

Kadiak Holdings, LLC /Paradigm Marine, LLC

Comments in attached file on behalf of Kadiak Holdings LLC and Paradigm Marine, LLC

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December 8, 2023

Alaska Dept. of Environmental Conservation
Wastewater Discharge Auth. Program/§401 Certification
555 Cordova Street
Anchorage, Alaska 99501-2617

Re: POA-2023-00376 v1.0
(Kodiak Harbor, Alaska)
Our File No: 217-1

Dear Sir or Madam:

I am responding to the ADEC document identified as Public Notice Reference Number POA-2023-00376 v1.0. This document contains a Notice of Application for State Water Quality Certification, originally dated October 20, 2023, with an extended public comment expiration date of December 17, 2023. The water quality certification is sought by Silver Bay Seafoods of Alaska, Inc. ("Silver Bay").

I am responding on behalf of my clients Paradigm Marine, LLC and Kodiak Holdings, LLC of Kodiak, Alaska (collectively referred to herein as "Kodiak"), and their owners David Sutherlin and Nickie Sutherlin. I request that this letter be included in the public comments your agency is receiving in response to Public Notice Reference Number POA-2023-00376 v1.0. A copy of this letter is being sent electronically to the ADEC Public Notice website at:
<https://water.alaskadec.commentinput.com?id=r68RYapfu>

There are several conclusive legal reasons why ADEC should not grant a State Water Quality Certification to Silver Bay for its proposed fill project, which would transform present tide and submerged lands into dry land; *i. e.*, lands that, after the fill has been placed, will lie upland of a newly-established Mean High Tide Line to be created as the result of the proposed fill.

The ADEC Notice states that the agency's role will be to ensure that the proposed project"will comply with the CWA [Clean Water Act], the Alaska Water Quality Standards, and other applicable state laws." These comments on behalf of Kodiak involve several "applicable state laws," including the Alaska Constitution, statutory law, and case law from the Alaska Supreme Court. These laws are as applicable to this

proposed project as any statutes or regulations that may pertain solely to ADEC's role in this process.

I. Kadiak's real property presently fronts on tide and submerged lands. The physical location of Kadiak's real property involved in this ADEC matter lies upland and directly adjacent to the area proposed to be filled by Silver Bay. Kadiak's property is described as Lot 13, Block 2, U. S. Survey 2537 B. (Some of the documents attached to the ADEC public notice incorrectly refer to this parcel as "Lot 3," USS 2537 B).

Presently, Kadiak's Lot 13 fronts on the tide and submerged lands of Near Island Channel, and they are subject to tidal influence every day. (In addition, a small portion of Lot 13 may itself be regularly submerged by tidal action. This situation will be confirmed by survey). If applicant Silver Bay is permitted to place the fill it has applied for on its Tract 16-A, Plat 74-2, the present tide and submerged lands fronting Kadiak's real property will disappear. Kadiak will thus become entirely isolated and blocked off from the tide and submerged lands that presently form the riparian border of its real property.

If this fill is permitted to occur, several state statutes and case law will be violated. Also, the installation of this fill will be in direct violation of several legal reservations and limitations which are Exceptions to Title explicitly listed in Exhibit "A" to the deed by which Silver Bay acquired title to its real property. This Statutory Warranty Deed is recorded at Serial No. 2016-000965-0 in the records of the Kodiak Recording District (June 27, 2016).

These violations of state statutory and case law, and the legal conditions and restrictions imposed on the Silver Bay property by the terms of the Warranty Deed, will be discussed below. Under each of these provisions to be discussed, this is an "either-or" situation. Either Kadiak's existing access to tide and submerged lands is preserved, or the fill project is permitted to proceed.

2. The Alaska Constitution protects Kadiak. Article VIII, Section 14 of the Alaska Constitution states:

Section 14. Access to navigable waters. Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

Silver Bay's proposed fill project cannot occur without destroying Kadiak's existing "free access" to the tide and submerged lands adjacent to its real property. Kadiak is presently a riparian landowner, but it would cease to be riparian if the proposed

fill project receives governmental approvals, and proceeds. If this were to occur, Kadiak's right of access under Article VIII, Section 14 of the Alaska Constitution will have been directly violated. ADEC has a legal obligation to ensure that its CWA certification is not issued in any manner that will be in direct conflict with or defiance of any applicable laws, including the Alaska Constitution.

