

From: [Sarah Davidson](#)
To: [House Resources](#)
Cc: [Guy Archibald](#); [Heather Evoy](#); [Shannon Donahue](#)
Subject: HB 138 Letter to House Resources fro SEACC
Date: Wednesday, May 1, 2019 9:56:47 AM
Attachments: [Letter to House Resources Committee from SEACC - 5.1.19.docx](#)
[5. EPA Email to DEC Re Undesignation 1.2916 - highlighted.pdf](#)
[3. Antideq-Responsiveness-Summary - highlighted.pdf](#)
[4. DEC Tier-3-Factsheet-2018 - highlighted.pdf](#)
[2. EPA Letter Approving 2010 Interim Designation Process - highlighted.pdf](#)
[1. DEC Interim Methods 2010 and EPA Approval - highlighted.pdf](#)

Dear House Resources Committee Chairs and Members,
Thank you for your deliberation on the issue of Tier 3 Waters in Alaska and for the opportunity to weigh in during the hearing on Monday. I've attached a letter that addresses many of the questions that came up regarding HB 138, along with the referenced documents for the record.

Please let myself or my colleagues (cc'd) know if you would like any additional clarification or documentation.

Many thanks,
Sarah

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

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OFFICE OF
WATER AND WATERSHEDS

July 15, 2010

Ms. Lynn J. Tomich Kent, Director
Division of Water
Alaska Department of Environmental Conservation
410 Willoughby Ave., Ste 303
PO Box 111800
Juneau, Alaska 99811-1800

Re: Interim antidegradation implementation methods

Dear Ms. Kent:

I am writing to acknowledge that the Alaska Department of Environmental Conservation (ADEC) has identified interim antidegradation implementation methods that EPA believes are consistent with 40 CFR 131.12. These methods were sent by ADEC to EPA by electronic mail on July 14, 2010, with a stated effective date of July 14, 2010, and have been posted on ADEC's website at:

http://www.dec.state.ak.us/water/wqsar/Antidegradation/docs/P&P-Interim_Antidegradation_Implemenation_Methods.pdf

EPA's water quality standards regulation at 40 CFR 131.12(a) requires states to adopt an antidegradation policy and to identify methods for implementing that policy. Both the policy and the implementation methods must be consistent with 40 CFR 131.12. ADEC previously adopted an antidegradation policy, which is at 18 AAC 70.015, and which EPA approved on April 7, 1997.

EPA has reviewed ADEC's interim antidegradation implementation methods and believes that they are consistent with EPA's antidegradation regulation at 40 CFR 131.12, as well as Alaska's antidegradation policy at 18 AAC 70.015. The enclosed support document explains in more detail EPA's rationale.

EPA notes that ADEC chose to identify these methods in guidance, *i.e.*, outside of regulation. As explained in the preamble to EPA's proposed antidegradation implementation methods for the State of Oregon (68 Federal Register 58775 (October 10, 2003)), "[w]hen a State or authorized Tribe chooses to develop such methods as guidance or outside of regulation, EPA reviews the methods either in connection with the State or Tribe's submission of an amendment to its antidegradation regulations under CWA section 303(c)(3) or under its discretionary authority to review existing water quality standards under CWA section 303(c)(4)." In this case, ADEC has not amended its antidegradation regulations, thus EPA has reviewed ADEC's methods under CWA section 303(c)(4)(B). That section requires the Administrator to promulgate new or revised water quality standards when it is determined that doing so is necessary. Because EPA

believes that ADEC's methods are consistent with 40 CFR 131.12, no such determination would be appropriate. Thus, this letter does not constitute a CWA 303(c)(4)(B) determination; rather, this letter informs ADEC that the State of Alaska has satisfied the federal requirement to identify methods to implement its antidegradation policy consistent with 40 CFR 131.12.

EPA looks forward to working with Alaska to ensure that any future revisions to ADEC's antidegradation implementation methods are consistent with the CWA and accompanying regulations. Please contact me (206-553-4198) or Bill Beckwith (206-553-2495) of my staff if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Bussell", written in a cursive style.

Michael A. Bussell, Director
Office of Water and Watersheds

Enclosure

cc: Commissioner Larry Hartig

July 15, 2010

**Review of ADEC's Interim Antidegradation Implementation Methods:
Support Document**

This document explains in detail the basis for EPA's finding that ADEC's antidegradation implementation methods are consistent with EPA's antidegradation regulation at 40 CFR 131.12. These methods were sent by ADEC to EPA by electronic mail on July 14, 2010, with a stated effective date of July 14, 2010.

► **General Applicability – Types of Activities Covered**

Consistent with 40 CFR 131.12. Under EPA's antidegradation regulation, antidegradation implementation methods are applicable to activities requiring state or federal permits consistent with EPA's position in the Water Quality Standards Advance Notice of Proposed Rulemaking (ANPRM) (63 FR 36780 (July 7, 1998)). See "When the policy applies" on page 2: "When a permit application [interpreted by EPA to mean an application for a state permit], or an application for state certification of a federal permit under Section 401 of the Clean Water Act, is received, staff should evaluate it to see if issuing the requested permit or certification would allow activities that would degrade the quality of the water body."

► **Applicability/"Triggers" for the various levels of Antidegradation Protection**

- **Existing Use Protection ("Tier 1")**

Consistent with 40 CFR 131.12(a)(1). Alaska's Tier 1 methods apply to all discharges, not just new or increased discharges that would lower water quality. See page 6 of Alaska's methods. This is consistent with 40 CFR 131.12(a)(1) and EPA's interpretation of its antidegradation regulation in its July 7, 1998 ANPRM (63 Federal Register 36781) ("Antidegradation policies are generally implemented for tier 1 by a review procedure that evaluates any discharge to determine whether it would impair an existing use."). "Discharge" as used here is not limited to the discharge of pollutants as in the NPDES context, but rather has the broad meaning consistent with the applicability of section 401 of the CWA.

- **High Quality Water Protection ("Tier 2")**

Consistent with 40 CFR 131.12(a)(2). The implementation methods overall are applicable to new or increased discharges that could lower water quality, and hence Tier 2 would be triggered in such cases. See "When the policy applies," pp. 2 & 3. Applying or "triggering" Tier 2 review requirements only where there is a new or increased discharge that could lower water quality is consistent with 40 CFR 131.12(a)(2) because the substantive Tier 2 "review" requirements of 40 CFR 131.12(a)(2) (e.g., "necessary to accommodate important economic or social development", etc.) only apply if the State is allowing lower water quality. Further, pursuant to ADEC's methods, Tier 2 is to be applied on a "parameter by parameter" basis, which EPA explained in its July 7, 1998

ANPRM (63 Federal Register 36782-83) is an acceptable approach to identifying high quality or Tier 2 waters. See "How to decide what tier applies," pages 4 & 5.

- Outstanding National Resource Water Protection ("Tier 3")

Consistent with 40 CFR 131.12(a)(3) in that ONRW or Tier 3 protection is applicable where a water is so designated. See pages 2-3, 5, and 9-10.

► Existing Use Protection ("Tier 1")

- Processes for determining what is an existing use and what water quality is necessary to protect the existing uses.

Consistent with 40 CFR 131.12(a)(1). ADEC's implementation methods (see "How to do a Tier 1 analysis" on pages 5-6) recognize that it may be necessary to request information from the applicant or State, local or federal agencies concerning existing uses for a particular waterbody. The methods also recognize that protecting existing uses may require water quality other than that provided by a water's applicable water quality criteria ("Often protecting existing uses will amount to specifying effluent limits in a permit or certification that are based on the corresponding water quality criteria for those uses or other information that relates to how good water quality must be to protect the specific 'existing' use."). ADEC's methods state that draft and final permit fact sheet or certification shall document the existing uses and the water quality necessary to protect them. As mentioned above, ADEC's methods also state that Tier 1 applies regardless of whether the proposed discharge would allow lower water quality, meaning that application of Tier 1 is not limited, as Tiers 2 and 3 are, to situations where the discharge could lower water quality, which is consistent with EPA's interpretation of its antidegradation regulation (see EPA's July 7, 1998 ANPRM (63 Federal Register 36781).

► High Quality Water Protection ("Tier 2")

- Process for determining where "the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water".

Consistent with 40 CFR 131.12(a)(2). ADEC's implementation methods refer to potential sources of water quality data, and default to an assumption of high quality water /Tier 2 protection absent sufficient data. This is done on a "parameter by parameter" basis, which, as mentioned above, is one of the approaches EPA has recommended as far as identifying high quality or Tier 2 waters. See "How to decide what tier applies," page 4. See also EPA's July 7, 1998 ANPRM (63 Federal Register 36782-83). EPA notes that ADEC's methods do not deny high quality water protection for a water body solely based on impairment for one or a small number of parameters, or based on impairment of one use.

- Process to determine if a proposed activity would accommodate important economic or social development in the area in which the effected waters are located.

Consistent with 40 CFR 131.12(a)(2). See “How to do a ‘tier 2’ analysis,” finding (A), pages 6-7. EPA has described in its July 7, 1998 ANPRM (63 Federal Register 36784) and EPA’s 1994 Water Quality Standards Handbook, section 4.5 (<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>) its expectations for states regarding this part of its Tier 2 regulation, and ADEC’s finding A is consistent with EPA’s expectations in that it specifies appropriate elements to consider regarding economic or social development, such as jobs, risk reduction, and public health.

- Process to identify if it is necessary to lower water quality to realize the economic or social development associated with the proposed activity (i.e., alternatives analysis to determine if there a least degrading feasible alternative that can be implemented to avoid or reduce the degree of degradation).

Consistent with 40 CFR 131.12(a)(2). This part of the federal regulation at 40 CFR 131.12(a)(2), which is reflected in ADEC’s antidegradation policy and at finding A of its implementation methods, presents two key questions 1) will the activity that would lower water quality provide important economic or social development? and 2) is it necessary to lower water quality to realize such development?

The first question is addressed in the implementation methods at finding A, and is deemed consistent with 40 CFR 131.12(a)(2) for the reasons explained above. Addressing the second question involves an analysis of feasible alternatives to determine if the important economic or social development associated with the project could be realized without degradation, or with a reduced degree of degradation. See EPA’s July 7, 1998 ANPRM (63 Federal Register 36784). ADEC has chosen to address the second question, with its associated analysis of alternatives, at finding D (“The most effective and reasonable methods of pollution prevention control and treatment will be applied to all wastes and other substances to be discharged”). See “How to do a ‘tier 2’ analysis,” finding (D) on pages 7 & 8 of the methods. This section refers to the level of pollution prevention, control and treatment that ADEC should require before allowing degradation of water quality, and, specifically, the option of requiring treatability studies to evaluate the effectiveness and cost of various candidate technologies that could be used to treat a discharge. Because ADEC has included a method that directs the State to evaluate alternatives to the proposed discharge, and choose the least degrading reasonable alternative, this method is consistent with EPA’s Tier 2 regulation (40 CFR 131.12(a)(2)) and the Agency’s interpretation of such regulation in its ANPRM.

- Process and timing for public participation and intergovernmental coordination.

Consistent with 40 CFR 131.12. Draft antidegradation analyses and findings are to be included with the public notice of the associated draft permit or water quality

certification. See "Public notice and comment," page 10. This is consistent with EPA's Tier 2 regulation (40 CFR 131.12(a)(2)) and EPA's WQS Handbook (section 4.8.2) (<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>) because it provides for an opportunity for the public and any other governmental entities to comment on ADEC's draft antidegradation analysis and finding at an appropriate stage in the decision-making process (i.e., while changes can still be made).

- Process for ensuring that the highest statutory and regulatory requirements for point sources are achieved and cost-effective and reasonable BMPs are achieved.

Consistent with 40 CFR 131.12. ADEC's implementation methods (see Tier 2, finding (E) on pages 8-9 and "How the policy works" on pages 3-4) implement this requirement and direct that it shall be fulfilled during any Tier 2 review conducted by the State. As EPA wrote in its July 7, 1998 ANPRM (63 Federal Register 36784-85), a state is required to implement the nonpoint source prong of this provision **only if** the state regulates nonpoint sources. Alaska has chosen in its antidegradation policy (18 AAC 70.015(a)(2)(E)(ii)) to regulate nonpoint sources, at least in the context of its antidegradation policy, and thus must ensure that any and all such nonpoint sources on the water body are implementing all cost-effective and reasonable best management practices before any point source lowering of water quality is allowed. (See EPA's July 7, 1998 ANPRM (63 Federal Register 36785)). ADEC's methods are consistent with this requirement and EPA's interpretation as stated in its ANPRM.

- Recognition that in allowing any lowering of water quality under Tier 2, existing uses must be protected and designated uses and their associated criteria must be met.

Consistent with 40 CFR 131.12(a)(2). See findings (B) and (C) at "How to do a 'tier 2' analysis," page 7. Because each of these findings refers back to ADEC's method regarding Tier 1 analysis, these provisions are consistent with EPA's antidegradation regulation for the same reasons that ADEC's Tier 1 method is consistent with EPA's regulation.

► Outstanding National Resource Water Protection ("Tier 3")

- Process and timing for identifying a waterbody as an ONRW, including process for public participation.

Consistent with 40 CFR 131.12(a)(3). ADEC's implementation methods provide that in addition to considering a water for possible Tier 3 designation as part of a permit action, waters could be designated as Tier 3 through nominations made during the water quality standards triennial review process, or by advocating for a bill before the state legislature. See "How to decide what tier applies," page 5.

