accordingly, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable). *New England*, 9 E.A.D. at 731. In this case, Alyeska submitted comments on both of the conditions presently on appeal. See RTC at 8-10.

waters.<sup>10</sup> AR 1 at 12 (NPDES Permit No. AK-000027-2 (Feb. 5, 2002)). In general, condition IV.A requires the permittee to "characterize the waste deposit and determine the configuration, area, and thickness of the continuous deposit of sludge, solid, or emulsion on the bottom that persist throughout the year." *Id.* More particularly, condition IV.A.1.a requires "a scaled map of the area of the continuous deposit of waste solid residues, delineating the areas that are greater than (1) one-half inch thick, (2) three inches thick, (3) one foot thick, (4) three feet thick, and (5) six feet thick." *Id.* In effect, condition IV.A.1.a requires Alyeska to conduct dive surveys to determine the area of waste solid residues on the seafloor, by identifying the areal extent of the waste pile and its depth. The 1996 Permit contained a similar permit condition. The 1996 Permit required Alyeska to "determine the configuration, area, thickness, and volume of the continuous deposit of sludge, solid, or emulsion on the bottom that is greater than 0.5 inch and 3 inches deep respectively and that persists throughout the year

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<sup>10</sup> Alaska's water quality standards prohibit depositing residues on the sea bottom. See Alaska Admin. Code tit. 18, § 70.020 (1999) (with regard to seafood processing plants, the Alaska water quality standards provide that the water supply "[m]ay not, alone or in combination with other substance or wastes \* \* \* cause a sludge, solid, or emulsion to be deposited beneath or upon the surface of the water, within the water column, on the bottom, or upon the adjoining shorelines.").



and the extent of any change in volume or area from the previous survey." See 1996 Permit at 10-11.

Alyeska argues on appeal that the seafloor monitoring requirement that seafood processing waste deposits be monitored down to a depth of one-half inch is unnecessary and would yield unreliable data. See Petition at 4-6. In its comments during the public comment period, Alyeska alleged that a professional diver who had performed dive surveys for the seafood industry advised that the one-half inch measuring requirement will result in erroneous waste pile size determinations. RTC at 8. Alyeska also indicated that it was unclear as to why thickness needed to be monitored. AR 8 (Alyeska Comments (Oct. 16, 2001)).

In its response to comments the Region explained the need and importance of the one-half inch seafloor monitoring requirement. The Region stated:

The lateral distance between the ten centimeter deposit and one-half inch deposit may, in some depositional areas, extend from 10 to 30 radial feet, amounting to 30% or more of the total deposit of offal. This apron of thin deposition is more important in view of the increases in pollock processing demonstrated in Figures 1 and 2 (above). The EPA will maintain its requirement that the area of waste deposits shall be measured out to a depositional thickness of one-half inch

in spite of the difficulty and uncertainty of this level of detection.

RTC at 8. Thus, the Region recognized the difficulty of measuring one-half inch deposits, but nonetheless retained the permit requirement in light of its potential significance for assessing the total amount and extent of the deposit.

On appeal, Petitioner argues that the requirement is unnecessary<sup>11</sup> and that the administrative record demonstrates that it is impossible for divers to distinguish between seafood processing deposits on the seafloor and normal sediment in a

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<sup>11</sup> According to Petitioner, the screening requirement, originally adopted in the 1996 Permit, see 1996 Permit at 1 (establishing a screening requirement of 1 millimeter ("mm")), has proven effective in reducing the historic waste pile. Petitioner cites to ADEC's section 401 certification as support for this assertion. See AR 6 at 4 (State Certification of NPDES Permit AK-000027-2) (indicating that the waste pile around the Alyeska discharge has shown a decline in total area between years 1996 and 2000). Because the new permit follows the same approach, that is, it incorporates a screening requirement, see 2003 Permit at 4 (establishing a screening requirement of 0.5 mm), the challenged condition, in Petitioner's view, is unnecessary. Petition at 4-5 ¶18.