3. Alaska statutory law protects Kadiak. The Alaska Statutes at AS 38.05.126 guarantee public access to the navigable or public waters of the state. That section states:

AS 38.05.126. (a) The people of the state have a constitutional right to free access to and use of the navigable or public water of the state.

(b). The state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered, and the state holds and controls all navigable or public water in trust for the use of the people of the state.

(c) Ownership of land bordering navigable or public water does not grant exclusive right to the use of the water and a right of title to the land below the ordinary high water mark is subject to the rights of the people of the state to use and have access to the water for recreational purposes or other public purposes for which the water is used or capable of being used consistent with the public trust.

Accordingly, the proposed fill project cannot occur without abrogating Kadiak's existing statutory rights of access and use regarding the tide and submerged lands that are presently adjacent to its real property. To proceed as Silver Bay proposes will be a direct violation of Alaska Statutes 38.05.126.

4. Alaskan case law protects Kadiak. The Alaska case of *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988) established that the Public Trust Doctrine applies to Alaska uplands that front on tide and submerged lands. The Public Trust Doctrine guarantees public access from the uplands to these waters for purposes of navigation, commerce, and fishery.

The Public Trust Doctrine arose in a case litigated in Illinois regarding title to submerged lands underlying Lake Michigan. In the landmark U. S. Supreme Court case of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L. Ed. 1018 (1892). The Public Trust Doctrine, as articulated in the *Illinois Central* case, was held applicable to Alaska tide and submerged lands access issues by the *CWC Fisheries* case:

Illinois Central remains the leading case regarding public rights in tide and submerged lands conveyed by the state [cited cases omitted]. While we have never had prior occasions to apply the public trust doctrine to tidelands in Alaska, those modern courts which have considered its application have generally held

that any attempted conveyance of tidelands by the state which fails to meet the *Illinois Central* criteria for passing title free of the public trust will pass only "naked title to the soil," subject to continuing public trust "easements" for purpose of navigation, commerce and fishery. [cited cases omitted]. The grantee may "assert a vested right to the servient estate (the right of use subject to the trust)" [cited cases omitted], but may not enjoin any member of the public from utilizing the property for public trust purposes [cited case omitted].

We adopt the approach employed by our sister states on this question, and hold that any state tideland conveyance which fails to satisfy the requirements of *Illinois Central*, will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce and fishery.

CWC Fisheries, id, p. 1118.

The Public Trust Doctrine, as outlined in the *CWC Fisheries* case, was later affirmed in the case of *City of Saint Paul v. State of Alaska, Dept. of Natural Resources*, 137 P.3d 261 (Alaska 2006). The *Saint Paul* case involved a tidelands boundary dispute between the City of Saint Paul, Alaska and the Alaska Dept. of Natural Resources. Under a 1995 statute (AS 38.05.825), municipalities were given the right to receive the State's legal interest in the tidelands adjacent to their communities. The Supreme Court nevertheless reiterated that any conveyance of these tidelands to a municipality transferred use and management rights, "but does not confer the right to sell or dispose of the lands or exempt them from the public trust doctrine." *Id.* at p. 262.

Silver Bay proposes to convert existing tide and submerged lands fronting Near Island Channel into filled uplands, for the purpose of constructing an 80-foot by 120-foot marine services building (according to its applications to ADEC and to the U. S. Army Corps of Engineers). It would make this construction possible by depositing 9,000 cubic yards of shot rock, 150 cubic yards of rip rap and 214 yards of concrete fill material onto 0.33 acres of intertidal waters (below the high tide line and mean high water mark). These intertidal waters cover, by definition "tide and submerged lands." Kodiak, as a riparian landowner, presently has access to and use of these intertidal waters.

This fill and construction project will replace tidelands with uplands, and will unavoidably deprive Kodiak of its existing direct access to the tidal and navigable waters of Near Island Channel. It will inevitably violate and infringe upon Kodiak's and the public's right of access to navigable waters under the Public Trust Doctrine.