The process for considering Tier 3 designation of a waterbody in conjunction with the permit process is described in some detail at "How to do a 'tier 3' analysis," pages 9-10, and includes (1) identifying early in the project design or permit application

process when a waterbody at issue is in a national or state park or wildlife refuge or is a water with exceptional recreational or ecological significance; (2) coordination with other state and federal resource agencies; and (3) a process for public participation (“a minimum 30-day public comment period which may occur independently or in conjunction with the public notice for a draft permit”).

The overall process described by ADEC in its methods is consistent with 40 CFR 131.12(a)(3) because it provides for three options which when considered together are reasonable avenues by which a member of the public may petition to have an eligible water designated as a Tier 3 water body. This is also consistent with EPA’s statements regarding Tier 3 protection in EPA’s July 7, 1998 ANPRM (63 Federal Register 36785-87) and EPA’s WQS Handbook, section 4.7 (<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>).

- Factors the state will use to make ONRW classification decisions.



Consistent with 40 CFR 131.12(a)(3). ADEC’s implementation methods provide that to qualify as Tier 3, a water must be in a national or state park or wildlife refuge, or a water with exceptional recreational or ecological significance. The methods also imply that the effects on future use of a nominated waterbody and nearby land use will be considered. See “How to decide what tier applies,” page 5. This is consistent with EPA’s Tier 3 regulation as interpreted in EPA’s July 7, 1998 ANPRM (63 Federal Register 36785-87) and EPA’s WQS Handbook, section 4.7 (<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>).

- Description of the prohibitions or limitations on new or increased discharges that will ensure Tier 3 protection, i.e., conditions that will ensure that water quality is maintained and protected in ONRWs.

Consistent with 40 CFR 131.12. ADEC’s methods specify that the permitting approaches for Tier 3 waters include zero discharge (denial), short-term/temporary changes, and effluent limits that do not allow any lowering from natural conditions existing water quality. See “How to do a ‘tier 3’ analysis,” pages 9-10. These approaches ensure that Tier 3 water quality is maintained and protected and are consistent with EPA’s interpretation of its Tier 3 regulation, as expressed in EPA’s July 7, 1998 ANPRM (63 Federal Register 36785-87) and EPA’s WQS Handbook, section 4.7 (<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>).

► Addresses how antidegradation analysis is done for general permits.

Consistent with 40 CFR 131.12. ADEC’s implementation methods provide that general permits shall undergo an antidegradation analysis either at the time the permitting authority develops and issues the general permit or upon review of an applicant’s request to be covered by a general permit, depending on the circumstances. See “General permits,” pages 10-11.

State of Alaska Department of Environmental Conservation  Policy and Procedure Procedure		POLICY AND PROCEDURE NUMBER 05.03.103	PAGE 1 of 12
		EFFECTIVE DATE July 14, 2010	
SUBJECT Interim Antidegradation Implementation Methods		SUPERCEDES Previous Edition dated June 28, 2010	
SECTION Division of Water	CHAPTER Permits/Authorizations	APPROVED BY  Lynn J. Tornich Kent, Director	

PURPOSE AND SCOPE

The purpose of this *Interim Antidegradation Implementation Methods* is to provide staff with a framework to implement the state's antidegradation policy. This serves as interim guidance to be used while the Division works with other agencies, permittees, and the public to develop more detailed procedures. The Division expects to develop the final implementation methods through a rule-making process.

PROCEDURE

See attached.

AUTHORITY

To prevent unnecessary lowering of water quality, 40 CFR §131.12 requires states to develop and adopt an antidegradation policy, as well as to identify methods to implement the policy. Alaska's antidegradation policy is established at 18 AAC 70.015. This guidance serves as the interim implementation methods.

IMPLEMENTATION RESPONSIBILITY

Division of Water staff that develop water quality standards regulations or develop and issue permits, or certify federal permits, for discharges to waters of the U.S are responsible to implement the attached methods.

Interim Antidegradation Implementation Methods

July 14, 2010

Introduction.

Federal law requires that each state, as part of its program to protect water quality, adopt a statewide antidegradation policy and also identify methods for implementing the policy. 40 CFR § 131.12(a). The State of Alaska, acting through ADEC, has adopted an antidegradation policy at 18 AAC 70.015, and EPA has approved that policy. The purpose of this guidance document is to describe the methods that ADEC staff should follow to implement the existing policy.

Staff should understand that the policy, having been adopted as a regulation, is part of state law, and compliance with that policy is required. In contrast, this guidance has not been adopted as a regulation, and is designed simply as a tool to help staff implement the policy itself. In the event of any conflict between this guidance and the policy, or any question about the proper interpretation of this guidance, the terms of the policy itself always govern. Also, there may be particular situations where ADEC staff must depart from the terms of this guidance in order to fully comply with state and/or federal law. If such situations arise, compliance with any governing laws will always take precedence over this guidance.

When the policy applies.

The general purpose of the antidegradation ("AD") policy is to protect the quality of the state's waters. Thus, any time someone proposes an operation or activity that could have the effect of lowering the quality of a waterbody, ADEC staff should presume that the AD policy applies, and should comply with it. While this could arise in a variety of contexts, by far the most common is the permitting of proposed discharges into state surface water. Thus, this guidance focuses on that common scenario.

When a permit application, or an application for state certification of a federal permit under Section 401 of the Clean Water Act, is received, staff should evaluate it to see if issuing the requested permit or certification would allow activities that would degrade the quality of a water body. If the application is for a new operation, the answer will usually be 'yes', because most discharges will add some pollutant at levels that exceed the natural condition of the receiving water. And that is what is meant by 'degradation': increasing the concentration of a pollutant in a receiving water. Even a discharge that meets the water quality standards may have the effect of

increasing the concentration of a pollutant in a receiving water. Again, most new discharges would have this effect.

An application for a permit renewal would also trigger analysis under the AD policy if the renewed permit would allow an increase in discharge of pollutants from what had previously been permitted. Thus, staff should compare the effluent limits of the old permit with the proposed renewed permit, to see if the applicant is asking for permission to degrade any state water. Even if the proposed degradation is only for one particular pollutant, analysis under the AD policy would be triggered for that pollutant.

The permitter must document the anti-degradation analysis in the draft and final permit fact sheet or the draft and final state certification of a federal permit. The anti-degradation analysis is not a substitute for the need to document the permitter's rationale for authorizing exceptions to the water quality standards (18 AAC 70.200.240) such as zones of deposit or mixing zones – these must also be documented in the permit fact sheet or state certification of a federal permit.

If the permit renewal would not relax any of the effluent limits or allow a reduction of water quality, no tier 2 or tier 3 AD analysis is required. However, a tier 1 analysis is still triggered, as discussed below. You should document in the permit fact sheet or permit certification that no lowering of water quality will occur and no further tier 2 or 3 analysis is required.

If staff have any doubt about whether AD analysis is triggered by a particular circumstance, they should consult with more experienced peers or with supervisors to answer that threshold inquiry.

How the policy works.

There are three ascending levels of protection offered by the AD policy. These are commonly referred to as “tiers,” even though the regulation itself does not use that term. The level of protection afforded to a particular water body depends upon which tier applies to it.

The lowest level of protection, or tier 1, applies to water bodies whose existing quality is no better than the state-wide water quality criteria for the designated uses of “growth and propagation of fish, shellfish, other aquatic life and wildlife” [see 18 AAC 70.020(a)(1)(C)] and contact recreation [see 18 AAC 70.020(a)(1)(B)(i)]. These two uses are often referred to together as the “fishable/swimmable” uses, entitled to particular protection under the federal Clean Water Act.

The next level of protection is tier 2, and it applies to water bodies whose quality is better than the criteria applicable to the fishable/swimmable uses.

If you decide that a water body is tier 1 for a given parameter, then the tier 1 protection that applies to it under the AD policy is simply that the existing uses, and the level of water quality necessary to support them, are maintained and protected. See 18 AAC 70.015(a)(1). Note that "existing uses" is a defined term, meaning "those uses actually attained in a water body on or after November 28, 1975." So, under a tier 1 AD analysis, you need to document in the draft and final permit fact sheet or the draft and final state certification of a federal permit that those existing uses, and the water quality necessary to protect them, are maintained and protected. Often protecting existing uses will amount to specifying effluent limits in a permit or certification that are based on the corresponding water quality criteria for those uses or other information that relates to how good water quality must be to protect the specific "existing uses." Note that some degradation may be allowed, as long as it won't harm any existing uses. Tier 1 applies regardless of whether the proposed discharge would allow lower water quality (i.e., Tier 1 is not limited, as Tiers 2 and 3 are, to situations where the new or increased discharge would lower water quality).

If you find that you don't have sufficient information to make a tier 1 determination, you may require the applicant to provide any information you deem to be reasonably necessary. See 18 AAC 70.015(b). You may also consider asking other state, local or federal agencies for information on existing uses of the particular water body. Use your judgment about how much information you need. The greater the level of degradation proposed by the applicant, the more information you may consider necessary and appropriate to inform your tier 1 determination.

How to do a "tier 2" analysis.

Tier 2 AD analysis is much more complicated than tier 1. Just compare 18 AAC 70.015(a)(1) with .015(a)(2). For a tier 2 analysis, you can only allow degradation of water quality if you first make five findings. This guidance will discuss the five findings in the order they are listed in the policy. See 18 AAC 70.015(a)(2)(A)-(E).

- (A)** Lowering water quality is necessary to accommodate important economic or social development in the area.

You should evaluate the economic and social consequences of the proposed project. For example, for a new operation, will it provide jobs for a community? For an on-going operation whose permit renewal triggers AD analysis: how important is its continued operation to the regional economy? Will the facility treat and dispose of sewage and reduce risk to public health? The essence of this prong is to force the department to consciously evaluate whether the proposed degradation is justified by the economic and social benefits the project would bring. Degradation of a tier 2 parameter for

purposes other than those that have associated social and economic benefits is prohibited.

Again, the depth and rigor of your evaluation should be appropriate to the level of degradation contemplated. A large new project may well deserve more thorough scrutiny than minor changes in a permit renewal for an on-going operation. Remember, you can always ask the applicant for more information you think is necessary for your evaluation, under 18 AAC 70.015(b). Use your judgment, and ask for help if you're not sure what level of analysis a given project requires.

- (B)** The reduced water quality won't violate applicable water quality criteria except as allowed under 18 AAC 70.015(a).

If the applicant proposes a discharge that would violate the state-wide criteria in 18 AAC 70.020, site-specific criteria established under 18 AAC 70.235, or the whole effluent toxicity limit in 18 AAC 70.030, then you must determine whether such an exceedance is allowed under 18 AAC 70.015(a). Common examples of exceedances are associated with mixing zones, short-term variances and zones of deposit, all of which are allowed exceptions to the state-wide standards. See 18 AAC 70.240 (mixing zones), 18 AAC 70.200 (short-term variances), and 18 AAC 70.210 (zones of deposit). If you encounter an applicant who seeks permission to violate criteria in some other context, seek advice from your supervisor and/or experienced peers. Most authorized exceedances of criteria fall into those three categories and are governed by additional regulatory requirements. The AD policy does not preclude use of these other regulatory tools. Rather, it is best understood as an analytical overlay, requiring its own evaluations and findings. under a tier 1 AD analysis, you need to document in the draft and final permit fact sheet or the draft and final state certification of a federal permit that those existing uses, and the water quality necessary to protect them, are maintained and protected.

- (C)** Resulting water quality will fully protect existing uses.

This finding, while worded slightly differently in the regulation, is functionally equivalent to the tier 1 analysis discussed above. Just as for tier 1 waters, the existing uses of tier 2 waters must also be fully protected.

- (D)** The most effective and reasonable methods of pollution prevention control and treatment will be applied to all wastes and other substances to be discharged.

and

See 18 AAC 70.015(a)(2). Most water of the state will fall into this category, because the quality of most of our surface waters is higher than the statewide criteria for those two designated uses. Among other things, the quality of tier 2 waters must be protected by ensuring that all statutory and regulatory requirements are met for all new and existing point sources and all cost-effective and reasonable best management practices are used to control nonpoint sources.

The highest level of protection is reserved for tier 3 waters, which are also referred to as outstanding national resource waters, or ONRWs. ONRWs are entitled to the highest level of protection because they are special for one reason or another. See 18 AAC 70.015(a)(3).

When you begin your AD analysis under the policy, figuring out what tier of protection applies to your case is the first step.

How to decide what tier applies.

For reasons explained below, as a practical matter, for most waters the question will be whether tier 1 or tier 2 applies. You need to evaluate the available information about the existing quality of the water in question, to determine which of those two tiers applies. Finding water quality data showing the current condition of the water body may be a challenge. The permit application may include ambient monitoring data for the proposed receiving water, and you should research whether ADEC, the U.S. Geological Survey, or another agency has any other useful water quality data on that water body. In some circumstances, regional water quality may be appropriate to consider. If you can't locate sufficient data to make a determination about the water quality, you should presume that it is of high quality, and subject to at least tier 2 protection.

One question will quickly arise: what water quality parameters should you focus on? The permit process will normally identify parameters for which effluent limits will be established through a "Reasonable Potential Analysis" or some other process. At a minimum, you need to consider each parameter for which a permit effluent limit will be established. For each parameter that has a corresponding water quality criterion (as listed at 18 AAC 70.020(b)), such as TDS, metals, fecal coliform, etc., you need to decide whether the quality of the receiving water exceeds (i.e. is of higher quality than) the criteria for the fishable/swimmable uses. If it does not, then the water is tier 1 for that parameter. If it does, then it is tier 2.

