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HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DOCKET NO. CWA-10-2009-0232

CHILKOOT FISH AND CAVIAR, INC.
Haines, Alaska

COMPLAINT

Respondent

I. AUTHORITIES

1.1. This Administrative Complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 10, who in turn has redelegated this authority to the Director of the Office of Compliance and Enforcement in Region 10.

1.2. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R Part 22, EPA hereby proposes the assessment of a civil penalty against Chilkoot Fish and Caviar, Inc. ("Chilkoot" or "Respondent") for violations of the CWA.

1 1.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and
2 40 C.F.R. § 22.38(b), EPA will provide the State of Alaska with an opportunity to consult within
3 thirty (30) days following proof of service of this complaint on Respondent.

4 **II. STATUTORY AND REGULATORY BACKGROUND**

5 2.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes unlawful the discharge
6 of any pollutant by any person except as authorized by an National Pollutant Discharge
7 Elimination System (“NPDES”) permit or other specified statutory sections.

8 2.2. Section 402(a) of the Act, 33 U.S.C. § 1342(a), authorizes the Administrator of
9 EPA to issue NPDES permits for the discharge of pollutants and to prescribe conditions for such
10 permits, including conditions on data and information collection, reporting, and such
11 requirements as she deems necessary to carry out the provisions of the Act.

12 2.3. Section 308 of the Act, 33 U.S.C. § 1318, provides that whenever required to
13 carry out the objectives of the Act, *i.e.*, the restoration and maintenance of the chemical, physical
14 and biological integrity of the Nation’s waters (33 U.S.C. § 1251(a)), the Administrator shall
15 require the owner or operator of any point source to establish and maintain such records, make
16 such reports, install, use, and maintain such monitoring equipment, and provide such information
17 as is reasonably required.

18 2.4. “Discharge of a pollutant” is defined by Section 502(12) of the Act, 33 U.S.C.
19 § 1362(12) to mean “any addition of any pollutant to navigable waters from any point source.”

20 2.5. “Pollutant” is defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6), to
21 include solid waste, biological materials, and industrial waste discharged to water.

22 2.6. “Navigable waters” is defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7)
23 to mean “the waters of the United States, including the territorial seas.”
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1 ebb and flow of the tides and is therefore "navigable waters" and "waters of the United States"
2 within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

3 3.6. Respondent discharged seafood processing waste and other wastewaters to Lutak
4 Inlet without an NPDES permit from June through October for five consecutive years,
5 specifically 2004, 2005, 2006, 2007 and 2008. These discharges constitute violations of Section
6 301(a) of the Act, 33 U.S.C. § 1311(a), on each of the days of discharge.

7 IV. PROPOSED PENALTY

8 4.1. The discharges of pollutants described in above were unauthorized discharges of
9 pollutants to waters of the United States and have resulted in more than 480 days of violation of
10 Section 301(a) of the Act, 33 U.S.C. § 1311(a). Consequently, pursuant to Section 309(g)(2)(B)
11 of the Act, and 40 C.F.R. Part 19, the Respondent is liable for the administrative assessment of
12 civil penalties in an amount not to exceed \$11,000 per violation for each day during which the
13 violation continues, up to a maximum of \$177,500.

14 4.2. In accordance with Section 22.14(a)(4)(ii) of the Part 22 Rules, 40 C.F.R.
15 § 22.14(a)(4)(ii), this Complaint does not include a specific penalty demand. Pursuant to Section
16 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), EPA must, in determining the specific penalty to
17 be assessed in this matter, take into account the nature, circumstances, extent, and gravity of the
18 violation, and, with respect to Respondent, ability to pay, prior history of violations, degree of
19 culpability, economic benefit and savings (if any) resulting from the violation, and such other
20 matters as justice may require. The following five paragraphs of this complaint briefly address
21 each of these statutory penalty factors.

22 4.3. Nature, Circumstances, and Gravity of Violations: The proposed penalty reflects
23 EPA's determination regarding Respondent's failure to apply for an NPDES permit and its
24 unpermitted discharging of seafood processing waste, which are serious violations that
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1 significantly undermine the CWA's regulatory scheme. The gravity of the violation is
2 aggravated in this case because in addition to failing to apply for the requisite NPDES permit
3 that resulted in unpermitted discharges of pollutants into Lutak Inlet, Respondent also failed to
4 comply with relevant permit requirements while operating, including monitoring, submitting
5 annual reports, completing dive surveys, and sampling and recording information.

6 4.4. Respondent's Ability to Pay: EPA has reviewed Respondent's financial condition
7 and has not received sufficient financial information from Respondent to overcome the inference
8 that the penalty need not be reduced further on account of this penalty factor. EPA will consider
9 any additional information submitted by Respondent related to its ability to pay the proposed
10 penalty.

11 4.5. Respondent's History of Prior Violations: EPA is unaware of Respondent having
12 any history of prior violations of the CWA.

13 4.6. Respondent's Degree of Culpability: Respondent did not submit a Notice of
14 Intent ("NOI") for NPDES coverage until after EPA's inspection on July 9, 2007. At that time
15 EPA's general seafood permit had expired, and Respondent was unable to receive coverage.
16 Respondent has continued to discharge without a permit to date, knowing that it does not have
17 coverage under any NPDES permit.

18 4.7. Respondent's Economic Benefit: Respondent received an economic benefit by
19 avoiding the costs of complying with the general seafood NPDES permit, including labor costs
20 for performing sampling and monitoring, preparing annual reports and performing dive surveys.

21 4.8. Other Matters as Justice May Require: Credible and consistent enforcement of
22 the CWA's requirements to apply for, obtain, and comply with NPDES permits regulating the
23 discharge of seafood processing water is necessary to deter Respondent and other similarly
24 situated from violating the law.

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3 **V. OPPORTUNITY TO REQUEST A HEARING**

4 5.1. Respondent has the right to file an Answer requesting a hearing on any material
5 fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon
6 request, the Presiding Officer may hold a hearing for the assessment of these civil penalties,
7 conducted in accordance with the provisions of the Part 22 Rules and the Administrative
8 Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

9 5.2. Respondent's Answer, including any request for hearing, must be in writing and
10 must be filed with:

11 Regional Hearing Clerk
12 U.S. Environmental Protection Agency, Region 10
13 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
14 Seattle, Washington 98101

15 **VI. FAILURE TO FILE AN ANSWER**

16 6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent
17 must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30)
18 days after service of this Complaint.

19 6.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and
20 directly admit, deny, or explain each of the factual allegations contained in this Complaint with
21 regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the
22 circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts
23 which Respondent intends to place at issue; and (3) whether a hearing is requested. Failure to
24 admit, deny or explain any material factual allegations contained herein constitute an admission
25 of the allegation.

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VIII. RESERVATIONS

8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this Complaint shall affect Respondent's continuing obligations to comply with: (1) the CWA and all other environmental statutes; (2) the terms and conditions of all applicable CWA permits; and (3) any Compliance Order issued to Respondent under Section 309(a) of the CWA, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

Dated this ^{5th} day of September __, 2009.



Edward J. Kowalski, Director
Office of Compliance and Enforcement

CERTIFICATE OF SERVICE

I certify that the foregoing "Complaint" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, M/S ORC-158
Suite 900
Seattle, Washington 98101

Copy, together with a cover letter and copy of the Part 22 Rules, by Certified Mail, Return Receipt Requested to:

L. Edward Lapeyri
President and Director
Chilkoot Fish & Caviar, Inc.
P.O. Box 1469
Haines, Alaska 99827

Dated 9/25/09

Julia M. Bingham
U.S. EPA Region 10