This is the first time Petitioner raises this specific argument, but because ADEC issued its section 401 certification after the public comment period closed, and Petitioner bases its argument on the conclusions reached by ADEC in its section 401 certification we will not regard Petitioner's argument as untimely. See *In re New England Plating*, 9 E.A.D. 726, 731 (EAB 2001) ("[O]nly those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable).") (emphasis added).

scientifically defensible manner. Petition at 4-6. Thus, Petitioner claims that the condition is arbitrary and capricious. *Id.* at 6.

We conclude that Petitioner's arguments do not warrant review because Petitioner has not shown that condition IV.A.1.a is clearly erroneous. We note first that Petitioner's assertions that the condition is unnecessary are conclusory and unsupported by the record. As discussed below, other than relying on ADEC's observation that the size of the historic waste pile has decreased,<sup>12</sup> and pointing to the permit issued to another seafood processing facility,<sup>13</sup> Petitioner provides no support to substantiate its claims that the condition is unnecessary. As to Petitioner's argument that the administrative record shows that it is impossible for divers to measure one-half inch seafood waste deposits, we also found no such support in the record. Such support is necessary to satisfy Petitioner's burden to

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<sup>12</sup> See *supra* note 11.

<sup>13</sup> Petitioner implies that because a permit to another seafood processing facility located in Unalaska only requires a dive survey to identify waste pile deposits of three inches and above, Alyeska's monitoring requirement is unnecessary. See Petition at 6 ¶22 ("Significantly, EPA's current permit for the Westward Seafood Processing Facility on Unalaska Island only requires a dive survey to identify seafloor deposits of [sic] greater than three inches in depth.").

establish that the Region committed clear error in setting the contested permit condition.

We have stated on numerous occasions that the Board assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). When presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *See NE Hub Partners*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's position. *Id.* Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated. *Town of Ashland*, 9 E.A.D. at 667 (citing *NE Hub Partners*, 7 E.A.D. at 567).

In the instant case, the Region's response to comments adequately addressed Petitioner's comments by responding to the specific concerns raised during the comment period. As on appeal, Petitioner's comments during the public comment period concerned the difficulty in measuring one-half inch seafood waste piles and the need for such a requirement. The Region's response explained that in some places the area of thin deposition may amount to 30% or more of the total deposit of offal. RTC at 8. Petitioner does not challenge this assertion, nor does Petitioner attempt to explain why this response is inadequate, as it is required to do. See *Town of Ashland*, 9 E.A.D. at 668 ("When the Region has responded to objections made by the petitioner, a petitioner must 'demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review.'") (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996)).

The Region recognized that the one-half inch measurement is difficult and uncertain, but explained that the requirement is important to develop assessments of the area of the seafloor that does not meet the State's standard prohibiting deposits on the seafloor. RTC at 8. The record supports this response; the fact sheet indicates that the purpose of monitoring is to verify the assumptions made in developing permit limits regarding receiving water conditions and the effectiveness of permit limits. AR 10

at 16 (Fact Sheet for Proposed NPDES Permit AK-000027-2 (Sep. 14, 2001)). Also, this permit condition is a continuation of the requirement in the 1996 Permit that the configuration, area, thickness, and volume of the continuous deposit on the sea bottom greater than one-half inch be measured. See 1996 Permit at 11. On appeal, the Region explains further that eliminating the requirement to measure down to the one-half inch depth would significantly underestimate the areal extent of seafood waste deposition. Region's Response at 6. In sum, the record before us demonstrates that the Region duly considered the issues raised during the public comment period, and adopted a rational approach. We, therefore, do not find clear error.

Secondly, we are not persuaded by Petitioner's argument that the monitoring requirement is unnecessary in light of ADEC's finding that the historic waste pile associated with Alyeska has decreased since 1996.<sup>14</sup> That the waste pile may have decreased over time does not necessarily indicate that monitoring is no longer required. Dischargers are still subject to the same water quality standard,<sup>15</sup> that is, 'no measurable increase';

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<sup>14</sup> See *supra* note 11.

