

**Public Comment on the Draft Alaska Pollutant Discharge Elimination System to IPOPOP, LLC (Alaska Department of Environmental Conservation Permit No. AK0062295) and Request for Public Hearing**

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**RE: Public Comment and Request for Public Hearing on Draft Alaska Pollutant Discharge Elimination System to IPOPOP, LLC (Alaska Department of Environmental Conservation Permit No. AK0062295)**

Ms. Ebert,

Kawerak, Inc. (Kawerak) submits these comments and request for public hearing pursuant to 18 AAC 83.120, and in response to the Alaska Department of Environmental Conservation (ADEC)'s tentative determination to issue a discharge permit for the activities set forth in Alaska Pollutant Discharge Elimination System (APDES) Permit No. AK0062295 (Draft APDES Permit) to IPOPOP, LLC (herein referred to collectively as IPOPOP, or Applicant). The Draft APDES Permit sets forth IPOPOP's proposal to discharge wastewater from the IPOPOP silt curtain containment system doorway into the Bonanza Channel (Project) under 18 AAC 83.005 - 18 AAC 83.990, and requires in relevant part that "[a]ll activities conducted and all plan approvals implemented by the permittee pursuant to the terms of this permit shall comply with all applicable local, state, and federal laws and regulations."<sup>1</sup> Yet the Project as structured already violates Federal and State subsistence and water quality requirements. On these and other grounds, Kawerak strenuously opposes the Project.

In a related proceeding, the U.S. Army Corps of Engineers (USACE, or Corps) arbitrarily reversed its earlier denial of IPOPOP's application to dredge under Section 404 of the Clean Water Act (CWA), and offered individual permit #P0A-2018-00123 (Corps Permit) to IPOPOP to dredge and dispose of material in U.S. waters approximately 25 miles east of Nome, Alaska, in the Bonanza Channel. The Corps Permit—which was issued without renewed public notice or comment—incorporates ADEC's April 6, 2022 CWA § 401 Certification of Water Quality,

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<sup>1</sup> Draft APDES Permit, § 1.17 of Appendix A-6.

July 30, 2024

Page 2

which certification is conditioned on IPOP obtaining the APDES Permit at issue in ADEC's Notice. In the six years that have passed since IPOP submitted its initial application materials to relevant Federal and State authorities, Kawerak has developed a consistent record of opposition to the Project on both State and Federal stages.

Our comments on the Draft APDES Permit specifically concern the adverse effects to subsistence activities, to water quality, and to Kawerak's sacred cultural and traditional resources that would occur as a result of the activities described in the Draft APDES Permit (which incorporates the Corps Permit by reference), and which run afoul of State and Federal law. We are especially alarmed by the "unavoidable adverse effects" occasioned by IPOP's proposed activity, which adverse effects are acknowledged by the Corps and—by extension—ADEC.<sup>2</sup> In sum, the Project disregards demonstrated negative impacts and cumulative damage to Tribal cultural and subsistence resources, the environment, wetlands, historic properties, fish and wildlife, water supply and quality, and welfare of the people. Both the Corps Permit and the Draft APDES Permit rely on the unsupported assertions of the Applicant, which do not overcome—and often do not even address—substantive issues of Federal or State law. Indeed, Federal and State laws prohibit the issuance of a permit that would de-prioritize the subsistence needs of rural Alaskans and result in yet-undetermined adverse impacts to water quality and wildlife.

Kawerak adopts in full and incorporates by reference its April 9, 2018 comments on IPOP's APMA permit application; its May 24, 2021 Comments to USACE regarding IPOP's Corps Permit application, and its Joint Correspondence of April 12, 2024 alongside the Village of Solomon, Solomon Native Corporation, Bering Straits Native Corporation, Sitnasuak Native Corporation, and Norton Sound Economic Development Corporation.

#### **I. The Project Violates State and Federal Law with Respect to Subsistence Priority.**

The Bonanza Channel and its surrounding environs serve as a subsistence use area throughout the year. The Corps has acknowledged the same.<sup>3</sup> In addition to fishing and foraging, subsistence users hunt mammals, marine mammals, and birds, gather eggs and greens, gather salt for processing meats, and herd reindeer, often as a means of food security and to insulate community members from the grocery markups in the fly-in City of Nome, Alaska. Moreover, Kawerak has explained, subsistence is part of the cultural identity of local Native communities.

