



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

June 8, 2022

MEMORANUM

SUBJECT: EPA's Final Permit Decision After Remand by Environmental Appeals Board

FROM: Jeaneanne Gettle, Director, Water Division **JEANEANNE
GETTLE**

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Date: 2022.06.08 11:44:56 -04'00'

TO: Ocean Era NPDES Permit Administrative Record

CLARIFICATION ON REMAND

On May 6, 2022, EPA's Environmental Appeals Board (EAB) issued an order remanding in part and denying review in part for NPDES appeals 20-08 and 20-09 relating to the Ocean Era NPDES Permit. The EAB remanded the permit decision to the Region "to clearly state whether the Region determined that the permitted discharge will not cause unreasonable degradation of the marine environment." The EAB denied review of all other issues raised by the petitioners.

In its decision, the EAB noted that EPA made two inconsistent statements in the conclusion of the Ocean Discharge Criteria (ODC) evaluation: (1) "EPA finds that ... [the conditions of the Permit] will ensure that the discharges from the [F]acility *do not cause unreasonable degradation* of the marine environment," and (2) "The EPA finds that '*no unreasonable degradation*' will likely occur as a result of the discharges from this project ...". The EAB remanded "for the Region to formally clarify its determination."

EPA is clarifying now that it determined prior to issuance of the permit in question that the authorized discharges will not cause unreasonable degradation of the marine environment. As reflected in the attached Declaration of Kip Tyler, the staff permit writer assigned to the Ocean Era permit, the use of inconsistent phrasing in describing the determination in the Ocean Discharge Criteria Evaluation (ODCE) was unintentional. Mr. Tyler intended to characterize the finding in the ODCE as a determination that the authorized discharges will not cause unreasonable degradation of the marine environment, in accordance with the applicable legal standard.

Additionally, the same determination using the correct standard was stated numerous times in the Fact Sheet and elsewhere in the administrative record. *See* Ocean Era Fact Sheet at page 4 ("EPA completed an ODC Evaluation and determined that sufficient information exists to conclude that the discharge from the facility would not cause unreasonable degradation of the marine environment in accordance with 40 Code of Federal Regulations (CFR) § 125.123(a) and 40 CFR § 125.123(d)), Fact Sheet at page 6 ("Further authority for the permit conditions is provided by CWA § 403 and the ODC (40 CFR Part 125, Subpart M), because these conditions help ensure that the discharges will not cause unreasonable degradation of the marine environment."), Fact Sheet at page 7 ("The EPA completed an ODC Evaluation and determined that sufficient information exists to conclude that the point source discharge from the marine aquaculture facility covered by this permit would not cause unreasonable degradation of the marine environment in accordance with 40 CFR § 125.123(a)").

The EAB's remand required only clarification of this one issue. Pursuant to 40 CFR § 124.19(l), final agency action on a permit occurs when EAB review procedures are exhausted, and the Regional Administrator subsequently issues a final permit decision. Under 40 CFR § 124.19(l) (2)(iii), a final permit decision must be issued by the Regional Administrator "[u]pon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies." As the EAB did not specifically provide for further appeal, the permit is now ripe for issuance by EPA Region 4 as final agency action and any further appeal must be brought in the appropriate U.S. Circuit Court of Appeals pursuant Section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F). Further, as EPA is not changing any terms of the permit, no further opportunity for public comment is necessary under 40 CFR §124.14. *See In Re Upper Blackstone Water Pollution Abatement District*, 15 E.A.D. 297, at 311-313 (EAB 2011).

I direct that this Clarification on Remand be added to the Administrative Record in accordance with the EAB's remand order providing for the Region to formally clarify its determination that the discharges authorized by the permit will not cause unreasonable degradation of the marine environment.

Attachment (Declaration of Kip Tyler)

DECLARATION OF KIP TYLER

I, Kip Tyler, based on my personal knowledge, declare and state the following:

1. I am employed by the United States Environmental Protection Agency (“EPA”), Region 4 in Atlanta, Georgia. I am employed as an Environmental Engineer in the NPDES Permitting Section, Permitting and Grants Branch of the Water Division. I was the primary permit writer assigned to develop the Ocean Era permit for issuance by the Director of the EPA Region 4 Water Division. In addition, I was responsible for overseeing development of many of the support documents associated with that permit, including the Ocean Discharge Criteria Evaluation (ODCE).
2. During the drafting of the ODCE for the Ocean Era permit, I drafted portions of the ODCE where the determination was variously stated as “that the discharge from the facility would not cause unreasonable degradation of the marine environment” and as “that ‘no unreasonable degradation’ will likely occur as a result of the discharges from this project.”
3. I am aware of the standard required under 40 CFR § 125.123(a), which provides that “[i]f the director on the basis of available information ... determines prior to permit issuance that the discharge will not cause unreasonable degradation of the marine environment after application of any necessary conditions specified in § 125.123(d), he may issue an NPDES permit containing such conditions.”
4. When drafting the ODCE, I intended to accurately cite the standard in 40 CFR § 125.123(a) and describe a determination that the discharge will not cause unreasonable degradation of the marine environment. However, I erroneously used the “not likely” language due to inattention while drafting. I also drafted the Fact Sheet that accompanied the draft permit, and in that document, I phrased the standard and determination correctly.
5. In arriving at my conclusion, I in fact applied the applicable standard rather than the “likely to occur” formulation, and it was my belief that the administrative record supported this finding.
6. I, Kip Tyler, declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge. Executed in Atlanta, Georgia.

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Kip Tyler, Environmental Engineer
NPDES Permitting Section