<sup>15</sup> Notably, ADEC indicates in its certification that it "will continue to review the required dive surveys against the standard of 'no measurable increase' in either area or volume from the historic pile." AR 6 at 2 (State Certification of NPDES (continued...))

therefore, monitoring seems like a sound approach to determine compliance with the standard. As the Region points out, the fact that the historic waste pile has decreased in size is not conclusive evidence that the technology is completely effective. See Region's Response at 6. The cause of the waste pile reduction in this case is unknown. In this regard, the Region explains that the reduction could be the result of natural decay occurring at a faster rate than the deposition rate or of Alyeska's practice of "dragging the pile."<sup>16</sup> *Id.* Indeed, the administrative record reflects that even Alyeska representatives believe that Alyeska's pile dragging practice was the main reason for the waste pile reduction.<sup>17</sup> AR 5 at 30 (Inspection Report of Alyeska Seafoods (Aug. 19, 2002)). In light of all this, we

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<sup>15</sup> (...continued)  
Permit AK-000027-2 (Apr. 16, 2002)). ADEC further indicates that "[t]he waste piles should continue to show that they are decreasing in size. If there is a measurable increase this department may request that the permit be reopened and modified to include provisions that will address the increase." *Id.*

<sup>16</sup> The Region explains that "dragging the pile" is the process of pulling chains or other weight through the seafood waste pile to break it up. Region's Response at 6 n.3.

<sup>17</sup> In August 2002, ADEC conducted a site inspection at Alyeska's facility. See AR 5 at 3 (Inspection Report of Alyeska Seafoods (Aug. 19, 2002)). In the inspection report, ADEC's inspector indicates that Greg Peters (Alyeska's Director of Environmental Compliance, *id.* at 3) and Dana Frojen (former manager of Alyeska's Meal Plant, *id.* at 10) believe that 50 hours of dragging the waste pile was the main reason for the dramatic reduction in the most recent dive survey. *Id.* at 30.

decline to second-guess the Region's judgment that the challenged monitoring requirement is necessary.

One additional related argument by Alyeska bears mention. Alyeska points to a permit issued to another seafood facility for the proposition that the one-half inch requirement is unnecessary.<sup>18</sup> We will not entertain this argument. First, Petitioner has not demonstrated that this argument, which Petitioner raises on appeal for the first time, was not reasonably available during the public comment period.<sup>19</sup> Second, even if Petitioner had demonstrated that this argument was not reasonably available during the public comment period, we would have not granted review on this basis. Petitioner has not provided a copy of the permit and such permit is not part of the record before us. Furthermore, as we have noted in the past, "the assertion that [a] \* \* \* reporting requirement is more burdensome than requirements imposed on other similar facilities does not provide grounds for review." *In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 304 n.44 (EAB 1997). As the Region correctly points out, there can be many reasons why

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<sup>18</sup> See *supra* note 13.

<sup>19</sup> See 40 C.F.R. §§ 124.13, .19(a) (persons seeking review of a permit must demonstrate that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable, or available at that time); see also *supra* note 9.



one permittee's requirement differs from another's. See Region's Response at 8. Disparity in requirements among point sources is not by itself a matter warranting review "because permits are issued on an individual basis, taking into account individual differences where appropriate." *City of Port St. Joe*, 7 E.A.D. at 304 n. 44. We also note that while the permit cited by Alyeska may not have a one-half inch requirement, the Region cites permits for two seafood processing facilities that do. See RTC at 8; Region's Response at 8.