This decision is made on a parameter-by-parameter basis. So, for example, the same water body could be tier 1 for arsenic, if it already has arsenic levels equal to or above levels allowed under the fishable/swimmable criteria for arsenic, but tier 2 for everything else that the applicant proposes to

discharge into it.¹ As you make these determinations for the various parameters, you need to document your reasoning, so you can include it in your ultimate AD analysis and findings.

At the time this guidance is issued, ADEC has not yet designated any tier 3 waters. Designation of a waterbody as tier 3 is a significant decision with far reaching effects on future use of a waterbody as well as nearby land use. To qualify as a tier 3, or "outstanding national resource" water, one of two criteria must be met. The water must either be in a national or state park or wildlife refuge or be a water with exceptional recreational or ecological significance. The department's past practice has been to consider a water's potential tier 3 designation as part of the public notice and comment process on a draft wastewater discharge permit. However, EPA has recently recommended that the state establish a stand-alone tier 3 designation process, outside the permit process. As a consequence, the department will consider whether and how to establish a separate procedure for designating tier 3 waters, as it develops the final AD guidance.

In the meantime, in addition to considering possible tier 3 designation as part of a permit action, waters could also be designated as tier 3 through two other existing legal mechanisms, prior to any permitting action. A person could propose a tier 3 designation as part of the division's existing triennial review process, where the public is invited to suggest changes to the state's water quality standards. Tier 3 nominations made this way would be handled in conjunction with the rest of the triennial review, and any final decision would likely be held in abeyance until the final AD implementation guidance establishes the procedures to be used for formal tier 3 designations.² Given the public policy and land management implications, ultimate decisions on tier 3 nominations may even end up before the legislature, as some other states have opted to do. Of course, people seeking tier 3 designations during this interim period may also pursue that goal before the state legislature in the first instance, by advocating for a bill recognizing an ONRW water. In either case, the criteria that the division, and presumably the legislature, would use in considering tier 3 nominations would be those already contained in 18 AAC 70.015(a)(3). Any designation of tier 3 waters reached through either of these other legal mechanisms will be conveyed to permitting staff so they will be able to incorporate those decisions into future permitting actions.

How to do a "tier 1" analysis.

¹ While ADEC is following this "parameter-by-parameter" approach for purposes of this interim guidance, it is still considering the relative advantages of both this approach and the alternative "waterbody-by-waterbody" approach as it develops its final guidance.

² Further details on how the tier 3 nomination process will be integrated with the on-going triennial review process will be posted on DEC's website, at <http://dec.alaska.gov/water/wqsar/trireview/index.htm>.

- (E) Wastes and other substances discharged will be treated and controlled to achieve the highest statutory and regulatory requirements.

These two required findings are closely related and should be considered together. They address the level of pollution prevention, control and treatment that ADEC should require before allowing degradation of water quality.

The first finding, .015(a)(2)(D), requires use of “the most effective and reasonable” methods. Note that this is not a defined term. This finding requires you to use your best professional judgment to evaluate the adequacy of the proposed methods. You must find a reasonable balance between the effectiveness of the possible technologies and their cost, as requiring the most effective methods may place an unreasonable economic burden on the applicant. For a larger project, you may choose to ask the applicant to perform and submit a “treatability study” that evaluates the effectiveness and cost of the various candidate technologies that could be used to treat their wastes and discharge. If you do not feel qualified to make a judgment as to which methods are “most effective and reasonable,” you should consult with other staff on what we have required at comparable operations.

Implementing the related finding, that operations follow “the highest statutory and regulatory requirements” in the control and treatment of their wastes/discharge, is more complicated. The phrase “highest statutory and regulatory requirements” was defined at 18 AAC 70.990(30) until the 2006 revision of the standards, when ADEC dropped that definition. But because EPA has not yet approved ADEC’s deletion of that definition, the former definition still remains in effect for purposes of the federal Clean Water Act. See 40 CFR § 131.21(e).

What this means is that if you are doing an AD analysis for a state certification of an EPA-issued NPDES permit, or for an ADEC-issued APDES permit, you need to retrieve and implement the definition formerly found at 18 AAC 70.990(30). That definition reads as follows:

- (30) “highest statutory and regulatory treatment requirements” means
- (A) any federal technology-based effluent limitation identified in 40 C.F.R. 125.3 and 40 C.F.R. 122.29, as amended through August 15, 1997, adopted by reference;
 - (B) minimum treatment standards in 18 AAC 72.040; and
 - (C) any treatment requirement imposed under another state law that is more stringent than a requirement of this chapter;

So, for you to make the fifth finding required by the AD policy for tier 2 waters, the treatment and control methods to be used must satisfy all three prongs listed in this definition. Prong (A) refers to the technology-based effluent limitation guidelines (ELGs) that EPA promulgates for specific industries. You will find these at 40 CFR Parts 400-471. If you are certifying a NPDES permit, EPA will have already identified the ELGs that apply to the operation in question. If you are issuing an APDES permit, it has to comply with applicable ELGs in any case. See 18 AAC 83.430(a) and 18 AAC 83.010(g).

The other two prongs in the definition refer to state law requirements. Prong (B) cites to the "minimum treatment standards in 18 AAC 72.040" which appears to be an incorrect reference, since the "minimum treatment" standards are found at 18 AAC 72.050 instead.³ Note that those treatment standards only apply to domestic wastewater. The final prong, (C), is a generic reference to other state law requirements that may be more stringent than the requirements of the water quality standards chapter, 18 AAC 70. You should consider whether any such requirements may exist, consulting with your peers as needed.

As you can see, the AD analysis for a tier 2 water is considerably more exhaustive than for tier 1. Since most state waters are relatively pristine, tier 2 AD analysis is the norm, and tier 1 the exception. Again, the level of rigor that you bring to your tier 2 analysis should be commensurate with the degradation to be caused by the proposed operation. Different degrees of degradation will deserve different levels of analysis. But all degradation of tier 2 waters must be evaluated under the framework outlined above, and the required findings must be made, supported and documented in writing.

How to do a "tier 3" analysis.

If the waterbody at issue in your case is in a state or federal park, or in a wildlife refuge, or may have exceptional recreational or ecological significance you should bring this fact to the attention of management early in the project design or permit application review process to consider the appropriateness of making a tier 3 designation as part of the permitting process itself. In considering whether to make a tier 3 designation, ADEC will, at a minimum, coordinate with other state and federal resources agencies with jurisdiction and/or expertise in parks, refuges, and waters that may have exceptional recreational or ecological significance. ADEC will public notice any draft decision to make a tier 3 designation for a minimum 30-day public comment period which may occur independently or in conjunction with the public notice for a draft permit.

³ ADEC corrected this mistake in its mixing zone regulations, also awaiting EPA approval. See 18 AAC 70.240(c)(1)(B).

Once ADEC establishes tier 3, or ONRW, waters, then degradation of those waters is not allowed under the AD policy. Because of the high level of protection afforded to tier 3 waters, a tier 3 designation could have significant public policy consequences, by limiting potential future development. The permitting approaches for tier 3 waters include zero discharge (denial of wastewater discharge permit applications); a permit limited to activities that result in short term and temporary changes in the water quality; or a permit with effluent limits that mirror the natural condition or otherwise do not allow for any change from the existing water quality.

Public notice and comment.

Just like a state-issued permit or a certification of a federal permit, your AD analysis must go through public notice and comment. Typically you simply include draft AD analysis and findings in the draft permit fact sheet or certification that goes out to public notice. For projects that also require federal permits, ADEC's public notice process is sometimes combined with the federal agencies' process. Either of these approaches will comply with the AD policy. See 18 AAC 70.015(c). Your job is simply to ensure that, one way or another, the public has the opportunity to review and comment upon ADEC's AD analysis before it becomes final.

General permits.

Doing AD analysis for general permits (GPs) presents unique challenges. For example, until you know what specific operations may apply for coverage under the GP, it may be difficult to evaluate whether a particular receiving water parameter is tier 1 or tier 2, and to determine existing uses. Lacking information about potential discharges to specific waters, you should assume that the waterbodies are Tier 2. Also, evaluating the economic and social impacts of permitted activity may be difficult at the time the GP is first issued. Other AD findings, such as the appropriate methods for pollution control and treatment, may be more amenable to analysis at the time of GP issuance, since GPs are typically used to authorize very similar operations.

Due to the variety of circumstances in which GPs are used, it is difficult to generalize about how to complete an AD analysis for one. In some cases you may be able to complete the AD analysis at the time the GP is issued, while in other cases you may have to complete the analysis when you authorize particular operations under the GP. Again, this is an area where consultation with peers may be necessary, as ADEC has issued many GPs in recent years, for various industry sectors and geographical areas. Reviewing some of those examples may help you tailor the required AD analysis and findings to your situation. Also, as a general rule, you should do your best to ensure that no tier 3 waters are covered under a GP. So you should evaluate the scope of the

GP to identify potential tier 3 waters, and make sure to exclude from coverage any that you can identify or reasonably anticipate.

Resources.

Attached is a list of resources, examples, and sources of factual information that may assist you with the AD analysis. ADEC will amend the resources list over time.

Conclusion.

This interim guidance will hopefully help you to understand and comply with our AD policy. But as you engage in AD analysis in particular cases, questions are sure to arise that this guidance doesn't address. Conferring with your supervisor and peers on such questions will yield dual benefits. First, it will give you the benefit of greater experience and collective expertise. Second, it will alert ADEC management about the kinds of questions and issues that can arise in the AD context. As mentioned above, ADEC plans to issue more comprehensive AD implementation guidance in the future. Keeping track of the AD issues that arise in the interim will help ADEC management make the final guidance both useful to staff and consistent with the AD policy itself.

ATTACHMENT [UNDER DEVELOPMENT]

Antidegradation Resources

- current unemployment rate (available from Department of Administration)
<http://almis.labor.state.ak.us/?PAGEID=67&SUBID=188>
- ADEC's *Reasonable Potential Procedure for Water Quality-Based Effluent Limits*, APDES Permits. January 2009.
- *Alaska Water Quality Criteria Manual for Toxic and Other Deleterious Organic and Inorganic Substances*. ADEC. December 12, 2008
- *Antidegradation Policy Implementation, Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications*. Oregon Department of Environmental Quality. March 2001
- APDES Permit Fact Sheet template: Mixing Zone Analysis Checklist
- *U.S EPA NPDES Permit Writers' Manual*. EPA. December 1996
- EPA's *Technical Support Document for Water Quality-Based Toxics Control*
- *Interim Economic Guidance for Water Quality Standards*. US EPA. Office of Water. EPA-823-B-95-002. March 1995
<http://www.epa.gov/waterscience/standards/econworkbook/>
- *Water Quality Standards Handbook: Second Edition*. EPA. August 1994 with revisions July 2007. <http://www.epa.gov/waterscience/standards/handbook/>
- *Evaluation of Options for Antidegradation Implementation Guidance*. Tetra Tech, Inc. October 6, 2008
- Log Transfer Facility – Notice of Intent Checklist
- §401 Certification of NPDES Permit No. AKG-31-5000 Cook Inlet Oil and Gas Exploration, Development and Production Facilities Located in State and Federal Waters. ADEC. May 18, 2007. 401 Certification for AKG-31-5000
- Ketchikan Gateway Borough, Ward Cove Log Storage Facility, Wastewater Disposal Permit, Decision Document. ADEC. May 14, 2004.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
WATER AND
WATERSHEDS

JUL 26 2018

Mr. Andrew Sayers-Fay
Director, Division of Water
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, Alaska 99501

Re: Revisions to Alaska's Water Quality Standards Addressing Antidegradation Policy and
Antidegradation Implementation Methods, March 9, 2018 Submittal

Dear Mr. Sayers-Fay:

Pursuant to section 303(c)(3) of the Clean Water Act and 40 CFR Part 131, the U.S. Environmental Protection Agency approves the new and revised water quality standards addressing antidegradation policy and antidegradation implementation methods submitted by the Alaska Department of Environmental Conservation on March 9, 2018. Details of the submitted water quality standards and the EPA's action are outlined below and in the enclosed support document.

Background

By letter dated March 9, 2018, the ADEC submitted new and revised water quality standards at 18 AAC 70.015, 18 AAC 70.016, and 18 AAC 70.990 of Alaska's water quality regulations. These new and revised water quality standards were adopted by ADEC on February 28, 2018; were certified by the Alaska Attorney General on March 7, 2018 as being duly adopted pursuant to state law; and became effective under Alaska state law on April 6, 2018. Prior to adoption, ADEC provided an opportunity for public comment, including a public hearing, as described in ADEC's public notice and ADEC's response to public comment ("Antidegradation Implementation Methods: Notice of Proposed Changes to the Water Quality Standards Regulations of the Department of Environmental Conservation," ADEC, May 31, 2017; and "Antidegradation Implementation Methods Regulations Responsiveness Summary," ADEC, November 2017; respectively).

The water quality standards changes submitted to the EPA for review and action are identified in an enclosure to ADEC's March 9, 2018 submittal letter, and include limited clarifying revisions to Alaska's antidegradation policy at 18 AAC 70.015, antidegradation implementation methods in rule at 18 AAC 70.016, and associated new definitions at 18 AAC 70.990 (Attachment to Memorandum, Scott Meriwether, Office of Lieutenant Governor, to Gary Mendivil, Department of Environmental Conservation, RE: Filed Permanent Regulations, March 9, 2018).

