

10/16/79

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of	}	NPDES Docket No. X-WP-78-19	
National Pollutant Discharge Elimination System Permit Application for		}	Initial Decision
Nefco-Fidalgo Packing Co.,			
Applicant			

Preliminary Statement

This is a proceeding under section 402 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1342), commonly known as the Clean Water Act. On August 15, 1977, the Environmental Protection Agency, Region X, received an application, dated August 4, 1977, from Nefco-Fidalgo Packing Co. for a National Pollution Discharge Elimination System (NPDES) permit under the act to discharge wastewater from its salmon processing plant located in Ketchikan, Alaska, into the Tongass Narrows, waters of the United States. <sup>1/</sup> A permit, NPDES permit No. AK-000079-5, was issued to the applicant September 29, 1978, effective October 30, 1978 and to expire at midnight, October 30, 1983, for such discharge. A prior permit had been issued for such discharge effective January 13, 1975 and to expire midnight, December 31, 1977.

<sup>1/</sup> On January 17, 1979, the Permits Branch, EPA, Region X, received an amended application for a permit in which Nefco-Fidalgo Packing Co. increased from 300,000 pounds to 400,000 pounds the maximum amount of raw materials consumed per day at the salmon processing plant involved, claiming, in effect, that it originally understated its plant capacity.



On October 17, 1978, EPA, Region X, received a request from Nefco-Fidalgo Packing Co. for an adjudicatory hearing on the reissuance of NPDES permit No. AK-000G79-5 and by letter dated November 24, 1978, the Regional Administrator, Region X, in effect, accepted such request for hearing as complying with section 125.36(b) of the rules of practice issued pursuant to the act (40 CFR 125.36(b)). The Regional Administrator issued a public notice of an adjudicatory hearing in this matter December 13, 1978 in which the following issues of fact were listed to be considered at the hearing:

1. Whether the effluent limitations of permit section I.A.1. are more stringent than effluent guidelines;
2. Whether the effluent limitations of the permit limit the maximum production of the applicant's facility;
3. Whether the permit section III.B (solids disposal) is ambiguous and erroneously suggests that the applicant can only dispose of collected seafood waste if certain alternatives are rejected; and
4. Whether permit section III.B. requires an unworkable and a less than practical method of open sea discharge.

Administrative Law Judge Herbert L. Perlman, Office of Administrative Law Judges, Environmental Protection Agency, was designated to act as the Presiding Officer in this proceeding under section 402 of the act and subsequently was designated by the Regional Administrator to issue the initial decision herein pursuant to section 125.36(1) of the rules of practice (40 CFR 125.36(1)). A prehearing conference was held in Seattle, Washington, April 17, 1979. The Administrative Law Judge held at this conference and in a subsequent order dated

June 8, 1979, that the 2 issues listed in the applicant's request for a hearing, but not in the notice of adjudicatory hearing issued by the Regional Administrator, were not accepted as issues in the proceeding.<sup>2/</sup> Pursuant to the Report of Prehearing Conference, dated April 24, 1979, counsel for EPA, Region X, filed a statement as to the legal basis or authority for the establishment of the "seafood dumping zone" in the permit and as to the standards to be applied in evaluating a contest of the zone so established and Nefco-Fidalgo Packing Co. filed, in part, a motion to defer the proceeding pending the outcome of Association of Pacific Fisheries et al. v. Environmental Protection Agency (No. 75-2007), an action in the United States Court of Appeals for the Ninth Circuit contesting the validity of the guidelines which form the basis of the discharge limitations contained in the permit. Counsel for EPA, Region X filed an opposition to such motion. The applicant's request to hold this proceeding in abeyance was denied in the June 8, 1979 order.

<sup>2/</sup> The first of such issues merely recited that the pertinent discharge limitations contained in the permit are not appropriate, as, in effect, the validity of the guidelines upon which they are based is being considered by the United States Court of Appeals for the Ninth Circuit in Association of Pacific Fisheries et al. v. Environmental Protection Agency (No. 75-2007). The Administrative Law Judge indicated that, in reality, the applicant was requesting that this proceeding be held in abeyance pending, in part, the outcome of the Circuit Court proceeding contesting the validity of the pertinent guidelines (40 CFR Part 408). The second issue listed in the request for hearing, but not in the notice of adjudicatory hearing, was also not accepted as an issue in the proceeding by the Administrative Law Judge on the basis that such issue dealt with the effect of the discharge waters on the receiving waters and is not relevant or material in this proceeding.