Finally, we note that Petitioner's assertion that the one-half inch thickness is impossible to measure is also unsubstantiated, and therefore we deny review on this basis as well. Petitioner merely alleges that a professional diver advised Alyeska that surveying the waste pile at the one-half inch depth would result in erroneous waste pile size determinations. This is not sufficient to show impossibility. The remarks Alyeska ascribes to the diver have not been supported with any documentation. As noted by the Region, "Alyeska did not submit the name, professional qualifications, or the exact statement of this individual, let alone provided any written statement or documentation of this person's qualifications to the administrative record for this permit." Region's Response at 7. This Board has noted on numerous occasions that "mere allegations of error" are not sufficient to support review of a permit condition. See *In re City of Moscow*, NPDES Appeal No. 00-10,

slip op. at 52 (EAB, Jul. 27, 2001), 10 E.A.D. \_\_\_; *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001); *In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992). To warrant review, allegations must be specific and substantiated. The petitioner must not only identify disputed issues but *demonstrate* the specific reasons why review is appropriate. *New England*, 9 E.A.D. at 737.

In sum, absent evidence in the record demonstrating that the basis for the Region's permit decision is erroneous, we are left with a record that supports the Region's determination. We, therefore, decline to overturn the Region's technical judgment in this matter.

**B. Condition IV.A.9 - The Far-Field Sediment Survey**

Petitioner also challenges the need for permit condition IV.A.9. This condition is also one of the seafloor monitoring requirements of the 2003 Permit, and requires the permittee to conduct a far-field sediment survey one kilometer outside the outfall.<sup>20</sup> Condition IV.A.9 provides as follows:

In the 2<sup>nd</sup> year of the permit, the survey shall be extended to include trace deposits of and organic enrichment by seafood

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<sup>20</sup> As explained below, see *infra* note 29, the 1996 Permit contained a similar requirement.

processing waste residues out one kilometer from the outfall terminus for seafood processing wastes. This far-field survey may be coordinated or completed in conjunction with other processors discharging to the receiving water. The survey of far-field organic enrichment should be conducted using grab or core samples which can characterize the grain size and chemistry of the sediment. The study plan for the survey should be developed in consultation with EPA and ADEC and shall require the approval of the two agencies. The study plan should make full use of previous studies of this impact area.

AR 1 at 14 (NPDES Permit No. AK-000027-2 (Feb. 5, 2002)).

On appeal, Petitioner argues that the requirement is unnecessary, and also challenges the Region's authority to establish this monitoring condition. See Petition at 7 ¶26, 8 ¶¶27-28. Alyeska raised similar concerns in comments below. Alyeska argued that there is no compliance-related reason to collect far-field survey data. AR 8 (Alyeska Comments (Oct. 16, 2001)). Alyeska asked the Region to explain the benefit of knowing the sediment physicochemistry, structure, diversity, and health of the infaunal community of the far field area. *Id.* Alyeska argued that even if differences were found, it would be difficult to determine the cause of the changes and their connection to Alyeska's discharges. *Id.*

In its response to Alyeska's comments, the Region explained that the Unalaska Bay has been identified as an impaired water

body,<sup>21</sup> and for that reason the South Unalaska Bay is a water body of concern meriting monitoring. RTC at 10. The far-field study is necessary, the Region continued, to evaluate the potential effects of the settlement of seafood processing residues outside of the immediate vicinity of the outfall stations. *Id.* The Region further indicated that far-field data collected to date suggest that the seafloor may be affected at a distance of one quarter of a mile, and that the potential for far-field deposition is now greater due to the increase in pollock processing. *Id.*

Petitioner contends on appeal that the far-field sediment survey bears no clear relationship to any effluent limitation or water quality standard and that the Region failed to explain its legal authority for imposing such permit condition. Petition at

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<sup>21</sup> Under section 303(d) of the CWA, states are required to identify those water segments where technology-based controls are insufficient to implement the applicable water quality standards, and which are therefore "water quality limited." See CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). Once a segment is identified as water quality limited, the state is further required to establish total maximum daily loads ("TMDLs"). CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7. A TMDL is a measure of the total amount of a pollutant from point sources, nonpoint sources, and natural background, that a water quality limited segment can tolerate without violating the applicable water quality standards. See 40 C.F.R. § 130.2(h). The concept behind the development of TMDLs is to provide a rational basis for developing water quality-based controls for discharges into already impaired waters. See U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.4.1 at 105 (1996). The Unalaska Bay has been identified as an impaired water under section 303(d) of the CWA, and the State of Alaska has developed a TMDL for the recovery of the water body. See RTC at 10.