The implementation methods section at 18 AAC 70.016 is new, represents the majority of ADEC's submittal, and generally replaces Alaska's 2010 interim antidegradation implementation guidance.

However, in its response to comments when addressing a concern that Alaska's rule making did not include a process for nominating and designating waters for Outstanding National Resource Water protection, ADEC referred to the interim antidegradation implementation guidance. ADEC stated that

Tier 3 designation methods are still present and available, and that ADEC will continue to work with all stakeholders on a final nomination and designation process (see "Antidegradation Implementation Methods Regulations Responsiveness Summary," ADEC, November 2017, Comment Summary 51).

The EPA's Action

Pursuant to section 303(c)(3) of the CWA and 40 CFR Part 131, the EPA approves the submitted changes at 18 AAC 70.015, 18 AAC 70.016, and 18 AAC 70.990, except as identified below and in the EPA's support document. Today's approval addresses only those submitted changes to 18 AAC 70 that are new or revised water quality standards for the purposes of CWA section 303(c). The EPA is not acting on unrevised language and previously existing provisions.

The EPA is also not acting on the following portion of the newly promulgated 18 AAC 70.016(a)(2)(B):

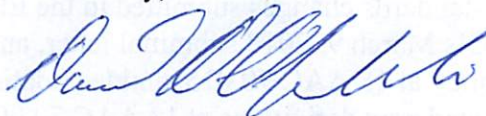
...the responsible party whose actions or lack of action necessitated an emergency response action shall address any lowering of water quality that is not temporary and limited; existing law may be used to address restoration, rehabilitation, replacement, or acquisition of the equivalent for the affected natural resources, including long-term water quality impacts;

Rather than stating a desired water quality condition, the provision addresses inconsistency with a desired condition. Such provisions are of an enforcement nature and therefore are not water quality standards subject to EPA action in accordance with CWA section 303(c) (see "What is a New or Revised Water Quality Standard under 303(c)(3), Frequently Asked Questions," October 2012, EPA Publication No. 820F12017).

The EPA's action applies only to water bodies in the State of Alaska, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this action shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

The EPA looks forward to future work with Alaska on water quality standards pursuant to our responsibilities under the CWA. If you have any questions regarding this letter, please contact me at (206) 553-1855 or Bill Beckwith of my staff at (206) 553-2495.

Sincerely,



Daniel D. Opalski, Director
Office of Water and Watersheds

Enclosure

cc: Mr. Earl Crapps, ADEC (email only)
Ms. Nancy Sonafrank, ADEC (email only)
Mr. Brock Tabor, ADEC (email only)

Department of Environmental Conservation
Division of Water



18 AAC 70 Water Quality Standards

Antidegradation Implementation Methods Regulations

Responsiveness Summary

November, 2017

Introduction

Clean Water Act and Antidegradation

The Federal Clean Water Act (CWA) requires states to have an antidegradation policy and implementation methods. Federal legislation specifies that states must have an antidegradation policy that:

- Protects existing uses.
- Authorizes the lowering of water quality in high quality waters, where necessary for important social or economic development.
- Provides a mechanism for additional protection of water with exceptional ecological or recreational significance. These are often called Outstanding National Resource Waters (ONRWs) or “Tier 3” waters.

The antidegradation requirement is primarily designed to require states to look carefully during the wastewater discharge permitting process when authorizing a discharge of pollutants that will lower the quality of a water of the state. Among other factors, states are to look at: (1) whether the receiving waterbody is high quality such that some degradation can be allowed without violating water quality standards, (2) the potential for water quality degradation from both point and nonpoint sources of pollution, (3) whether there are cost effective practicable alternatives that can be applied to a new or increased discharge, and (4) whether important social or economic development in the area of the receiving water exists in order to justify any authorized degradation. States must also include a process for nomination and designation of ONRWs or “Tier 3” waters. Once an ONRW is established, states must maintain and protect the quality of the water in the ONRW.

Summary of Project

Alaska’s current antidegradation policy, adopted in 1997, is found in the Water Quality Standards (WQS) regulations at 18 AAC 70.015. The Environmental Protection Agency (EPA) approved Alaska's policy with the expectation that Alaska would write implementation guidance.

The Alaska Department of Environmental Conservation (DEC or the department) contracted with Tetra Tech, Inc. to produce an October 6, 2008 report, titled “Evaluation of Options for Antidegradation Implementation Guidance.” The report presents Alaska’s antidegradation policy and a description of how other states implement their policies. It describes the major elements of implementation procedures and includes options for Alaska’s implementation procedures.

DEC hosted a public workshop on antidegradation issues on December 2 and 3, 2009. The purpose of the workshop was to inform policy makers, wastewater discharge permittees, permit writers and the interested public of options and considerations for implementation procedures. The workshop included presentations by attorneys, the EPA, an environmental interest group, and other states that had experience implementing antidegradation policies or implementation procedures.

DEC adopted “Interim Antidegradation Implementation Methods” in July 2010. Additionally, the Interim Antidegradation Implementation Methods were determined consistent by EPA in July 2010; “EPA has reviewed ADEC's interim antidegradation implementation methods and believes that they are consistent with EPA's antidegradation regulation at 40 CFR 131.12, as well as Alaska's

antidegradation policy at 18 AAC 70.015.” and “Thus, this letter does not constitute a CWA 303(c)(4)(B) determination; rather, this letter informs ADEC that the State of Alaska has satisfied the federal requirement to identify methods to implement its antidegradation policy consistent with 40 CFR 131.12.” A copy of the Interim Antidegradation Implementation Methods can be found at: http://dec.alaska.gov/water/wqsar/Antidegradation/docs/P&P-Interim_Antidegradation_Implementation_Methods.pdf.

In January 2012, DEC assembled a stakeholder workgroup, comprised of representatives from state resource agencies, industry and non-governmental groups to evaluate options and to provide recommendations on various core elements for Alaska’s antidegradation implementation methods to be developed by DEC. This Antidegradation Workgroup met for a total of six two-day meetings, the initial meeting in February 2012 and the final in October 2012. The meetings were conducted in person, in Anchorage, and were open to the public. In January 2013, the workgroup completed a final report that highlights key issues and makes recommendations for drafting new antidegradation implementation regulations.

An invitation to attend informational teleconferences on water quality protection and antidegradation was sent to community and tribal leaders on April 16, 2012. The public informational teleconferences were held at ten Alaska Legislative Information Offices on April 24 and April 26, 2012, and held with an open call line on June 19, 2012, with the same content at each event. The teleconferences were held to educate the public on antidegradation issues and were not part of the workgroup or a formal public comment process.

DEC Division of Water staff drafted antidegradation implementation method regulations, which were noticed for public comment on January 17, 2014 for 60 days. The comment period was extended for an additional 30 days, and closed April 16, 2014. The Division received comments and based on the public feedback decided to hold additional workshop(s) in 2015 to discuss and evaluate select issues that were raised during the comment period.

The Division held a public workshop May 13-14, 2015, to discuss issues identified during the initial public comment period on the Draft Antidegradation Implementation Method regulations. The Division evaluated the recommendations and information provided at the workshop for possible future regulation revisions.

During the 2016 legislative session, the Governor introduced legislation to establish a Tier 3 or ONRW nomination and designation process. After significant interest in and opposition to the legislation, the Governor requested the bills be set aside and committed to more dialog with Tribes and stakeholders before offering another proposal. The Division subsequently decided to separate the regulations into two distinct projects. First, this regulation package, which primarily addresses the analysis aspect of antidegradation implementation associated with APDES permits. Second, the Division removed the nomination and designation process from the regulations in order to obtain additional stakeholder input and to continue to work on a Tier 3 nomination and designation process in parallel.

The Division revised and posted the draft antidegradation implementation regulations for a formal 67-day public comment period. The public comment period opened Friday, June 2, 2017 and closed at 5:00 pm on Monday, August 7, 2017. With the proposed regulations, the antidegradation implementation methods will be included as part of the state’s Water Quality Standards at 18 AAC 70.016.

Opportunities for Public Participation

The department formally published a 67-day public notice of the draft regulations for the Antidegradation Implementation Methods on June 2, 2017. The department posted the notice online in accordance with state requirements; provided downloadable files of the proposed regulations, public notice and fact sheet on the department website; and published the public notice in the Anchorage, Fairbanks, and Juneau newspapers. The public notice was mailed out to all contacts on the statewide local and tribal government list on approximately June 7, 2017. A notification of the public notice was also issued electronically to four of the department's listserv email lists.

The department held a one-hour informational question and answer session followed by a formal public hearing in Anchorage. The question and answer session began at 3:00 p.m. on July 20, 2017 at the ADEC Anchorage Building, 555 Cordova Street, First Floor Main Conference Room, Anchorage, AK 99501. A state-wide teleconference number was available for those wishing to participate, but unable to attend the meeting in person. The public hearing followed from 4:00 p.m. to 6:00 p.m. There were no formal oral comments given at the Anchorage hearing.

The department received written comments from ten interested parties on the draft regulations. The department also consulted with and received written comments from the EPA Region 10 regarding the draft regulations.

Individuals/Organizations Commenting

DEC received comments on the draft Antidegradation Implementation Regulations from the following eleven entities:

- | | |
|----------------------|---|
| 1. Bill Beckwith | U.S. Environmental Protection Agency (EPA), Region 10 |
| 2. Deantha Crockett | Alaska Miners Association, Inc. |
| 3. Joshua M. Kindred | Alaska Oil and Gas Association |
| 4. Dan Graham | Donlin Gold |
| 5. Nancy Hillstrand | Pioneer Alaskan Fisheries Inc. |
| 6. Marlenna Hall | Resource Development Council |
| 7. Buck Lindekugel | Southeast Alaska Conservation Council |
| Guy Archibald | |
| 8. Anthony Mallott | Sealaska Corporation |
| 9. Henri Letient | Teck Alaska Incorporated, Red Dog Operations |
| 10. Brook Brissom | Trustees for Alaska, <i>et. al</i> |
| 11. Jerry McCune | United Fishermen of Alaska |
| Mark Vinsel | |

Comments:

I. General Comments

1. Comment Summary

DEC received three comments that the comments submitted during the 2014 public comment period were not addressed. The 2014 comments were re-submitted as part of the 2017 public comment period and responses requested.

Response:

Responses to the applicable 2014 comments are incorporated with substantially similar 2017 comments in this document. No changes were made to the regulations based on these 2014 comments.

2. Comment Summary

DEC received one request to hold additional public hearings during the formal public comment period. DEC received one written comment summarizing and reiterating this request.

Response:

DEC considered the single request for additional hearings and determined that additional public hearings were not necessary at the time. The public hearing held in Anchorage on July 20, 2017, with the availability of a statewide teleconference number for those unable to attend in person, meets both federal and state requirements and the hearing announcement provided ample advanced notice for entities wishing to participate to plan to be available for the scheduled hearing. Regulation 40 CFR 25.5(c) states “Hearings must be held at times and places which, *to the maximum extent feasible*, facilitate attendance by the public.” and 40 CFR 131.20(b) “*Public participation*. The State shall hold *one or more* public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25).”

(emphasis added). In addition, there were no formal oral comments given at the Anchorage hearing. No changes were made to the regulations based on these comments.

3. Comment Summary

DEC received three comments on the proposed repeal of 18 AAC 70.015(a)(2)(D). All three comments were in opposition to the proposed repeal. Additionally, one of the three comments requested that the current antidegradation policy regulations in 18 AAC 70.015 be revised to coordinate and conform to the proposed implementation regulations of 18 AAC 70.016.

Response:

The provision repealed is replaced by a similar enforceable provision in 18 AAC 70.016(c)(7)(D)(ii), with only one minor wording change, the regulatory defined term “practicable” replacing the undefined term “reasonable.” Overall, sections 18 AAC 70.016(c)(4) and 18 AAC 70.016(c)(7) provide more detail and informative guidance than existed in 18 AAC 70.015(a)(2)(D) on the required information and evaluation for the range of practicable alternatives and alternatives analysis findings required by the department to determine the discharge is necessary.

The repealed regulation is a step in the implementing antidegradation policy, and as such, is more appropriately included as part of the proposed 18 AAC 70.016 implementation regulations. Retaining the language in both sections of the regulations would be repetitive and unnecessary. The department does not agree that the revised language of “practicable” in place of the previously used term “reasonable” reduces the standard set forth, but rather provides more clarity as it is a defined term set forth in 18 AAC 70.990(48). Finally, Alaska’s antidegradation policy regulations at 18 AAC 70.015(a)(2)(E) remains consistent with the federal regulation at 40 CFR 131.12(a)(2). No changes were made to the regulations based on these comments.

4. Comment Summary

DEC received two comments stating that the proposed regulations were too broad, should be more narrowly focused to what the Environmental Protection Agency (EPA) is requiring and could serve as a barrier to resource development, economic development, and crucial infrastructure projects. The commenters further stated the existing policy and interim guidance are sufficient, ensure that all uses of state waters are maintained, have been approved by EPA, and have been upheld in case law (legally sufficient). The state’s current permitting and water quality standards programs ensure that all uses of the state’s waters are fully maintained. These programs are already among the most rigorous and stringent in the country. As such, implementation of the proposed regulations will produce a significant additional burden on applicants during permitting and operations without producing any real benefits in regards to protecting the uses of State waters. The extensive and potentially lengthy analysis could delay permits issued by DEC and other agencies. The antidegradation analysis could also pose significant costs on entities seeking permits and Clean Water Act 401 certifications, as well as to communities that depend on resource development.