A prehearing conference and hearing were held August 22, 1979 in Ketchikan, Alaska. At such conference and hearing, the applicant was represented by G. Lawrence Salkield, Attorney at Law, Seattle, Washington, and EPA, Region X, was represented by Brent J. Gilhousen, Attorney at Law, Seattle, Washington. Nefco-Fidalgo Packing Co. presented 3 witnesses and the testimony of one witness was adduced on behalf of EPA, Region X. After the hearing, the parties filed briefs.

#### Findings of Fact

1. The applicant, Nefco-Fidalgo Packing Co., is a corporation whose address is 2360 West Commodore Way, P. O. Box 99008, Seattle, Washington. Nefco-Fidalgo Packing Co. operates a mechanized salmon processing facility or plant located within the city limits of Ketchikan, Alaska, at 710 Stedman Street, Ketchikan, Alaska.

2. A permit effective January 13, 1975 and a modification thereof were issued by the Environmental Protection Agency, Region X, to Nefco-Fidalgo Packing Co. for its plant at Ketchikan, Alaska, on December 13, 1974 and July 28, 1977, respectively, in which during the period beginning July 1, 1977, Nefco-Fidalgo Packing Co. was "authorized to discharge process wastewater, after screening . . . to a screening device or devices equivalent to an efficiently operated tangential screen with a grid spacing of 1mm (0.040 inch) or less." The permit further provided, in part, as follows:

(4) Seafood processing waste materials which are retained on the screening device or devices shall be disposed of by 1) recovery or 2) transport (without loss of solids) to a dumping site, which is within the baseline from which the territorial sea is measured as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639), as depicted in Figure 1 approximately 90 meters (100 yards) west of Pennock Reef, and in at least 13 meters (7 fathoms) depth and so as to not cause pollution or be a nuisance, or 3) other means approved by the Regional Administrator.

The permit also contained a schedule of compliance with the effluent limitations specified for discharges which required, in part, that Nefco-Fidalgo Packing Co. complete design of a process wastewater system and screening devices by December 31, 1975, complete procurement of all required process waste disposal equipment by September 30, 1976, report on method of disposal of screened waste solids, that is, recovery, barging, or other means, by March 31, 1977, and achieve screening of process wastes, discharge of process wastewaters through the screening device and approved disposition of screened solids by July 1, 1977.

3. On August 15, 1977, the Environmental Protection Agency, Region X, received an application dated August 4, 1977 from Nefco-Fidalgo Packing Co. for a National Pollutant Discharge Elimination System (NPDES) permit under the act to discharge wastewater from its mechanized salmon processing plant in Ketchikan, Alaska, into the Tongass Narrows, waters of the United States. The permit application, in effect, stated, in part, that the plant consumed a maximum of 300,000 pounds per day of raw material, that is, salmon, for processing. On January 17, 1979, the Permits Branch, EPA, Region X, received an amended application for a permit in which the 300,000 pound maximum was increased to 400,000 pounds.

4. A permit, NPDES Permit No. AK-000079-5, was issued to Nefco-Fidalgo Packing Co. for its facility at Ketchikan, Alaska, September 29, 1978, effective October 30, 1978 and to expire at midnight, October 30, 1983. Such permit provides, in part, as follows:

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. During the period beginning on the effective date and lasting through the expiration date, the permittee is authorized to discharge from outfall serial number 001 (when processing salmon).

a. Such discharges shall be limited . . . as specified below:

<u>EFFLUENT CHARACTERISTIC</u>	<u>DISCHARGE LIMITATIONS</u>			
	<u>Kg/day</u> <u>Daily Avg</u>	<u>(lbs/day)</u> <u>Daily Max</u>	<u>Other Units</u> <u>Daily Avg</u>	<u>(Specify)</u> <u>Daily Max</u>
Flow-m <sup>3</sup> /Day (MGD)	N/A	N/A	N/A	N/A
Total Suspended Solids	3545 (7800)	6000 (13,200)	N/A	N/A
Oil and Grease	1500 (3300)	3954 (8700)	N/A	N/A

B. Solid Waste Disposal

In the event the permittee is unable to dispose of collected seafood wastes by by-product recovery or ocean dumping as allowed in the Marine Protection, Research, and Sanctuaries Act of 1972, Public Law 92-532, the permittee may dispose of said waste in the "seafood dumping zone" identified on Figure 1. This zone is approximately 90 meters (100 yards) west of Pennock Reef and in at least 13 meters (7 fathoms) depth.

5. Pursuant in part to sections 301(b)(1)(A) and 304(b) of the act (33 U.S.C. 1311(b)(1)(A) and 1314(b)), the Acting Administrator on November 13, 1975 (40 F.R. 55770, 55783-4) issued with respect to the

seafood processing point source category, effluent guidelines and standards for the canned and preserved seafood processing point source category, including Subpart Q thereof dealing with the Alaskan mechanized salmon subcategory (40 CFR 408.170-408.176), which required the application of the best practical control technology currently available. Corrections thereof were issued by the Acting Administrator on July 23, 1976 (41 F.R. 31820, 31821-2). The guidelines for the Alaskan mechanized salmon processing subcategory provide, in part, as follows:

§408.170 Applicability; description of the Alaskan mechanized salmon processing subcategory.

The provisions of this subpart are applicable to discharges resulting from the mechanized butchering of salmon in Alaska.

§408.171 Specialized definitions.

For the purpose of this subpart.

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "seafood" shall mean the raw material, including freshwater and saltwater fish and shellfish, to be processed, in the form in which it is received at the processing plant.

§408.172 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

(a) In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if

the state has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

(b) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

(1) Any mechanized salmon processing facility located in population or processing centers including but not limited to Anchorage, Cordova, Juneau, Ketchikan, Kodiak, and Petersburg shall meet the following limitations:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed -
Metric units (kilograms per 1,000 kg of seafood)		
TSS-----	44-----	26
Oil and grease-----	29-----	11
pH-----	Within the range 6.0 to 9.0	-----
English units (pounds per 1,000 lb of seafood)		
TSS-----	44-----	26
Oil and grease-----	29-----	11
pH-----	Within the range 6.0 to 9.0	-----

(2) Any mechanized salmon processing facility not covered under §408.172(b)(1) shall meet the following limitations: No pollutants may be discharged which exceed 1.27 cm (0.5 inch) in any dimension.

6. In the preparation of an NPDES permit under the act, the Environmental Protection Agency applies thereto the national effluent limitation guidelines, if available. With respect to seafood processing plants, a permit application is evaluated to determine the type of activity, effluent flow, source of intake water, in-plant process techniques, species processed, the maximum amount of raw material processed per day of plant operation, current waste abatement practices, wastewater characteristics and effluent discharge data. Then, the applicable effluent guideline is applied to determine the permit's effluent limitations. In connection with Nefco-Fidalgo Packing Co.'s permit, where the application therefor listed 300,000 pounds as the maximum amount of raw material processed per day, the following calculations were employed, utilizing the 300,000 pound value and the per unit limitations set forth in the guidelines for non-remote Alaskan mechanized salmon processing facilities, to arrive at the effluent limitations set forth in section I.A.1. of the permit (see Finding of Fact 5):

Total Suspended Solids (TSS)

Daily Average	300 X 26 lbs	=	7800 lbs 3545 kg.
Daily Maximum	300 X 44 lbs	=	13,200 lbs per day 6000 kg. per day

Oil and Grease (O & G)

Daily Average	300 X 11	=	3300 lbs 1500 kg.
Daily Maximum	300 X 29	=	8700 lbs per day 3954 kg. per day

The effluent limitation guidelines are technology based and can be achieved by the use of a screening device or devices equivalent to an efficiently operated tangential screen with a grid spacing of 1 mm (0.40 inch) or less. The permit merely authorizes the discharge of process effluent after screening or its equivalent.