7 ¶26. Petitioner also argues that the Region's response to comments does not dispute that the survey result will not indicate whether seafood processing wastes were causing changes in the sediment and whether those changes were caused by Alyeska's discharges. *Id.* at 8 ¶27. Finally, Petitioner claims that the monitoring condition is unnecessary. *Id.* In support of this assertion, Alyeska indicates that it already conducted a far-field benthic study in connection with the previous permit, which showed that the facility was in full compliance with its permit effluent limits, and based on those findings ADEC concluded that it was unnecessary to conduct another study.<sup>22</sup> *Id.* ¶28.

Petitioner's challenges to permit condition IV.A.9 must fail. As noted previously, we typically defer to the Region's expertise in areas that are technical in nature, when the Region has adopted an approach that is sound, rational, and supported by the record. The Region's decision to include as a permit condition a far-field study to assess the effectiveness of a new permit condition strikes us as sound, rational, and supportable. As we have stated in the past, when a petitioner challenges the Region's technical judgement, "[p]etitioners must provide compelling arguments as to why the Region's technical judgments

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<sup>22</sup> In fact, ADEC recommended that the far-field study be removed from the permit. See AR 6 (State Certification of NPDES Permit AK-000027-2 (Apr. 16, 2002)).

or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001) (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997)). Petitioner here has provided no compelling reasons as to why we should conclude that the Region's judgment is clearly erroneous.

First, we note that Petitioner's argument that the far-field survey bears no relationship to any effluent limitation or water quality standard is simply incorrect. As the Region explained in its response to comments, the far-field sediment survey is intended to evaluate the potential effects of the settlement of seafood processing residues on the sea bottom in areas outside the vicinity of the outfall. See RTC 10. On appeal, the Region elaborates on its response to comments by explaining that the contested monitoring condition relates directly to permit condition I.A.1, which requires Alyeska to screen waste solids and settleable residues to a size of 0.5 millimeters. See Region's Response at 9. The purpose of screening any waste solids to such a small size, the Region adds, is to comply with the Alaska water quality standard that prohibits deposition of solids on the seafloor. See *id.* The Region further explains that the far-field study is necessary to determine if the new screening requirement merely moves the problem further away from the outfall. *Id.* at 9-10.

With that established, we note that where monitoring relates to maintaining state water quality standards nothing in the CWA or the implementing regulations constrains the Region's authority to include monitoring provisions. *In re Avon Custom Mixing Serv., Inc.*, NPDES Appeal No. 02-03, slip op. at 12-13, (EAB, Aug. 27, 2002), 10 E.A.D. \_\_; *Town of Ashland*, 9 E.A.D. at 662. Sections 308 and 402 of the CWA provide broad authority to require owners and operators of point sources to establish monitoring methods and to prescribe permit conditions for data collection and reporting. CWA §§ 308(a)(A), 402(a)(2); 33 U.S.C. §§ 1318(a)(A), 1342(a)(2); see also *Avon Custom*, slip op. at 12, 10 E.A.D. \_\_. In this regard we have stated that for a petitioner to raise a material issue of fact as to whether an information gathering requirement in a permit is unreasonable and, therefore, exceeds the Agency's authority under section 308(a), a petitioner must cite evidence sufficient to support a finding that there is no basis in fact for the Agency to require information gathering in the first place. *In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 310 (EAB 1997). We do not find Petitioners' arguments sufficient to support such a finding.

Instead, we are persuaded by the Region's arguments about the need for this permit condition, particularly considering the

impaired condition of the receiving water body,<sup>23</sup> the increase in pollock processing at the facility,<sup>24</sup> and the requirement under the Alaska water quality standards that prohibits seafood processing plants from causing deposition of solids anywhere on the bottom of the sea, not only in the vicinity of an outfall. The incorporation of the challenged monitoring condition for the purpose of evaluating the effectiveness of the new effluent limitation, and assessing the need for more stringent limits or further studies to ensure compliance with the applicable state water quality standard is, in our view, an acceptable approach.<sup>25</sup>

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<sup>23</sup> See *supra* note 21.