Response:

In the Purpose and Scope section of the July 2010 interim guidance, the department highlighted the interim nature of the guidance and the intent “to develop final implementation methods through a rule-making process” and work “with other agencies, permittees, and the public to develop more detailed procedures.” DEC continues to find that drafting more detailed

implementation methods into state regulations would improve both transparency and legal defensibility for this important component of the state water quality standards.

Federal regulations at 40 CFR 131.12(b) require that “The State *shall develop methods* for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section.” (emphasis added). Per current antidegradation policy regulations, 18 AAC 70.015(a)(2) and 18 AAC 70.015(b), it is the applicant’s responsibility to provide all information reasonably necessary for the department to make antidegradation findings. The level of detail in the proposed regulations is intended to clarify and address any gaps in the interim guidance. In particular, the proposed regulations identify the information the department finds necessary to make informed antidegradation findings.

The department has reviewed the comments and the proposed regulations, and does not consider the proposed regulations to be too broad, nor to impose any significant additional burdens on the regulated community beyond what is currently in practice under the existing policy in regulation and the interim implementation guidance. The proposed regulations provide additional clarity, flexibility, and certainty. This is provided by elements such as:

- the department, in its discretion, shall review and determine whether the information is sufficient (proposed 18 AAC 70.016(a)(5));
- if determined necessary by the department the following baseline water quality provisions apply (proposed 18 AAC 70.016(a)(6)); and
- when evaluating whether the information submitted is sufficient and credible or whether additional information may be required, the department will consider all relevant factors, including ... (proposed 18 AAC 70.016(a)(6)(C)).

DEC recognizes that the implementation of the proposed regulations entail a greater level of detail; however, specificity is necessary to ensure regulatory consistency as well as withstand legal scrutiny and, therefore, the clarity the regulations provide will have the effect of streamlining permitting processes. No changes were made to the regulations based on these comments.

5. Comment Summary

DEC received one comment requesting the regulations address the process DEC will use to ensure that any compliance and mitigation measures arising from the antidegradation analysis and department findings are consistent with permit requirements from other agencies.

Response:

Compliance and mitigation are not required as part of, nor applicable to, antidegradation implementation methods or a State’s antidegradation policy. Similarly, antidegradation regulations do not require consistency with other agency requirements and/or permits. Compliance with all permit conditions, including those from other agencies or applicable regulatory jurisdictions, remains the responsibility of the project entity. No changes were made to the regulations based on this comment.

6. Comment Summary

DEC received one comment requesting the regulations include a timeline for the antidegradation analysis and department findings. Specifically, that DEC amend the proposed regulations to state that DEC will publish its antidegradation analysis and department findings within 30 days of

determining that an application is complete. If DEC fails to issue an analysis and finding within 30 days, the finding should be presumed to be "no degradation."

Response:

The antidegradation analysis and department findings are one part of the overall APDES permit development and issuance procedure. As such, the antidegradation analysis and findings are documented in the fact sheet associated with the permit. The permit and fact sheet are made available for applicant review and public comment per 18 AAC 83.110 and 120. Portions of the APDES permit and the associated fact sheet (including the antidegradation analysis) are not published separately, nor would it be appropriate or meaningful to the public in a public participation sense to impose an arbitrary regulatory deadline based on the application completeness determination. In addition, State 401 certification (including the antidegradation analysis) of federal permits shall continue to comply with federal and state regulatory required procedures and timelines. No changes were made to the regulations based on this comment.

7. Comment Summary

DEC received one comment requesting the department specify an effective date for the regulations and how projects that are in various permitting stages will be addressed. The comment further recommended that pending applications be exempt from the new antidegradation analysis, since adding a lengthy analysis to already ongoing permitting process would cause unfair delays and additional costs

Response:

Per state statute 44.62.180, a regulation becomes effective on the 30th day after the date of filing by the Lt. Governor. The antidegradation analysis and department findings are already required for APDES permitting under the current state regulations 18 AAC 70.015 Antidegradation Policy and the July 2010 Interim Antidegradation Implementation Methods. The regulations will not be "adding a lengthy analysis," nor are significant delays or costs expected once the regulations become effective. Compliance with state regulations is required upon the effective date of said regulations. Compliance with the state regulations for Clean Water Act purposes, e.g. APDES permits and state 401 certifications, will be required after final approval by the EPA. Exemptions for pending applications are accordingly not legally appropriate. No changes were made to the regulations based on these comments.

8. Comment Summary

DEC received one comment stating the proposed regulations do not sufficiently address the treatment of U.S. Army Corps of Engineers (USACE or Corps) Nationwide Permits ("NWP").

Response:

A USACE nationwide permit serves the purpose of regulating Clean Water Act section 404 activities. DEC reviews and certifies nationwide permits utilizing the legal authority Congress provided to states in Clean Water Act section 401 to ensure federally issued permits are consistent with state water quality standards, which include antidegradation provisions. The regulations at 18 AAC 70.016(a)(1)(B) specifically addresses antidegradation within the realm of department 401 certifications of 404 permits. Consistent with historical practice, the department will review and determine if the proposed permits comply with state antidegradation requirements prior to final certification. The implementation regulations will not apply retroactively. As such, existing State of Alaska 401 certifications of nationwide permits will

remain in effect until USACE proposes permit reissuance and the department evaluates certification of the to-be-proposed federal permit(s). The state will continue to issue a single 401 certification for each nationwide permit once the regulations are adopted and approved for use by EPA. Subsequent state 401 certifications of 404 permits and other federal permits that require certification will adhere to the regulations upon the effective date of the subject antidegradation regulations and EPA approval. No changes were made to the regulations based on this comment.

9. Comment Summary

DEC received one comment stating the regulatory data requirements are inadequate, appear inconsistent with the data requirements identified by DEC to monitor and report on the quality of Alaska's surface and groundwater (e.g., Alaska's Final 2012 Integrated Report), should not rely on available evidence, and should specifically incorporate the requirements outlined in DEC's Water Program Quality Management Plan (WPQMP).

Response:

DEC is responsible for drafting regulations with general guidelines that provide transparency and consistency when requesting information and data. Having more descriptive language would make the regulations prescriptive and eliminate DEC's flexibility in requesting the most appropriate and cost effective data collection necessary to assess the receiving water status and the project-specific potential for degradation of the receiving water. DEC and EPA guidance is available to determine appropriate quality assurance and quality control when collecting data under a project specific quality assurance project plan (QAPP). Due to the wide range of permits issued under the APDES program in terms of size, complexity, water quality impacts and risk, flexibility in the quality and quantity of data required is necessary. Integrating DEC's WPQMP either as a whole or as specific sections would not offer any additional clarity or benefit and potentially impede consideration of site-specific factors. No changes were made to the regulations based on this comment.

10. Comment Summary

DEC received one comment requesting DEC apply the "polluter pays" principle when levying fees for evaluating applications to discharge pollutants into Alaska's waters, specifically in relation to the collection of data and evaluation of the status of receiving water.

Response:

Per current antidegradation policy regulations, 18 AAC 70.015(a)(2) and 18 AAC 70.015(b), it already is the applicant's responsibility to provide all information reasonably necessary for the department to make antidegradation findings. Therefore, the applicant is already financially responsible for the information and data required as part of the permitting application and issuance process. DEC already has a permit fee structure under 18 AAC 72 to address application evaluation, drafting and issuance. Per state statute 37.10.052, the fees are reviewed at least once every four years and adjusted accordingly. No changes were made to the regulations based on this comment.

11. Comment Summary

DEC received one comment requesting the regulations enact a 10% Margin of Safety Assimilative Capacity Reserve. The reserve capacity would be used to prioritize beneficial uses relative to the assimilative capacity utilized and act as a buffer for potential errors or inaccuracies

in the predictions made with the water quality model, variances in receiving water conditions, and/or to allow for future growth.

Response:

Antidegradation itself is based upon the precautionary principle that there is inherent value in high quality water even though all uses will be maintained and protected if the water just meets water quality standards. The antidegradation policy allows degradation of water quality to the level of the applicable water quality criteria subject to certain requirements (e.g., alternatives analysis and importance test). Setting a blanket assimilative capacity reserve goes beyond federal and state requirements and does not allow for individual considerations of projects or the uniqueness of waterbodies. The applicability of the beneficial use prioritization, potential error and/or future growth factors that may lead to the consideration of an assimilative capacity reserve have not been demonstrated to be necessary in a state like Alaska where multiple discharges to the same water body are rare. No changes were made to the regulations based on this comment.

12. Comment Summary

DEC received several comments in regards to the use of the term “in its discretion” (e.g., 18 AAC 70.16(a)((1)(B)). Comments stated that the department findings are mandatory, not discretionary and the phrase “in its discretion” be deleted from the proposed regulations.

Response:

DEC is within its statutory and regulatory authority to apply discretion when considering whether an applicant has provided adequate information to comply with this regulation as well as in making department findings. DEC is authorized to adopt regulations necessary to control water pollution and set pollution standards under AS 46.03.020, 46.03.050, 46.03.070, and 46.03.080. Further, in AS 46.030.100, the section for Waste management, disposal and discharge authorization, the term “in its discretion” is specifically used.

The term is consistent with other WQS regulation sections and other state regulations. The phrase “in its discretion” is part of the existing antidegradation policy at 18 AAC 70.015(a)(2). The term “discretion” is also used in the following sections of the current WQS regulations: short term variance at 18 AAC 70.200, zone of deposit at 18 AAC 70.210, thermal discharges at 18 AAC 70.220, and site specific criteria at 18 AAC 70.235. Additionally, the APDES regulations at 18 AAC 83 use “sole discretion” in one instance at 18 AAC 83.110(d) and department’s discretion under 18 AAC 83.120(l). No changes were made to the regulations based on these comments.

13. Comment Summary

DEC received one comment in regards to the proposed regulations and the implied perception of a variety of terms, specifically “sufficient,” “sufficient and credible,” and “available evidence” (e.g., 18 AAC 70.016(a)(5)). The commenter stated these terms were confusing and requested an explanation of DEC’s selection of a particular term for a particular type of antidegradation analysis. The commenter additionally requested that DEC remove all references only to “sufficient” and apply “sufficient and credible” consistently throughout the regulations.

Response:

Use of the phrase “sufficient and credible” is consistent with that of other EPA and state documents associated with water quality monitoring and assessment. The state has the discretion to determine whether the amount of data submitted in support of a permit application meets state requirements for quality assurance and quality control, is representative of the ambient condition(s) of the waterbody in question, and is collected and analyzed according to accepted and approved methodology.

The regulations include a definition for “sufficient and credible” at 18 AAC 70.990 that is descriptive of the appropriateness of data provided to DEC in support of a permit or action – essentially qualifying whether the submitted data is appropriate for making a finding or determination. “Sufficient and credible” is defined in terms of analytical (water quality) data. The standalone term “sufficient” applies to all information, e.g., 18 AAC 70.016(a)(5) “the department, in its discretion, shall review and determine whether the information is sufficient;” and does not require a separate definition. The term “available evidence” is defined in existing regulations in 18 AAC 70.990(5) and does not include data that in the department’s determination is not practicable. No changes were made to the regulations based on these comments.

II. Regulation Specific Comments

14. Comment Summary

DEC received several comments on the jurisdiction of waters and limited applicability of the proposed regulations. Some commenters found the proposed language at 18 AAC 70.016(a) unclear and ambiguous. Commenters either requested that the proposed antidegradation implementation regulations (1) apply to all state waters consistent with the existing antidegradation policy regulations, or (2) that both the proposed implementation (18 AAC 70.016) and the existing policy (18 AAC 70.015) antidegradation regulations be revised to limit application only to waters of the U.S. within Alaska. Further, one commenter stated that DEC is “impermissibly exempting regulated activities from application of the implementation methods” and requested the section be redrafted.

Response:

The antidegradation policy (18 AAC 70.015) is inclusive of all state waters. The title of 18 AAC 70.016 and the first subsection are both clear that this regulation only applies to those state waters that are also considered to be a “water of the U.S.” as defined in 18 AAC 70.990(66). The department has determined that while groundwater and other waters are considered to be state water by definition under 18 AAC 70.990(65) and AS 46.03.900, the proposed implementation regulations (18 AAC 70.016) determine as matters of federal requirement, practicality, and policy that only waters of the U.S. will be subject to the proposed antidegradation implementation regulations. The Clean Water Act and federal regulations (or state legal requirements for that matter) do not require that antidegradation policy and methods apply to other non-jurisdictional waters not subject to the Clean Water Act, nor do they prohibit it. The federal legal antidegradation requirements are limited in scope to only those waters which the federal government exerts authority over per the Clean Water Act. As such, the department has discretion in determining whether to broaden the reach of antidegradation requirements to other waters beyond waters of the U.S. jurisdictional waters. At this time, the department does not wish to limit its flexibility in this area when not required to do so. However, the department

maintains the right to develop specific antidegradation implementation methods applicable to other waters of the state, including groundwater, in the future.

The department is not proposing any substantive scope revisions to the 18 AAC 70.015 antidegradation policy at this time. As such, while the policy still applies to all state waters, the proposed implementation regulations are limited to waters of the U.S. within the state jurisdiction in order to fulfill Clean Water Act requirements. No changes were made to the regulations based on these comments.