7. In considering the appropriateness of the seafood dumping site or zone established in the permit, there was considered the tide, depth, current, direction of the current, the proximity of populated areas, namely, the City of Ketchikan, any other aesthetic problems and the review of the State of Alaska. The State of Alaska, Department of Environmental Conservation, on September 19, 1978, issued a Certificate of Reasonable Assurance, certifying that there is a reasonable assurance that the discharge originating from the Nefco-Fidalgo Packing Co. processing facility located at Ketchikan, Alaska, and discharging to the Tongass Narrows, is in compliance with the requirements of section 401 of the Clean Water Act, contingent upon compliance with the provisions of NPDES permit No. AK-000079-5, the permit in issue herein. The Alaska Area Office, Fish and Wildlife Service, United States Department of Interior, reviewed the permit application filed by Nefco-Fidalgo Packing Co. and, by letter dated August 4, 1977, did not object to the issuance of a permit and did not recommend any special stipulations. By letter dated December 28, 1977, the Alaska Region, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, United States Department of Commerce, did not object to the issuance of permit No. AK-000079-5 as it was concluded that the discharge

involved probably will not have a significant adverse impact on aquatic resources or their environments of concern to such organization. This conclusion was reached on the basis of the material submitted including the permit application and the draft permit and not upon a field inspection.

8. The Nefco-Fidalgo Packing Co. plant in Ketchikan, Alaska, is one of the oldest sites in Alaska in the salmon canning business and operates between 30 to 45 days per year. The plant currently disposes of process or salmon waste by collecting the heads, fluming the heads into a grinder and grinding the heads, and fluming the ground heads to a catch basin where the viscera and tails have been collected. The ground heads and the viscera and tails are then fed into a chopper pump where they are chopped and pumped out of a disposal pipe under the plant dock into water approximately 40 feet deep relatively close to the shoreline. The seafood dumping zone is approximately one and one quarter miles from the applicant's plant.

9. Wards Cove Packing Company operates a salmon processing plant located approximately 3 miles outside of the City of Ketchikan, Alaska. It currently disposes of its process waste by grinding and pumping it. (See 40 CFR 408.172(b)(2)).

### Conclusions

It is patent from the record that the effluent limitations contained in section I.A.1. of the permit in controversy, that is, NPDES permit No. AK-000079-5, are not more stringent than the effluent guidelines involved (See issue No. 1 of the Notice of Adjudicatory Hearing promulgated by the Regional Administrator).<sup>3/</sup> In fact, the record indicates that such discharge limitations in the permit with respect to total suspended solids and oil and grease were determined by the application of the guidelines, and the effluent limitations therein for such effluent characteristics, to the maximum amount of raw material, that is, salmon, listed in Nefco-Fidalgo Packing Co.'s August 4, 1977 application for a permit as processed per day at its Ketchikan cannery, that is 300,000 pounds (See Finding of Fact 6). Subsequently, the applicant filed an amended application for a permit January 17, 1979 wherein the maximum amount of raw materials consumed per day at the salmon processing plant was increased from 300,000 to 400,000 pounds of salmon. The applicant claims that it originally understated its plant capacity and counsel for EPA, Region X, has indicated that the Environmental Protection Agency is willing to modify the permit discharge limitations in accordance with the amended permit application on the basis of the methodology utilized to arrive at the discharge limitations for total suspended

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<sup>3/</sup> Counsel for EPA, Region X, erroneously states that in the Report of Prehearing Conference, dated April 24, 1979, the Administrative Law Judge ruled that this issue would not be tried in the hearing. Issue No. 1 of the request for hearing filed by Nefco-Fidalgo Packing Co. was not accepted as an issue in the proceeding.

solids and oil and grease contained in the permit. The permit should be so modified (see Finding of Fact 6).<sup>4/</sup>