5. The deed restrictions reservations and prohibitions listed in Silver Bay's Warranty Deed protect Kodiak. Silver Bay obtained ownership of the subject property by a Statutory Warranty Deed recorded on June 27, 2016 at Serial No. 2016-000965-0, Records of the Kodiak Recording District. This deed contains "Exhibit A" which is a list

of thirty-one (31) "Exceptions to Title," which are enforceable legal restrictions, reservations and prohibitions which, among other requirements, protect Kadiak and the public from any loss of existing access to public tidelands, submerged lands and navigable waters.

Exception No. 10 states:

10. Any provision or limitation on the use, occupancy or improvement of Properties resulting from the rights of the public or riparian owners to use any waters which may cover the properties.

This Exception to Title protects a riparian owner, such as Kadiak, from loss of the right of access and use of the waters of Near Island Channel that presently front Kadiak's riparian real property. Silver Bay's application to fill these tidelands, if granted, would extinguish Kadiak's present rights of access to and use of these riparian waters of Near Island Channel for navigation, commerce and fishery, in violation of the Public Trust Doctrine as determined in the *CWC Fisheries* case. The Public Trust Doctrine thus constitutes a "provision or limitation" that prohibits granting approval for Silver Bay's application to fill these submerged lands and convert them to filled uplands.

Exception No. 12 states:

12. Rights of the public and of governmental bodies in into that portion of the Properties herein described lying below the high water mark of Near Island Channel and Kodiak Island Channel.

This Exception to Title preserves the rights of the public and the government (federal, state, and local) to access and use that portion of Silver Bay's Tract 16A and Alaska Tidelands Survey Plat 74-2 lying below the high water mark to continue their access and use of Silver Bay's tidelands property for Public Trust uses. Silver Bay's application to fill these tidelands, if granted, would extinguish the public's and the government's legal rights of access and use of these presently-submerged lands.

Exception No. 14 states:

14. Any adverse claim based upon the assertion that some portion of Properties is tide or submerged lands, or has been created by artificial means, or has accreted to such portions, so created.

This Exception to Title acknowledges that the upland owners such as Kadiak, and other individual claimants and the general public, have an adverse claim to Silver Bay's real property based on its present characteristic of being tide and submerged lands. Silver Bay's application to fill these tidelands, if approved, would directly interfere with

this adverse claim based on these tide and submerged lands' present character, and the public's rights to continue to access and use them under the Public Trust Doctrine.

Exception No. 17 states:

17. Any prohibition or limitation on the use, occupancy or improvements of the Properties resulting from the right of the public or riparian owners to use any waters which may cover the land or to use any portion of the land which is now or may formerly have been covered by water.

This Exception to title acknowledges that the tenets of the Public Trust Doctrine protect the public, and riparian owners such as Kadiak, from the infringement or loss of their rights of access to and use of use the waters that presently cover Silver Bay's real property in Tract 16A for navigation, commerce and fishery, which the Public Trust Doctrine continues to protect from infringement .

6. Conclusion. For all of the above-discussed reasons, ADEC should deny Silver Bay's application for state water quality certification under the Clean Water Act. It should be apparent that Silver Bay lacks the right to apply for such certification, or for any other local, state or federal permission to fill the tide and submerged lands on its real property that it proposes to convert to filled uplands.

The conflict between Silver Bay's plans to fill its tide and submerged lands and the Public Trust Doctrine is starkly evident. This Doctrine will be violated if Silver Bay's proposed project receives ADEC certification under the Clean Water Act.

The above-discussed restrictions contained in the deed by which Silver Bay obtained title to the subject property show conclusively that under these stated Exceptions to Title, Silver Bay simply lacks the necessary land title and legal capacity to fill its tide and submerged lands. Its applications for governmental approvals to enable it to do so must be rejected because its proposed filling of tide and submerged lands explicitly lies outside the limited "bundle of rights" that Silver Bay acquired when it obtained title to the subject real property. This land-title limitation on Silver Bays' ownership rights is clearly evident from the specific content of Exceptions to Title numbered 10, 12, 14 and 17.

Please place my name and address on your mailing list regarding any future correspondence or agency action concerning this proposed project, and in response to the assertions of my clients Kadiak Holdings, LLC and Paradigm Marine, LLC, and their owners.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas E. Meacham". The signature is written in a cursive style with a large, prominent initial 'T'.

Thomas E. Meacham