15. Comment Summary

DEC received numerous comments on the proposed regulatory approach to antidegradation analysis pertaining to state 401 certifications of federal 404 permits (18 AAC 70.016(a)(1)(B)). Comments were received that (1) supported or opposed providing blanket exemptions including social or economic analysis and public comment periods (see Comment # 19 below), for classes of 404 permit activities that may degrade tier 2 waters, (2) objected to setting a significance threshold for 404 permits that does not account for cumulative impacts, (3) supported or opposed the use of alternatives analysis prepared by the U.S. Army Corps of Engineers under CWA section 404(b)(1) guidelines, (4) objected that the interim guidance did not include antidegradation analysis of 404 permits and that this should not be included in the final regulations, (5) objected to the language allowing the state to waive 401 certification without antidegradation analysis, and (6) requested additional regulatory language be added to categorically exclude Section 404 permits from the antidegradation process unless ADEC determines there is good cause to undertake the analysis.

Response:

The CWA 404(b)(1) analysis, although similar to the antidegradation analysis, may not meet the proposed antidegradation implementation methods and findings for a particular permit. 404(b)(1) guidelines include requirements for alternative analysis; consideration of significantly adverse effects of the discharge on recreational, aesthetic and economic values; and determination of cumulative effects on the aquatic ecosystem. To meet 18 AAC 70.016, a dredge or fill activity would first need to pass the “no significant degradation” finding per the 404(b)(1) guidelines. In addition, the information and findings in a 401(b)(1) analysis for a particular permit must document that the proposed lowering of water quality is both necessary (alternatives analysis) and important (social or economic analysis). The proposed regulations simply state the department will review the 404(b)(1) analysis to determine if it is sufficient to meet the state required necessary and important findings.

The current antidegradation policy in 18 AAC 70.015(c) specifically states:

An application received under (a) of this section is subject to the public participation and intergovernmental review procedures applicable to the permit, certification, or approval sought, including procedures for applications subject to 18 AAC 15. If the department certifies a federal permit, the public participation and intergovernmental review procedures followed by the federal agency issuing that permit will meet the requirements of this subsection.

The department has determined that this, in combination with the referenced 18 AAC 15 regulations, is sufficient to address public participation for the antidegradation implementation methods for 401 certifications of federal permits. The department is not proposing to revise

established public participation procedures and regulations at this time. See response to Comment #19 below.

DEC has authority to develop antidegradation methods for 404 permits based on the CWA section 401 process for state certifications including the 404/401 waiver process. When DEC waives state 401 certification of a 404 permit that does not diminish the Corps' responsibility or authority to issue 404 permits that meet state water quality standards including the antidegradation policy, as specified in 40 CFR 230.10(b)(1).

CWA Section 404(h)(5)(I) allows states to establish categories of discharges not subject to requirements and may distinguish among classes, types, and sizes within any category of discharges. Therefore, DEC has the authority to make a determination setting a significance threshold for state certification and how it will administer permits and certifications that exceed that threshold.

The department determined the categorical exclusion of Section 404 permits from state antidegradation review is not appropriate. Exclusion would set aside state 401 certification authority.

No changes were made to the regulations based on these comments.

16. Comment Summary

DEC received three comments requesting that specific exemptions for (1) groundwater and (2) North Slope dredge and fill projects impacting less than one acre be added to the proposed antidegradation exemptions in section 18 AAC 70.016(a)(2).

Response:

The proposed regulations at 18 AAC 70.016(a) clearly state "for a water of the United States within the State of Alaska, the following provisions apply." Groundwater by definition is not a water of the United States, therefore, the department finds it duplicative and unnecessary to include the specific exemption in section 18 AAC 70.016(a)(2).

The department has determined not to include *de minimis* provisions in the proposed regulations that would apply to such activities like the request for North Slope wetlands fill projects. All 404 disposals will be required to meet 18 AAC 70.016(a)(1)(B) antidegradation requirements. No changes were made to the regulations based on these comments.

17. Comment Summary

DEC received one comment on the proposed antidegradation analysis exemption for restoration activities (18 AAC 70.016(a)(2)(A)). The commenter was concerned that project proponents will frame their discharges in terms of environmental benefits and water-quality improvement to get out of antidegradation review.

Response:

The department believes that the definition of actions excluded from antidegradation analysis at 18 AAC 70.016(a)(2)(A) provides enough guidance for DEC to determine (at its discretion) whether or not a discharge could be considered to be of benefit to a watershed. No changes were made to the regulations based on this comment.

18. Comment Summary

DEC received one additional comment in regards to the antidegradation analysis exemption for state waivers of 401 certifications (18 AAC 70.017(a)(2)(C)). The commenter expressed concerns that it remains unclear if DEC intends and expects the U.S. Army Corps of Engineers will conduct an antidegradation analysis for the Section 404 permits where DEC waives certification, which is not currently the Corps' practice. The result is that there is no application of the antidegradation policy to many Section 404 permits, which is in violation of the CWA.

Response:

DEC has authority to develop antidegradation methods for 404 permits based on the CWA section 401 process for state certifications including the 404/401 waiver process. When DEC waives state 401 certification of a 404 permit that does not diminish the Corps' responsibility or authority to issue 404 permits that meet state water quality standards including the antidegradation policy, as specified in 40 CFR 230.10(b)(1). No changes were made to the regulations based on this comment.

19. Comment Summary

DEC received several comments on public participation as stated in 18 AAC 70.016(a)(4). Commenters specifically expressed concerns in regards to public participation in the 401 certification of 404 permits and suggested language be added to the section to clarify for the public how DEC will ensure that its antidegradation review and tentative decisions are made available so that there is an opportunity for public comment before final decisions are made.

Response:

DEC has clarified the proposed language in 18 AAC 70.016(a)(4) as follows:

- (4) **an antidegradation analysis for a discharge under the APDES program specified in (a)(1)(A) of this section is subject to the public participation and intergovernmental review procedures under 18 AAC 83.120; an antidegradation analysis for a 401 certification of a discharge under (a)(1)(B) of this section is subject to the public participation and intergovernmental review procedures under 18 AAC 70.015(c).**

The department has determined that this, in combination with the referenced 18 AAC 15 regulations, is sufficient to address public participation for the antidegradation implementation methods for 401 certifications of federal permits. The department is not proposing to revise established public participation procedures and regulations at this time.

The department publishes an intent to certify letter with the federal posting of Clean Water Act section 404 permit applications. The department's intent to certify letter shall include information on how the public may request the complete permit application, including the submitted antidegradation information proposed to meet regulatory criteria, for review and comment. The complete 404 permit application and all comments submitted during the federal public comment period are evaluated. After evaluation, the department issues its final state 401 certification, which will set out the antidegradation analysis and department findings. This procedure is compliant with all federal and state regulations. No additional changes were made to the regulations based on these comments.

20. Comment Summary

DEC received one additional comment on public participation as stated in 18 AAC 70.016(a)(4). The commenter requested DEC develop specific protocols for informing and consulting with Alaska Tribes about permits that propose lowering water quality in waters used by Tribal citizens.

Response:

DEC involves tribes and has the authority to do so under Alaska Statute (AS) 46.03.020. A specific reference to tribal involvement is not required or necessary as part of the proposed antidegradation implementation regulations.

DEC has published the *APDES* [Alaska Pollutant Discharge Elimination System] *Guidance for Local and Tribal Governments* (2012) (Public Process guide) in which DEC details procedures used to identify, inform, and involve local and tribal governments that may be affected by a potential APDES permitting action. This guidance details the permitting process, opportunities for involvement including information on local and traditional knowledge, and supplementation communication tools available to local and tribal governments potentially affected by an ADPES permitting action. Additional information is posted online at the department's APDES Information for Tribes page at <http://dec.alaska.gov/water/TribalCommunication/tribes.html>. DEC uses this guidance for department actions other than permitting actions, like this proposed rulemaking; for example, DEC mailed a notification letter about the proposed antidegradation implementation regulations to all contacts on the statewide local and tribal government list.

No changes were made to the regulations based on this comment.

21. Comment Summary

DEC received one comment on the proposed regulatory requirement that information be submitted on department approved forms. The commenter requested that the forms must be provided for public review and comment.

Response:

The department has identified in regulations the type of information that will be requested. The department is legally not required to accept public comment on the format of forms it uses to collect applicant submitted information. Agencies receive deference from the courts when it comes to performing such administrative tasks. No changes were made to the regulations based on this comment.

22. Comment Summary

DEC received two comments in regards to the use of the term “measured or modeled” as applied in sections 18 AAC 70.016(a)(5) and (a)(6). One commenter interpreted a conflict between sections and that the language prohibits inferences and presumptions allowed as part of the baseline water quality evaluation. The second commenter requested that modeling not be allowed alone without some measured data.

Response:

DEC agrees with the comment that the proposed language may be interpreted as conflicting. DEC also recognizes the need for as much specificity as practicable in baseline water quality determinations and that a particular water may be unique. Modeling is regularly used to establish

water quality loading allocations, permit limitations and water body goals (e.g. mixing zone design, total maximum daily loads) and is considered to be an appropriate means of establishing assimilative capacity of a water body in EPA guidance for antidegradation. The purpose is to provide definitive information to compare with water quality standards and to determine the impacts of a discharge on its receiving water. In reviewing the proposed regulations, DEC determined the requirements as listed in sections 18 AAC 70.016(a)(5)(A)-(H) and 18 AAC 70.016(a)(6)(C)(i)-(vii) provided sufficient specificity. Therefore, the term “measured or modeled” has been removed from both 18 AAC 70.016(a)(5) and (a)(6)(A).

23. Comment Summary

DEC received one comment requesting two additional requirements be added to the applicant information required by the proposed regulations section 18 AAC 70.016(a)(5), specifically; (I) other statutory, regulatory or constitutional authority pertaining to this waterbody, and (J) justification of how allowing lower water quality is necessary to accommodate important economic or social development for the benefit of the State of Alaska for preferences among beneficial uses where the water is located.

Response:

The department determined the requested additions were unnecessary and duplicative of section 18 AAC 70.016(c)(4)(F), therefore, the requested additions have not been included. No changes were made to the regulations based on this comment.

24. Comment Summary

DEC received two comments on the specification of tier level as part of the applicant information required by the proposed regulations 18 AAC 70.016(a)(5)(G). One commenter was unclear on why the tier determination would be submitted by the applicant. The second commenter stated DEC has the authority to determine the applicable tier and to make the determination, DEC should consider all known information about the waterbody and not rely solely on the applicant to provide the information.

Response:

The lead in language at 18 AAC 70.016(a)(5) states “the applicant shall submit sufficient information...” and “the department, in its discretion, shall review and determine whether the information is sufficient.” Therefore, the applicant is responsible for submission of demonstrative documentation and justification of a parameter’s specific tier level for the waterbody and the department will make a determination. Additionally, 18 AAC 70.016(c)(7) states “the department will review available evidence.” This includes both Tier 1 and Tier 2 department findings. As defined at 18 AAC 70.990(5), available evidence includes “all relevant and applicable data and information available to the department from other sources.” No changes were made to the regulations based on these comments.

25. Comment Summary

DEC received two comments on the applicant information required by the proposed regulations 18 AAC 70.016(a)(5). The commenters requested that the applicants be required to submit information about fish and wildlife, including identifying whether water within or downstream of the proposed activity is in the Anadromous Waters Catalog.

Response:

Biological information may be submitted as a complementary part of the antidegradation process or requested by the department under 18 AAC 70.016(a)(5)(H). The presence or absence of specific salmon species is better addressed by ADF&G rather than DEC antidegradation regulations. The department has the discretion to determine if the application is lacking information on fish and wildlife that is relevant to the antidegradation analysis and whether that is available evidence that the department already has access to (i.e., Anadromous Waters Catalog and lists of endangered and threatened species in Alaska) or that it will require of the applicant (i.e., through 18 AAC 70.016(a)(5)(H)). No changes were made to the regulations based on these comments.

26. Comment Summary

DEC received three comments on the proposed regulatory requirement that the applicant submit “any additional information as requested by the department” (18 AAC 70.016(a)(5)(H)). The commenters stated this requirement could be used to require extensive studies and analyses that have little bearing on permitting, that there is not a necessary or relevance limitation and recommended the subparagraph be deleted.

Response:

The lead-in language to 18 AAC 70.016(a)(5) makes it clear that the purpose of such additional information requests is for the purpose of completing antidegradation analysis as required under this section, “the applicant shall submit sufficient information, measured or modeled, *to complete an antidegradation analysis under (b), (c), and (d) of this section*” (emphasis added).

Regulatory language allowing the department to request additional information already exists in other sections of 18 AAC 70: site-specific criteria at 18 AAC 70.235 and mixing zones at 18 AAC 70.240. Additionally, separate state regulations make similar requests; see for example 18 AAC 83.310(o) and 18 AAC 75.380(b)(9)(j). No changes were made to the regulations based on these comments.

27. Comment Summary

DEC received numerous comments on the proposed regulatory requirement for baseline water quality information (18 AAC 70.016(a)(6)). Comments were received that (1) the requirement of baseline water quality information could be unduly burdensome and unfair to applicants, (2) baseline water quality data should always be required (not only if determined necessary by DEC) and the regulations should define the minimum baseline data required before an application is considered complete, (3) the basis for how the department determines if baseline water quality data is necessary is not provided, nor what the department will do if the applicant chooses not to submit baseline water quality information, (4) the regulation is inconsistent with DEC mixing zone policy and guidance, (5) is inconsistent with the requirement at 18 AAC 70.016(c)(4)(C), (6) each waterbody is unique and that modeling is not necessarily sufficient, and (7) if DEC fails to require an applicant to submit a basic minimum of data on the background water quality of a receiving water, DEC lacks a reasonable basis for quantifying or accounting for the presence or absence of each relevant pollutant parameter in a receiving water for the proposed action or any of the practicable alternatives, which is inconsistent with the Clean Water Act and the state’s antidegradation policy.