The second issue noticed by the Regional Administrator for consideration in this proceeding is "Whether the effluent limitations of the permit limit the maximum production of the applicant's facility." This may well be the case should the applicant continue its present method or mode of disposal of waste from its mechanical processing operation as approximately 25 percent of the raw product received at a mechanized salmon processing plant is waste, that is, fish heads, viscera and tails. Currently, Nefco-Fidalgo Packing Co., at its plant at Ketchikan, collects all of the heads, tails and viscera of the processed salmon and after grinding this waste (see Finding of Fact 8), pumps the ground effluent through a pipe into waters in the vicinity of its plant. It does not appear, however, that the maximum production of the facility involved will be limited by the effluent discharge limitations set forth in the permit if the applicant employs the technology upon which such values are based. This is especially so since the permit is to be modified to reflect the 400,000 pounds per day maximum processing capacity of the Ketchikan plant, as reflected in the amended permit application. Nefco-Fidalgo Packing Co., in reality, admits this to be the case when it states in the opening brief filed on its behalf that "The proposed permit, Exhibit A2, does not mention the word

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<sup>4/</sup> Such modification would result in a daily average and daily maximum for total suspended solids of 10,400 and 17,600 pounds, respectively, and a daily average and daily maximum for oil and grease of 4,400 and 11,600 pounds, respectively.

'screening', but that is the technology upon which the effluent characteristics were based and that is the only method currently available which would meet the discharge limitations of the proposed permit."

The third issue contained in the notice of adjudicatory hearing issued by the Regional Administrator, that is, "Whether the permit section III.B (solids disposal) is ambiguous and erroneously suggests that the applicant can only dispose of collected seafood waste if certain alternatives are rejected", is readily determined and solved by reason of the intent of such provision, as stated by the permit draftsman and counsel for EPA, Region X. Bill H. Lamoreaux, an EPA employee whose duties include the preparation of draft industrial NPDES permits for Alaska testified, in part, with respect to the permit provision involved that "The alternatives of waste disposal of collected seafood wastes depicted in the permit . . . Part III.B. merely sets forth alternatives. The applicant has no affirmative duty to show that either by-product recovery or ocean dumping are not viable means of waste disposal." Out of an abundance of caution, as some ambiguity is present in section III.B of the permit, such provision should be modified to reflect clearly its intent. Accordingly, section III.B. should be modified to read as follows:<sup>5/</sup>

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<sup>5/</sup> Of course, any suitable language agreeable to the parties which encompasses or expresses the intent of section III.B of the permit may be substituted. In this connection, at the prehearing conference held August 22, 1979, the attention of the parties was called to a similar provision contained in a stipulation entered into by the parties in In re Morpac, Inc., Docket No. X-WP-78-17. That provision also provides that seafood processing waste materials which are retained in the screening device or devices may also be disposed of by "other means approved by the Regional Administrator." Disposal in a landfill is recognized by the parties as an alternative method of disposal. If the applicant does not dispose of the collected solids recovered by screening into the waters of the United States, it does not probably require authorization under the NPDES program.

The permittee may dispose of collected seafood wastes by by-product recovery, ocean dumping as allowed in the Marine Protection, Research, and Sanctuaries Act of 1972, Public Law 92-532 and in the "seafood dumping zone" identified in Figure 1. This zone is approximately 90 meters (100 yards) west of Pennock Reef and in at least 13 meters (7 fathoms) depth.

The fourth issue listed in the notice of adjudicatory hearing is "Whether the permit section III.B. requires an unworkable and a less than practical method of open sea discharge." In reality, Nefco-Fidalgo Packing Co. is attacking primarily the "seafood dumping zone" established in section III.B. and is also contesting the disposal of the collected seafood wastes by any means other than that presently employed, that is, the grinding and pumping of the waste out of a pipe extending out from under the plant's pier. This issue is somewhat difficult to consider as, in large measure, the applicant is challenging the guidelines upon which the effluent limitations contained in the permit are based and attempting to deal with the effect of the plant discharge waters on the receiving waters. We cannot consider such challenges at this time in this proceeding under section 402 of the act. See e.g. GC Opinions No. 3, 23, 24 and 27 and Weyerhaeuser Company v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Consolidated Coal Company v. Costle, 13 ERC 1289 (4th Cir. 1979); National Crushed Stone Association v. EPA, 13 ERC 1277 (4th Cir. 1979); In re Louisiana-Pacific Corporation, 10