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<sup>2</sup> U.S. ARMY CORPS OF ENGINEERS, PACIFIC OCEAN DIVISION, MEMORANDUM FOR RECORD: DEPARTMENT OF THE ARMY ENVIRONMENTAL ASSESSMENT AND STATEMENT OF FINDINGS FOR THE ABOVE-REFERENCED STANDARD INDIVIDUAL PERMIT APPLICATION (Decision Document), File Number, POA- 2018-00123.

<sup>3</sup> Decision Document at 12 ("Government-to-government consultations with the Village of Solomon, a federally recognized Tribe traditionally associated with the project vicinity, confirmed the longterm subsistence activities conducted by the Tribe and others in this general area.

In previous comments, Kawerak and other affected parties have raised concerns that the presence, noise, and visual disturbance of IPOP's Project would negatively impact subsistence resources—specifically including saffron cod or tomcod, eiders, swans and other birds, ringed & subadult bearded seals which utilize the area to hone their foraging skills as it is an inshore estuary; both of which are on the ESA list as Threatened and are known to frequent the area — and therefore these year-round local subsistence users. Additionally, the Safety Sound/Bonanza Channel is host to the farthest north eelgrass bed in Alaska. Eelgrass plays an important role in the marine environment, and the federal government designated eelgrass as Essential Fish Habitat (EFH) and a Habitat of Particular Concern under the Magnuson-Stevens Fishery Conservation and Management Act of 1996 (<https://www.fisheries.noaa.gov/feature-story/importance-eelgrass>).

Rather than address these concerns, IPOP has simply taken the position that no subsistence permits have been issued for the Project area. Numerous subsistence salmon permits have been issued by the State Of Alaska; Alaska Department of Fish & Game for decades. With respect to local concerns regarding the effect of Project on fish migration, seal presence, and other subsistence resources of the area, IPOP simply declined to respond.<sup>4</sup> When commenters explained that IPO's proposed operations would limit the use of subsistence vessels to navigate the channel, IPOP argued that "there would be other places in the vicinity from which to view wildlife and engage in recreational activities."<sup>5</sup> But **yielding to subsistence priority is not discretionary. Rather, entitlement to subsistence priority is enshrined in both State and Federal law.**

Federal law requires that rural residents of Alaska be given a priority for subsistence uses of fish and wildlife.<sup>6</sup> At the State level, **AS 16.05.258** SUBSISTENCE PRIORITY, mandates that subsistence use is prioritized above all else. **AS 16.05.790** protects against HUNTER HARASSMENT. The Corps deferred any such analysis to the State, noting that "[a]s both are state laws, their implementation and enforcement are outside of the Corps' purview . . ."<sup>7</sup> With respect to its own subsistence analysis, the Corps simply concluded that

[t]he mining operation would **likely prevent subsistence-related activities in the area being actively mined and the immediately surrounding areas**, but this involves a relatively small area compared to the 25-mile regional estuary system and the terrestrial areas to the north of estuary. **Although the general project vicinity supports various subsistence activities**, no unique subsistence

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<sup>4</sup> *Id.* at 47; 48.

<sup>5</sup> *Id.* at 46.

<sup>6</sup> 16 U.S.C. §3101, *et seq.*

<sup>7</sup> *Id.* at 54.

opportunities are known to exist at Bonanza Channel that would be adversely affected.<sup>8</sup>

The Corps further acknowledged that “[p]otential adverse impacts related to subsistence activities, aesthetics, noise, and increased activity levels in the project area” had been identified.<sup>9</sup>

For purposes of ADEC’s analysis, the Corps’ findings—which expressly acknowledge the Project’s likely adverse impacts to subsistence use in the area—are insufficient to overcome Alaska’s statutory requirements. Specifically, AS 16.05.258 directs the Alaska Board of Fisheries and Alaska Board of Game to provide a **reasonable opportunity for subsistence uses** first, before providing for other uses of any harvestable surplus of a fish and game population. A “reasonable opportunity” under the statute means an opportunity, as determined by the appropriate board, “that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.”<sup>10</sup> IPOP’s Application denies subsistence users this “reasonable opportunity,” as IPOP has declined altogether to address the community members’ concerns related to the Project’s effects on fish migration, seal presence, and other subsistence resources of the area. Moreover, IPOP’s response to concerns regarding access for subsistence activities has been to point to the existence of **other** subsistence areas (rather than accommodating the requisite reasonable subsistence use of the area at issue).