Response:

DEC is responsible for drafting regulations with general guidelines that provide transparency and consistency when requesting baseline water quality data including the use of surrogates and modeling when appropriate. Having more descriptive language would make the regulations prescriptive and eliminate DEC's flexibility in requesting the most appropriate and cost effective data collection necessary to assess the project-specific potential for degradation of the receiving water. For example, the amount and type of baseline water quality data required for a small village's discharge and a proposed large-scale mine discharge are vastly different and should not be treated uniformly.

DEC recognizes the desire for as much specificity as possible in baseline water quality determinations, but each project and the particular water to receive the discharge may pose individual considerations that overly prescriptive regulations would limit the department's ability in making the most informed and best decision for the particular project. In addition, modeling is regularly used to establish water quality limits and water body goals (e.g. mixing zone design, total maximum daily loads) and is considered to be an appropriate means of establishing assimilative capacity in federal and state guidance. The purpose is to provide definitive information to compare with water quality standards and to determine the impacts of a discharge on its receiving water. DEC maintains that the regulations provide the necessary flexibility to meet current approved mixing zone regulations and guidance. The proposed language is consistent with federal guidance and allows the agency the deference in determining the appropriate level of baseline water quality expected for each unique project. No changes were made to the regulations based on these comments.

28. Comment Summary

DEC received one comment requesting two additional requirements be added to section 18 AAC 70.016(a)(6)(C) baseline water quality data departmental considerations; (viii) the estimated cost of rehabilitation, and (ix) an adequate bond posted to pay for necessary repair or rehabilitation of damaged resources belonging to the State of Alaska.

Response:

Antidegradation is not the appropriate mechanism to address rehabilitation, financial costs, and bonding. The requested requirements were not added to the proposed regulations. No changes were made to the regulations based on this comment.

29. Comment Summary

DEC received one comment requesting section 18 AAC 70.016(b)(2) be clarified to plainly state that a finding of no significant degradation fulfills the analysis and finding requirement for Tier 1.

Response:

As stated in the lead in language at 18 AAC 70.016(b), "Tier 1 applies to all water of the United States within the State of Alaska and affords the protection under 18 AAC 70.015(a)(1)." In cases of dredge and fill, the existing use is eliminated in the fill area. Therefore, the finding of no significant degradation only fulfills Tier 1 antidegradation finding requirements for dredge or fill material. Tier 1 findings are still required for impacts to water outside of the area. This is also specified in 18 AAC 70.016(a)(1)(B), "the department, in its discretion, will determine upon review, whether the evaluation and findings of no significant degradation per 33 U.S.C. 1344 and

40 C.F.R. 230, as amended through July 1, 2012, are sufficient to *comply with state antidegradation requirements for Tiers 1 and 2 under this section with regard to water quality impacts to receiving water immediately surrounding the dredge or fill material;*” (emphasis added). No changes were made to the regulations based on this comment.

30. Comment Summary

DEC received three comments on the proposed regulatory language in section 18 AAC 70.016(b)(4). Commenters (1) stated the purpose and content of the section was unclear, (2) stated that the use of the term “exceeds” in the positive is counterintuitive and creates confusion, and requested revisions to be consistent with the use of the term in other portions of 18 AAC 70 regulations, (3) interpreted the use of the “and” connector indicates all four factors (A)- (D) must be met, (4) requested “specific to the parameter” be added to section (b)(4)(B), and requested the “finding” statement in section (b)(4)(C) be an independent section as it applies to all three sections (A) – (C).

Response:

DEC has revised all relevant sections of the proposed regulations in terms of the use of “exceeds” in relation to water quality criteria and Tier levels. For example 18 AAC 70.016(b)(4),

“Tier 1 is the only antidegradation protection level for a parameter where the **applicable** water quality **criteria is exceeded** ~~does not exceed the applicable criteria~~ for that parameter as demonstrated by the fact that...”

All four factors do not need to be met for only the Tier 1 protection level to apply. An “or” has been added after (B) in the section to clarify that Tier 1 is applicable when either conditions of (A), (B) or (C) are met. The “and” connector is retained as Tier 1 and Tier 3 protection may both apply to a parameter.

Alaska’s CWA section 305(b) report provides information and categorizes waters on a parameter basis for each waterbody of concern, and 18 AAC 70.016(b)(4)(B) states that the department determines a Tier 1 protection for a parameter based on information in the 305(b) report. 18 AAC 70.016(a)(3) also states that antidegradation analyses and department findings for Tier 1 and Tier 2 protection levels are on a parameter basis. DEC does not see the need for additional clarifying language.

When a water is not listed as impaired on the state’s 303(d) list or in the 305(b) report, criteria for making a Tier 1 determination under 18 AAC 70.016(b)(4)(C) are based on the department’s review of information submitted by the applicant under 18 AAC 70.016(a)(6). As such, the department finding language applies only to (4)(C). Additional regulatory language describing the process in greater detail is not appropriate for regulations, because DEC needs to have the flexibility to adjust the amount of information required based on the size and scope of the proposed project, and the risk of impacts to the receiving water from the parameters in the discharge. No additional changes were made to the regulations based on these comments.

31. Comment Summary

DEC received one comment requesting language be added to 18 AAC 70.016(b)(5) to clarify that the authorization under the subsection is specific to Tier 1 waters.

Response:

The text at 18 AAC 70.016(b) clearly states the section overall is for Tier 1 water, “(b) Tier 1 analysis of existing use protection. Tier 1 applies to all water of the United States within the State of Alaska and affords the protection under 18 AAC 70.015(a)(1). The *following applies for Tier 1 antidegradation analysis*” (emphasis added). Therefore, the additional text requested in subsection (b)(5) is duplicative and would not offer any additional clarity or benefit. No changes were made to the regulations based on this comment.

32. Comment Summary

DEC received one comment requesting language be added to 18 AAC 70.016(b)(5)(A) to define the term “water quality necessary for protection” that was interpreted as vague and ambiguous.

Response:

Water quality and the classes and subclasses of water uses are defined in current regulations at 18 AAC 70.020(a) and (b) and 18 AAC 70.050. Additional language is not warranted. No changes were made to the regulations based on this comment.

33. Comment Summary

DEC received two comments stating the phrase “equals or does not exceed” in subsection 18 AAC 70.016(b)(5)(C) is potentially confusing. Commenters suggested that DEC revise 18 AAC 70.016(b)(5)(C) and (c)(1)(C)(i) to simply use “does not exceed,” rather than “equals or does not exceed”/“equal to or does not exceed.” Use of “does not exceed” would capture all cases where water quality is not better than criteria, *i.e.* where water quality is either equal to or does not meet criteria.

Response:

DEC agrees and has made modifications that adopt the requested revisions. See also Comment Response #30.

34. Comment Summary

DEC received one comment stating that section 18 AAC 70.016(c) is unclear as to whether a waterbody could be subject to both Tier 1 analysis and Tier 2 analysis.

Response:

Section 18 AAC 70.016(a)(3) states “an antidegradation analysis is tier specific as described under (b), (c) and (d) of this section; *antidegradation analyses and department findings for Tier 1 and Tier 2 protection levels are on a parameter by parameter basis*; (emphasis added). The protection level, antidegradation analysis and department findings are applied on a parameter by parameter basis. Therefore, a receiving water may be considered Tier 1 for certain parameters in a new or expanded discharge and Tier 2 for others, dependent on water quality criteria and site specific conditions. No changes were made to the regulations based on this comment.

35. Comment Summary

DEC received one comment requesting the term “water” in section 18 AAC 70.016(c)(1) be revised to “water of the U.S.” to clarify and further confirm that the antidegradation review only applies to CWA-regulated activities.

Response:

The text at 18 AAC 70.016(c) clearly states the section overall is for Tier 2 water as: “(c) Tier 2 analysis for the lowering or potential lowering of high quality water. Tier 2 applies when the water quality for a parameter *in a water of the United States within the State of Alaska...*” (emphasis added). Therefore, the additional text requested in subsection (c)(1) is duplicative and would not offer any additional clarity or benefit. No changes were made to the regulations based on this comment.

36. Comment Summary

DEC received two comments that expressed concern with the use of the qualifier “persistently” as part of the determination language in section 18 AAC 70.016(c)(1)(C)(i). Commenters were not sure what was meant by “persistently” and believed that the relevant question should be whether one or more parameter results are observed above applicable water quality criteria (and are not explicitly shown to be an outlier).

Response:

DEC has retained the term “persistently” as a qualifier to the conditions. Water quality criteria are often derived from toxicological information on potentially adverse effects of a particular parameter. The threshold for an adverse effect is a function of the magnitude, frequency, and duration of the exposure. Water quality criteria often are a simplification of exposure thresholds to aid in implementation, to include a safety factor, or for other regulatory purposes. The use of the word “persistently” is consistent with the DEC 303(d) listing determination process, and its use provides a quantitative means of determining whether the presence or absence of a particular parameter is a consistent excursion from the water quality criteria sufficient to justify lowering the antidegradation protection level. Finally, use of the term “persistently” affords DEC the flexibility to account for seasonal, individual, and uncharacteristic excursions from the water quality standards without having a water being considered as “impaired” and unable to support the designated and existing uses affected by that parameter. For certain parameters DEC has published 303(d) listing methodologies that might be considered for tier determination purposes. DEC reserves the right to use discretion to determine when a water does not meet water quality criteria for a parameter, such that there is no assimilative capacity and no further degradation can be allowed (Tier 1). Without use of the word persistently, a waterbody might conceivably be considered Tier 1 when it is actually Tier 2, and a discharge to the waterbody would no longer require the Tier 2 alternatives analysis or importance tests. No changes were made to the regulations based on these comments.

37. Comment Summary

DEC received two comments regarding when the department will conduct a Tier 2 analysis as described in section 18 AAC 70.016(c)(2). One commenter interpreted that DEC’s intent is to conduct the analysis when an application is made for a permit or a modification to a permit and requested the term “reviewing” be revised accordingly. The second commenter was unclear on how DEC will apply or conduct an antidegradation review of “the portion discharge.” The commenter also expressed concern that the section allows antidegradation analysis for general permits at the time the general permit is issued (See Comment # 54 and Response for a response on this issue).

Response:

DEC has revised the term “reviewing” in section 18 AAC 70.016(c)(2) to “evaluating development of” to provide clarity as to when an antidegradation analysis will be completed by the department.

EPA guidance on antidegradation clearly indicates that a Tier 2 analysis is only necessary for “new or expanded” discharges where an additional pollutant load is released that degrades existing water quality in the area of the discharge. A Tier 2 analysis is not required to be done retroactively for existing permitted or allowed discharges, which are considered part of the baseline water quality at the time these regulations go into effect. Retroactive Tier 2 analysis for existing facilities would require speculative estimates of a water quality baseline that may have existed prior to the establishment of antidegradation methods, which is not practical or necessary to meet the intent of antidegradation policy.

The regulations have different alternatives analysis requirements for existing and new facilities in recognition that there is a difference between what is practicable for an existing facility versus a new facility. It is appropriate for the Department to only consider the effects of the increased portion of the discharge rather than the entirety of the discharge for an existing discharge. No additional changes were made to the regulations based on these comments.

38. Comment Summary

DEC received several comments on the section of the proposed regulations that describes when a Tier 2 antidegradation analysis will not be required by the department (18 AAC 70.016(c)(3)). Some commenters were generally opposed to the categorical exemptions and recommended some or all be removed from the proposed regulations. Commenters stated an antidegradation analysis should always be performed to evaluate new information (synergistic effects) and new technologies or practices for improvements in water quality from the previous permit. One commenter questioned what factual situation section 18 AAC 70.016(c)(3)(B) addresses. One commenter stated an exemption should never apply to a short-term variance, zone of deposit, or mixing zone. Finally, commenters stated that the only instance where an antidegradation analysis should not be required is for a reissued permit with a previous antidegradation analysis that is not proposing to expand and the discharge is not causing unauthorized or unanticipated degradation (such as historic noncompliance or cumulative or unforeseen impacts). Commenters also requested that consistent language be used in (A) – (C).

Response:

As listed in 18 AAC 70.016(c)(2)(A)-(E), a Tier 2 antidegradation analysis is required for a new or expanded discharge. DEC maintains the proposed language does not create a group of activities that are exempt from antidegradation analysis, rather clarifies when an antidegradation analysis will not be required for existing discharges that are not proposing to expand. In order to maintain agency resources to evaluate higher risk activities, the Department has determined that reevaluating existing discharges that have already gone through antidegradation and will not result in additional degradation is not the best use of the agency’s resources. The federal antidegradation requirements allows delegated authorities like states the ability to implement such provisions. In addition, 18 AAC 70.016(c)(4)(B) specifically addresses a case where a discharge or activity did not previously require permit coverage, but through, for example, a change in interpretation of law is determined to require permit coverage. If an expansion of the existing discharge is not proposed, an antidegradation analysis and department findings are not required as this discharge results in the existing baseline for the water.