ERC 1841 (1977); GC Opinions No. 38 and 70.<sup>6/</sup> The applicant has been repeatedly advised thereof, but persists in pressing such issues.<sup>7/</sup>

For example, the applicant attacks the distinction made in the guidelines between, and the classification therein of, remote and non-remote mechanized salmon processing facilities and the economics of the disposal of collected seafood waste. The economic effect of the barging of seafood waste was considered on an industry-wide basis in the construction and promulgation of the guidelines and the economic effect of such requirement upon the applicant in this proceeding, as distinguished from a variance proceeding perhaps, may not be considered. Nor can we revise in this proceeding the inclusion of Ketchikan as a city within the non-remote category. Nefco-Fidalgo Packing Co.'s basic complaint in this regard is that Wards Cove Packing Company, a competitor whose plant is located approximately 3 miles outside of the City of Ketchikan, is not subject to the same effluent limitations pursuant to the guidelines as is Nefco-Fidalgo's plant (see 40 CFR 408.172(b)(2)). As

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<sup>6/</sup> This is not a proceeding instituted pursuant to a request for a variance as provided in section 408.172(a) of the pertinent guidelines (40 CFR 408.172.(a)). Nefco-Fidalgo Packing Co. has not requested a variance or submitted evidence to the Regional Administrator pertinent to such inquiry to enable the Regional Administrator to make an administrative determination, instead of a quasi-judicial determination, as explained at the hearing. The issues under such process and the framework of such a process would be significantly different from the issues presented herein and the limited scope of this proceeding.

<sup>7/</sup> The applicant attempted to present evidence appropriate to the proceeding in the United States Court of Appeals for the Ninth Circuit attacking the guidelines and the enforcement action brought against the applicant in the United States District Court for the District of Alaska apparently for violation of the prior permit.

indicated above, the applicant's attack upon the guidelines may not be considered herein, although it should be stated, at this point perhaps, that the record indicates, on the basis of an inspection on September 30, 1977 by EPA employees, which included an underwater examination by divers and underwater measurements, that there was no build up of waste at the Ward Cove site while there were definite accumulations of groundup waste resulting from discharge from applicant's plant with the accumulations being most persistent from the plant outfall pipe in a southerly direction as well as in an inshore direction.

The applicant further contends that none of the alternatives for disposal of collected waste are acceptable to it or as desirable as its present method of grinding and pumping the waste out of the plant pipe. It appears to argue that this is so from an economic, environmental and practical standpoint. As indicated above, we have serious doubts with respect to our authority to consider much of what the applicant contends by virtue of the limited scope of this proceeding. We should state, however, that it does not appear that the applicant has seriously considered, studied or examined the various disposal alternatives as it basically takes the position that it should not have to engage in the screening of its waste with the consequent problem of disposal of collected waste as its present method of treatment is adequate and as Wards Cove Packing Company need not do so. For example, while Mr. Lamoreaux testified generally that there is a lack of suitable land disposal sites in Southeast Alaska, the applicant has made no inquiry of the City of

of Ketchikan as to the possibility of a landfill site for disposal of its waste. Similarly, it has not made any study or, at least, has not offered any study with respect to the costs of screening and barging of seafood waste, either to the "seafood dumping zone" or in the ocean or of transporting such waste to a by-products processing plant in Petersburg, Alaska. It's officer, John Lyon, merely states that screening and barging would cost 500,000 dollars without any support for such statement.