Nor does IPOP’s Application adequately address the prohibition on harassing activities towards those conducting lawful hunting, fishing, trapping or viewing of fish and game under AS 16.05.790. That statute prohibits the intentional obstruction or hindrance of another person’s lawful hunting, fishing, trapping or viewing of fish and game. Illegal activities include positioning one’s self in a location where human presence may alter the behavior of fish or game another person is pursuing.<sup>11</sup> It is also illegal to create a sight, sound, smell, or physical stimulus to alter the behavior of fish and game another person is attempting to take.<sup>12</sup> Yet IPOP’s Application proposes to do just that, without regard for the consequences.

## **II. IPOP Has Not Established That its Project Will Not Degrade Alaskan Waters.**

Alaska’s commitment to protecting its pristine waters drives ADEC’s water quality standards.<sup>13</sup> Pursuant to the ADEC’s antidegradation policy, “if the quality of a water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation

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<sup>8</sup> *Id.* at 92 (Emphasis added).

<sup>9</sup> *Id.* at 120.

<sup>10</sup> AS 16.05.258(f).

<sup>11</sup> AS 16.05.790(a)(1).

<sup>12</sup> AS 16.05.790(a)(2).

<sup>13</sup> AAC tit. 18, § 70.015(a)(2) (2023); *see generally* ALASKA DEP’T OF ENV’T CONSERVATION DIV. OF WATER, <https://dec.alaska.gov/water/water-quality/> .

July 30, 2024

Page 5

in and on the water, that quality must be maintained and protected” unless the ADEC provides a short-term variance.<sup>14</sup> Moreover, “[a]n applicant for a permit, certification, or approval who seeks to reduce water quality as described in . . . this section shall provide to the department all information reasonably necessary for a decision on the application.”<sup>15</sup> To Kawerak’s knowledge—and with the limited documentation and data available—IPOP has altogether failed to establish that the resultant changes to the Project area’s water quality will not curtail the propagation of fish, wildlife, and recreation in the area.

Indeed, IPOP concedes that its activities **will** impact water quality “within the curtailed area.”<sup>16</sup> And in response to concerns that

[t]here was a lack of water quality characterization (e.g., pH, salinity, dissolved organics, metals) and little analysis regarding changes from pre-project to post-project conditions for SAV, benthic communities, aquatic habitat functions, fish habitat, bird habitat, water quality, etc.[,]

IPOP “declined to disclose project activities,” instead proposing a ‘case study’ that “would” illustrate “temporary” impacts.<sup>17</sup> Likewise, in response to NMFS concerns regarding the adverse effects dredging and disposal operation would have on the water column and quality, IPOP simply “declined to respond.”<sup>18</sup>

The ADEC mandate to ensure water level quality sufficient to support fish and wildlife propagation takes on especial importance in this region. As just one example, the Southern Seward Peninsula is in the midst of a salmon crisis that has lasted nearly five years. The majority of salmon that enter the Bonanza Channel and Safety Sound Estuary come through the eastern most outlet just past the Bonanza Bridge. If IPOP is allowed to dredge and mine these waters, their operations will certainly impact salmon migration and propagation, further exacerbating salmon declines. The Bonanza Channel and Safety Sound are listed in the Anadromous Body of Water Catalog and chum salmon are noted by the Alaska Department of Fish and Game to have spawning grounds in close proximity to the proposed dredging and mining operation. Further, Safety Sound has been documented as an important rearing and growth habitat for juvenile chum salmon as they migrate to the ocean.

Kawerak therefore joins with Tribes, its tribal members, community and neighbors in

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Decision document at 5.

<sup>17</sup> *Id.* at 19-20.

<sup>18</sup> *Id.* at 42.

expressing its opposition to the as-of-yet undetermined levels of disturbance to the substrate and resuspension of toxic heavy metals occasioned by IPOP's mining activities. Kawerak notes with particular concern IPOP's lack of data regarding water chemistry and the potential for introduction of metals including arsenic, mercury, copper and lead into the Project area. Nor has IPOP furnished any reassurance on this front; to the contrary, IPOP has conceded that its activities will negatively impact the water quality, wildlife, and recreational activities in the area (but assures the authorities these effects will be "temporary" and "minor").<sup>19</sup> But ADEC cannot as a matter of law simply take IPOP's unsupported water quality assurances at face value. Nor can ADEC rely on the Corps' determination that IPOP's Project will pass muster, because the Corps Permit in turn relies on the State's determination.<sup>20</sup>

It is impermissible for ADEC to certify a Project if the Project will cause the quality of water to exceed levels necessary to support propagation of fish, shellfish, wildlife and recreation. Yet IPOP has provided no evidence that its dredging activities will meet this standard. ~~ADEC therefore lacks the data and the evidentiary support to conclude that the~~ Project will continue to support the various wildlife, recreation, and subsistence uses within the Project area, and ADEC must deny IPOP's Application.