<sup>24</sup> In its response to comments, the Region explained that the increase in pollock processing has also increased the potential for far-field deposition. See RTC at 10. In its petition Alyeska indicates that it processes more than 140 million pounds of fin fish and crab each year, of which more than 90% is pollock. Petition at 2 ¶4. Alyeska's petition does not dispute the Region's contention in its response to comments that pollock processing has increased. On appeal, the Region further explains that Alyeska's production was over 180 million pounds in the year 2001 and over 193 million pounds in 2002. Region's Response at 2.

<sup>25</sup> As previously noted, one of Alyeska's contentions is that the survey will not indicate whether any changes detected in the sediment are caused by seafood processing wastes and, if so, whether those changes were caused by Alyeska's discharges. See Petition at 8 ¶27. On appeal, the Region concedes that the data from the far-field study would not itself identify the source of the deposition. Region's Response at 10. However, the data, the Region explains, could demonstrate the need for further studies that could identify the source. *Id.* This, in our view, is a sound, reasonable, and acceptable approach.



Moreover, the Region is prohibited from issuing a permit when "the imposition of conditions cannot ensure compliance with the applicable water quality requirements."<sup>26</sup> 40 C.F.R. § 122.4(d). The Region in this case reasonably concluded that the far-field study was necessary to ensure that the Alaska's water quality standards are met, and we see no clear error in that conclusion.

As for ADEC's recommendation that the far-field study be eliminated from the permit, we note initially that the Region was not required to treat that recommendation as it would a condition or requirement of a section 401 certification.<sup>27</sup> In its Certificate of Reasonable Assurance, ADEC clearly indicates that its recommendation regarding the elimination of the far-field

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<sup>26</sup> See *In re City of Moscow*, NPDES Appeal No. 00-10, slip op. at 43-44 (EAB, July 27, 2001), 10 E.A.D. \_\_\_ (indicating that federal permits are required to meet state water quality standards) (citing CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2)). See also *In re Mass. Corr. Inst.-Bridgewater*, NPDES Appeal No. 00-9, at 9 (Oct. 16, 2000) (Order Dismissing Petition for Review) ("In setting permit limits, EPA is required under CWA 301(b)(1)(C) to set permit limitations necessary to meet water quality standards \* \* \*").

<sup>27</sup> See e.g., *In re Gen. Elec. Co., Hooksett, N.H.*, 4 E.A.D. 468, 470 (EAB 1993) ("Section 401 of the Clean Water Act (CWA) authorizes States to certify that any effluent limitations or monitoring requirements in a federal NPDES permit will comply with the Act 'and with any other appropriate requirement of State law set forth in such certification.' CWA §§ 401(d). Any such limitation or requirement shall then 'become a condition on any Federal license or permit subject to the provisions of this section.'") (quoting CWA § 401(d); 33 U.S.C. § 1341(d)).

survey is "outside the scope of [its] 401 certification." AR 6 (State Certification of NPDES Permit AK-000027-2 (Apr. 16, 2002)). ADEC's recommendation is not based on state law considerations; ADEC merely bases its recommendation on its review of monitoring data collected in connection with the previous permit. See *id.* ("[b]ased on the fact that your water quality monitoring results for dissolved oxygen (DO) have shown no violations in five years, you have not exceeded the effluent limits for biological oxygen demand (BOD), and you completed the far-field survey required in the past permit, the department is recommending a reduction in monitoring and omission of the far-field survey.").