In short, it is clear that the grinding and pumping of the seafood processing waste of the Nefco-Fidalgo Packing Co.'s plant at Ketchikan into Tongass Narrows, without screening, will not meet the effluent limitations in its permit for total suspended solids and oil and grease, which limitations are based upon the effluent guidelines for non-remote mechanized Alaskan salmon processing plants. The only alternative advanced by the applicant to the seafood dumping zone established in the permit for the disposal of solid processing waste from its plant is the present system employed for such disposal, that is, grinding and pumping. That obviously cannot be employed under the permit and the guidelines. In addition, the applicant has clearly failed to meet its burden of proving that the methods of disposal set forth in section III.B. of the permit, as modified by this decision, are unworkable or not practicable (see 40 CFR 125.36(i)(1)).<sup>8/</sup> Each of the alternative means of

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<sup>8/</sup> On this record at least, the seafood dumping zone appears to offer the most likely alternative. The location of the City of Ketchikan in relation to such zone and aesthetic considerations appear to have played a large role in its selection in addition to tides, currents etc. Those factors and Alaskan State standards and review negative any adverse inferences to be drawn from the fact that such zone is only one and one quarter miles from the applicant's plant. In fact, such location should minimize transportation expenses.

disposal of the seafood processing waste materials retained in the screening device or devices require the expenditure of funds. The applicant is apparently unwilling to make such investment. This is not a factor or consideration within the limited scope of this proceeding and perhaps not even in a variance proceeding. Cf. Weyerhaeuser Company v. Costle, supra, at pp. 1036-7. Also, any infirmity or invalidity in the seafood dumping zone alternative would only result in the elimination thereof as an alternative means for solid processing waste disposal to the applicant's detriment.

Counsel for Nefco-Fidalgo Packing Co. further requests that the Administrative Law Judge delay the issuance of this decision until a decision by the United States Court of Appeals for the Ninth Circuit in Association of Pacific Fisheries et al. v. Environmental Protection Agency (No. 75-2007), until the Environmental Protection Agency has complied with section 74 of the 1977 amendments to the Clean Water Act by issuing its overdue report on the affects of seafood waste discharge into Alaskan Waters,<sup>9/</sup> or until the applicant has had the opportunity to review the economic feasibility of disposing of its seafood waste in

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<sup>9/</sup> Section 74 of the Clean Water Act of 1977 (33 U.S.C. 1251 note; 1976 Ed., Supp I (1977); 91 Stat. 1609) provides as follows:

The Administrator of the Environmental Protection Agency shall conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters. In addition, such study shall examine technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment. The results of such study shall be submitted to Congress not later than January 1, 1979.

Counsel for EPA, Region X, contends, and the applicant agrees, that this study was not to interfere with the on-going regulatory process.

the sewer system which has just been approved for the City of Ketchikan by its citizens. Such a delay would be contrary to, and violative of, section 125.36(1)(1) of the rules of practice (40 CFR 125.36(1)(1)) which provides for the issuance of the initial decision within 20 days, in effect, of the filing of briefs herein.<sup>10/</sup> In addition, the applicant would have us do what the Circuit Court of Appeals failed or refused to do and as stated in the June 8, 1979 order, "further delay herein is contrary to the statutory purpose and design especially in view of the alleged continuing or prior violation by the applicant of permit standards. Cf, e.g., Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 92 (1975); Bethlehem Steel Corporation v. Train, 544 F.2d 657 (3d Cir. 1976), cert. denied 430 U.S. 975 (1977)." In this connection, we know of no attempt by the applicant to meet the compliance schedule contained in its earlier permit. The applicant has not demonstrated the kind of performance to warrant an open ended delay of this proceeding. We make the further observation that the applicant's plant will not again operate for approximately 9 months and that some of the matters advanced by it as bases for delay may be resolved prior thereto.<sup>11/</sup>

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<sup>10/</sup> Since the Presiding Officer has been designated to issue the initial decision herein, the certification of the record to the Regional Administrator is inappropriate and the time for the issuance of this decision runs from the filing by the parties of briefs herein.

<sup>11/</sup> Of course, this Initial Decision is not the final decision in this proceeding. The applicant may file a petition pursuant to section 125.36(n) of the rules of practice (40 CFR 125.36(n)) for the Administrator's review of this decision. The request for delay may there be addressed to the Administrator who is not bound by similar time constraints.

Order

The Regional Administrator, Region X, shall forthwith modify the final NPDES permit which is the subject of this proceeding, AK-000079-5, as necessary to conform with this decision.

**HERBERT L. PERLMAN**

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Herbert L. Perlman  
Chief Administrative Law Judge

October 16, 1979