### **III. The Project will Adversely Impact Numerous Cultural and Natural Resources.**

As established by the public record for this Project, the Corps' decision to issue IPOP's Corps Permit failed to take into account the vociferous opposition of local testimony and comments, was contrary to actions requested during Tribal Consultation, and ignored the recommendations of the U.S. Fish and Wildlife Service and NOAA. We ask that ADEC not repeat the mistakes of the Federal government, and instead take into account the devastating impact that IPOP's Project will have on Native and rural Alaskan communities.

Another factor that IPOP's permit application does not address is the impact it will have on Native Allotment and campsite owners. Several Native Allotments have been identified by the Corp's and the State of Alaska to be in close proximity to the area intended to be mined by IPOP. There are reports of IPOP trespassing on several Native Allotments in the area. Native allotments and campsites are chosen in this area due to their close proximity to subsistence harvestable resources. Native Allotments have been in use for generations and must be maintained as such and simply cannot be moved.

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<sup>19</sup> *Id.* at 72.

<sup>20</sup> *Id.* ("In addition, the Applicant would implement water quality conditions included in the Clean Water Act Section 401 water quality certification issued by the state of Alaska, including obtaining permits under Section 402 of the Clean Water Act that govern discharges by this project.").

Bird-watching is another activity that would be impacted if IPOP is allowed to operate. Migratory birds, birdwatching and bird tourism provides economic opportunities and the maintenance of the wildlife habitat is of economic importance.

State & Federal agencies have stated that they will not be on the ground, or in the area to regulate any activity taking place by IPOP, LLC. However, state & federal agencies will rely on members from IPOP, LLC to self-report or the general public to make a report. Kawerak's experience with state agencies (DNR, DED, Div. of Habitat) regarding reporting on other mining activities taking place to be that of reluctance or just outright denial of any reports having been made. This is of concern, as the closest Department of Natural Resource office is located in Fairbanks, Alaska and then Anchorage, Alaska over 539 air miles from Nome.

#### **IV. Request for Public Hearing**

As provided by ADEC in its Public Notice regarding this matter, Kawerak formally submits this written request for a public hearing. Kawerak asks that the public hearing undertake the following issues, as set forth in greater detail above:

- Draft APDES Permit's lack of compliance with AS 16.05.258;
- Draft APDES Permit's lack of compliance with AS 16.05.790; and
- IPOP's failure to meet ADEC's anti-degradation and water quality requirements.
- Further data i.e. eel grass documentation.

Kawerak's contact information is as follows:

- Melanie Bahnke, Kawerak CEO or desired point of contact
- Address P.O. Box 948, Nome, AK 99762
- telephone number 1-907-443-5231 or 1-907-443-4377
- Email address [MBahnke@kawerak.org](mailto:MBahnke@kawerak.org) or [bahmasuk@kawerak.org](mailto:bahmasuk@kawerak.org)

#### **V. Conclusion**

Thank you for the opportunity to provide comments on Kawerak's concerns with the Project and the minimal cosmetic changes to the Project that still do not bring the Project into compliance with State or Federal law. We are very troubled with how the Project would seriously and adversely impact community subsistence, Subsistence Priority, Native Allotment owners, water quality, migratory birds, marine mammals, aquatic species, and other properties of traditional, religious, and cultural importance to Kawerak, as well as native and non-native use of the area. These comments and our previous comments on the scope of the Project describe the many reasons why Kawerak opposes this Project and the many considerations that ADEC must evaluate in reviewing IPOP's Application. After completing a thorough review of all the

July 30, 2024

Jackie Ebert, Alaska Dep't of Environmental Conservation

Page 8

environmental and cultural impacts and costs that would result from this Project, we strongly urge ADEC to deny the Application.

If you have any questions regarding these comments, you may call me at 907-443-5231.

Sincerely,

KAWERAK, INC.

A handwritten signature in cursive script that reads "Mary David for".

Melanie Bahnke, President