As the Region persuasively argues, ADEC's recommendation seems to be unfounded. ADEC's grounds for its recommendation are that: (1) the same study was required and completed in the last permit cycle, and the findings and conclusions of that report were unremarkable; (2) Alyeska's monitoring results under the 1996 Permit show compliance with the requirements for Biological Oxygen Demand ("BOD") and Dissolved Oxygen ("DO"); and (3) the size of the historic waste pile is decreasing.<sup>28</sup>

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<sup>28</sup> See AR 6 at 2 (State Certification of NPDES Permit AK-000027-2 (Apr. 16, 2002)) ("This far-field study was required and completed in the last permit cycle. Given that the findings and conclusions of that report were unremarkable, the facility's discharge monitoring reports indicate full compliance with its permit effluent limits including BOD, there have been no violations of DO and the size of the pre-existing waste piles are (continued...)

While the record shows that a similar study was required by the prior permit,<sup>29</sup> we are not convinced that this is grounds for eliminating the far-field study from the current permit. Nor are we persuaded by ADEC's conclusion that the results of the previous study were unremarkable. As the Region points out, the new study intends to follow up on the results of the previous study, and also avoid some of the problems encountered during the first study. Apparently some of the data collected during the first study were useless due to lost samples and atypical station depths. See RTC at 10. The Region also notes that the previous study suggested that the seafloor may be affected at a distance of one-quarter of a mile. *Id.*; Region's Response at 11. In our view, these are sound reasons why the follow-up far-field study is necessary.

As to ADEC's conclusion that Alyeska's monitoring results under the 1996 Permit show compliance with the requirements for BOD and DO, as the Region notes, Alyeska does not explain how compliance with these effluent limitations relates to compliance with Alaska's water quality standard for settleable residues. Region's Response at 11. We agree with the Region. It is not

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<sup>28</sup> (...continued)  
decreasing, it is not necessary to require another far-field study.").

<sup>29</sup> See 1996 Permit at 11 (Condition IV.A: benthic survey extended to include trace deposits and organic enrichment of far-field deposition out one mile from the outfall terminus).

self-evident that there is a connection between the effluent limits mentioned by ADEC and the zero waste deposition requirement under the Alaska water quality standards, and Alyeska has failed to provide this Board with supporting evidence of any such connection. Finally, we also do not find ADEC's assertion that the size of the historic waste pile is decreasing to be sufficient ground for eliminating the far-field requirement. As discussed previously, the reason for this decrease is uncertain, and the decrease does not necessarily show that the technology is completely effective in preventing settleable residues. In addition, because the screening requirement in the 2003 Permit has changed from that in the 1996 Permit,<sup>30</sup> there is the further basis that the Region would like to determine if the new requirement merely moves the problem of deposition to a more remote location.<sup>31</sup>

In sum, given the importance of monitoring to the integrity of NPDES permits, and the broad authority the CWA confers on the Region to impose monitoring requirements in NPDES permits, it does not strike us as unreasonable that the Region has decided to include the challenged monitoring requirement in this permit.

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<sup>30</sup> Compare 1996 Permit at 1 (Condition I.A.1: screening requirement 1 mm) with 2003 Permit at 4 (Condition I.A.1: screening requirement 0.5 mm).

<sup>31</sup> The far-field study, the Region indicates, is necessary to determine if the new screening requirement merely moves the problem further away from the outfall. See Region's Response at 9-10.

Moreover, absent sufficient evidence supporting Petitioner's contentions we find no cause to review this condition.

#### IV. CONCLUSION

The Region's attempt to assess compliance with Alaska's water quality standards clearly falls within the authority granted by the CWA, and, as noted above, the record here contains ample support for the Region's decision to include the one-half inch monitoring requirement and the far-field sediment survey in the new permit. In light of all the above, Alyeska's petition for review is hereby denied.

So ordered.<sup>32</sup>

ENVIRONMENTAL APPEALS BOARD

Dated: April 14, 2004

By: \_\_\_\_\_/s/  
Edward E. Reich  
Environmental Appeals Judge

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<sup>32</sup> The three-member panel deciding this matter is comprised of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Review in the matter of Alyeska Seafoods, Inc., NPDES Appeal No. 03-03, were sent to the following persons in the manner indicated:

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Dated: April 14, 2004

\_\_\_\_\_/s/  
Annette Duncan  
Secretary