The reference to mixing zones, zones of deposit and short term variances are not relevant to the proposed implementation methods regulations as these regulatory provisions are addressed in separate sections of the existing 18 AAC 70 regulations and the APDES permitting process. Additionally, zones of deposit and mixing zones are both addressed as part of the permit process and not considered separately from the Tier 2 analysis of the discharge. Short-term variances are generally used for 401 certifications of 404 permits. Under 18 AAC 70.200 the granting of a short-term variance to the antidegradation policy or water quality standards is applicable to certain temporary activities and only after the department, in its discretion, is satisfied that certain conditions are met. The short-term variance conditions include items relevant to the antidegradation policy such as whether the activity is necessary and whether the impacts are limited (18 AAC 70.200(b)(1) through (3)). Given that a short-term variance is temporary, is limited by those conditions, and is granted under departmental discretion, it is appropriate that the existing water quality standards allow for short-term variances to the antidegradation policy and that the antidegradation implementation methods do not need to apply requirements for permits and 401 certifications to short-term variance applications..

DEC maintains the existing language in the proposed regulations is adequate. No changes were made to the regulations based on these comments.

39. Comment Summary

DEC received one comment requesting text be added to 18 AAC 70.016(c)(3)(A) – (C) addressing “unless uncertainty is proposed.”

Response:

DEC determined the proposed language would decrease clarity, therefore no revisions were implemented. No changes were made to the regulations based on this comment.

40. Comment Summary

DEC received two comment on the proposed regulatory language at 18 AAC 70.016(c)(4) “relative to the size of the project.” The commenters stated that the focus should be on the “size and nature of the discharge” and projects should not have a different standard of antidegradation review based upon “size of the project” or ability to pay.

Response:

DEC determined the proposed language at 18 AAC 70.016(c)(4), “relative to the size of the project or facility” provides the breadth and flexibility necessary for the department to apply the antidegradation implementation methods to the variety of sectors, permits and/or case-by-case scenarios that are required to be addressed under the program. Also note that the subsequent clauses in the regulation list “the characteristics of the proposed discharge” and “the characteristics of potential risk to the receiving water”, which should address the commenter’s concerns on the “nature” of the discharge. The information required will be commensurate with the level of risk as identified by DEC. No changes were made to the regulations based on these comments.

41. Comment Summary

DEC received two comments both requesting the list of practicable alternatives be added to section 18 AAC 70.016(c)(4)(B). One commenter expressed concerns that evaluation of “non-

degrading and less degrading” alternatives should be explicitly required for clarity. Additionally, one commenter previously requested that analysis of seasonal discharges to avoid critical ecological time periods be required in any waters included in the Catalog of Anadromous Waters.

Response:

See Response #25 in regards to the Catalog of Anadromous Waters.

The proposed regulations are consistent with federal terminology. The preamble to EPA’s 2015 Final Rule explains, “The final rule specifies that states and authorized tribes must analyze ‘practicable alternatives that would prevent or lessen the degradation,’ rather than ‘non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation,’ as proposed. While non-degrading or minimally degrading alternatives preserve high water quality to a greater extent, in cases where no minimally degrading alternatives exist, a less degrading alternative will still provide a margin of protection for the high quality water. The final rule requires a broader, more complete analysis.” Federal antidegradation policy does not require the selection and implementation of the least degrading practicable alternative. “EPA chose not to require implementation of the least degrading practicable alternative to allow states and authorized tribes the flexibility to balance multiple considerations.” The department believes it is appropriate for the proposed regulations to retain this degree of broadness and flexibility to allow a range of practicable alternatives to be evaluated and potentially approved on a permit-by-permit basis, without specifying a list of potential alternatives in regulation.

Additionally, inclusion of a list of potential or “example” (*i.e.* 2014 regulatory “such as” language) alternatives could be interpreted as a definitive list which would be required to be evaluated for every permit, which is not DEC’s intent. No changes were made to the regulations based on these comments.

42. Comment Summary

DEC received one comment requesting language be added to section 18 AAC 70.016(c)(4)(B) to clarify the term “practicable” in relation to land ownership as follows: “an alternative is not practicable if it would require the applicant to access land that is not under the applicant’s ownership or control.”

Response:

Land based decision making is beyond the scope of the antidegradation regulations, therefore the requested regulatory addition was not implemented. No changes were made to the regulations based on this comment.

43. Comment Summary

DEC received two comments requesting section 18 AAC 70.016(c)(4)(C) be deleted from the regulations, stating the objective appears to be to provide nuanced information to differentiate between alternatives, the information is not required by EPA and could be interpreted to require modeling or extensive analysis to evaluate competing alternatives.

Response:

DEC determined that the requested information is necessary for the evaluation of the range of practicable alternatives submitted by the applicant, as well as the subsequent department findings, and will be retained in regulations. No changes were made to the regulations based on these comments.

44. Comment Summary

DEC received several comments on the section 18 AAC 70.016(c)(4)(D) requirement for a cost evaluation of each practicable alternative “relative to the degree of water quality degradation.” Commenters stated: (1) cost information is often proprietary, (2) EPA does not require cost information, nor that alternatives be evaluated based on cost, (3) it is unclear how the cost will be evaluated relative to water degradation, creating uncertainty and grounds to argue, (4) interpreted the evaluation to mean cost relative to the amount of degradation that would be avoided (cost/benefit analysis); and requested addition regulatory text be added to clarify, (5) requested that DEC independently verify an applicant’s cost estimates, make sure the information is available for public review and that the information not be characterized as Confidential Business Information, and (6) expressed concerns that by narrowly focusing on cost, DEC may not be able to adequately identify the best alternative for protecting water quality and requested that DEC broaden the category of issues considered to insure that the alternatives identified represent the full scope of practicable alternatives, which is based on more than just cost.

Response:

The department believes it is appropriate for the proposed regulations to retain the degree of flexibility to allow the range of alternatives to be evaluated and potentially approved on a permit-by-permit basis. This would be especially relevant, for example, in a case where the cost of one practicable alternative was significantly more than another practicable alternative, and with only a slight increase in water quality benefits. The department will review the cost effectiveness for the range of practicable alternatives as part of the applicant’s submission and department’s findings process. However, the department does not agree that independent verification of cost estimates, nor having this information available for general public review if it is indeed Confidential Business Information, is appropriate or necessary. However, in most cases, any information submitted by an applicant to DEC is available to the public upon request. No changes were made to the regulations based on these comments.

45. Comment Summary

DEC received several comments on section 18 AAC 70.016(c)(4)(E). Commenters (1) requested clarification as to when a social or economic importance analysis is not required, (2) requested the text be revised to “identification of a proposed practicable alternative” rather than the “identification of the practicable alternative,” (3) requested that DEC should also require the applicant to document any less-degrading alternatives considered but deemed impracticable and provide a basis for that conclusion, and (4) requested that the final rule require the identification and selection of the least-degrading alternative.

Response:

DEC has made modifications to clarify the section as follows:

(E) identification of ~~the~~ a proposed practicable alternative which prevents or lessens water quality degradation while also considering accompanying cross media environmental impacts; if the applicant has selected a non-degrading alternative, ~~a~~ the social or economic importance analysis in (F) of this paragraph is not required;

Documentation and practicability of less-degrading alternatives is already required as described in 18 AAC 70.016(c)(4)(B),

(B) *a description and analysis* of a range of practicable alternatives that have the potential to *prevent or lessen* the degradation associated with the proposed discharge (emphasis added)

See Comment Response #41 for discussion of the least degrading practicable alternative requirement. No other changes were made to the regulations based on these comments.

46. Comment Summary

DEC received two comments on the social or economic importance analysis section at 18 AAC 70.016(c)(5)(A) and (B). Commenters requested (1) activities on lands subject to State best interest findings be considered to meet criteria for social or economic importance, and (2) tourism and fish and wildlife abundance considerations be added to the listed areas of economic importance.

Response:

The proposed antidegradation implementation methods are not intended to conform to the State Best Interest Findings. However, relevant information from the Best Interest Findings process can be submitted to the department for evaluation and consideration as part of the social or economic analysis.

DEC determined that the language at 18 AAC 70.016(c)(5)(A)(vi) recreational opportunities and 18 AAC 70.016(c)(5)(B)(iv) commercial activities is sufficiently broad to address the considerations, therefore tourism and fish and wildlife abundance are not necessary to specifically include in the proposed regulations. No changes were made to the regulations based on these comments.

47. Comment Summary

DEC received several comments on the proposed regulatory approach to and requirements for a social or economic importance analysis at 18 AAC 70.016(c)(5) and department findings for social or economic importance at 18 AAC 70.016(c)(7)(E). Commenters (1) requested that all social and economic impacts, both positive and negative, be required and evaluated as well as evaluating the importance of maintaining (not-degrading) existing water quality, e.g. recommended a broad, balanced socioeconomic analysis be required, and (2) stated that an economic/social importance analysis in the area where the water is located is too narrow and should be broadened to account for economic effects of fisheries outside the local area and to account for impacts to communities given the geographic scale of Alaska and the expansive areas for subsistence use.

Response:

The CWA requirement is specific in that the lowering of water quality supports important economic or social development, not that positive and negative impacts be evaluated. The workgroup recommendation and DEC's decision was to propose a format that only considers the social or economic development benefits of a particular project when evaluating importance. It is not prudent for DEC to establish qualitative or quantitative metrics in these regulations for each project that undergoes an antidegradation analysis nor to establish the range of perceived impacts such as the amount of job creation or increase to tax base since such an analysis will be case-specific and tied to the waterbodies affected. There may well be potential negative social or economic impacts of a project that are of concern to the public. These are appropriately addressed through the applicable land use planning or environmental assessment process, rather than through the narrow lens of an antidegradation analysis. Finally, any impacts that are of concern, positive and negative, can be submitted during the required public notice period for the permit and will be addressed in the department's response to comments document.

The CWA requirement is to evaluate whether the proposed lowering of water quality supports important economic or social development in the area where the water is located. Given the rural nature of many parts of Alaska, there is not a fixed size that defines this area. The department's evaluation of the area where the water is located can be more expansive for a general permit in order to reflect the permitted area of coverage or important tax revenue streams provided to the State.

No changes were made to the regulations based on these comments.

48. Comment Summary

DEC received two comments on the proposed departmental findings relative to nonpoint sources. One commenter interpreted 18 AAC 70.016(c)(7)(C) to compel DEC to deny a point source permit if any nonpoint source is not in compliance with "all cost effective and reasonable best management practices" and requested the regulations be revised to limit the finding to "department" regulated nonpoint sources regulated under 18 AAC 70.016(a)(1). The second commenter requested the regulations expressly confirm that DEC has discretion to approve an alternative which meets the regulatory standards of 18 AAC 70.015(a)(2)(E).

Response:

DEC believes that the regulation is consistent with EPA interpretation of 40 CFR 131.12(a)(2), which requires the evaluation of nonpoint sources and a finding that when there are best management practices (BMPs) established under State authority, they have been implemented and are in compliance before new or expanded point sources can be authorized. This is not limited to "department" BMPs under APDES permits and 401 certifications. While BMPs are required in various APDES general permits, as well as individual permits, and may include provisions for storm water BMPs or BMPs associated with a TMDL, other State authorities may regulate nonpoint sources as well. Therefore, the proposed regulations retain the term "state regulated" and nonpoint sources will be evaluated as specified as part of the department findings.

Additionally, section 18 AAC 70.016(c)(7)(C)(ii) will be revised from "department" to "required state regulated" nonpoint source best management practices.

The department determined that language that expressly confirms that DEC has discretion to approve an alternative which meets the regulatory standards of 18 AAC 70.015(a)(2)(E) is not necessary. The department's discretion to authorize a discharge is already stated in the lead in language at 18 AAC 70.016(c)(7). No other changes were made to the regulations based on these comments.

49. Comment Summary

DEC received two comments on the department's finding of "necessary" as specified in section 18 AAC 70.016(c)(7)(D)(i). Commenters reiterated the request that DEC require the implementation of the least degrading alternative.

Response:

Federal antidegradation policy and regulations do not require the selection and implementation of the least degrading practicable alternative. "EPA chose not to require implementation of the least degrading practicable alternative to allow states and authorized tribes the flexibility to balance multiple considerations." Likewise, the department has determined not to require implementation of the least degrading practicable alternative. The department believes it is appropriate for the proposed regulations to retain this degree of broadness and flexibility to allow a range of practicable alternatives to be evaluated and potentially approved on a permit-by-permit basis, without always and absolutely requiring the implementation of the least degrading alternative. See also comments 41 and 45. No changes were made to the regulations based on these comments.

50. Comment Summary

DEC received two comments on the department's findings at 18 AAC 70.016(c)(7)(D)(ii) that "methods of pollution prevention, control, and treatment applied to all waste and other substances to be discharged are found by the department to be the most effective and practicable." Commenter stated the requirement has always been a source of confusion in relation to an alternatives analysis and requested the section, as well as the corresponding provision in 18 AAC 70.015, be deleted.

Response:

DEC has determined the two regulatory findings at 18 AAC 70.016(c)(7)(D)(i) and (ii) complement each other and that both are necessary for completeness. No changes were made to the regulations based on these comments.

51. Comment Summary

DEC received several comments on the Tier 3 analysis section 18 AAC 70.016(d). Commenters were either: (1) generally opposed to the section and requested all references be removed from the regulations, or (2) requested DEC fully incorporate the Tier 3 nomination and designation process into regulations to be in compliance with the Clean Water Act. Commenters opposed to the section stated, (1) regulatory package did not give the public notice that Tier 3 provisions were included within it or provide any explanation about the potential interaction of placing the Tier 3 requirements in the package and nomination and the designation provisions in a future regulatory package, the regulatory notice was inadequate (AS 44.62.190), (2) were strongly opposed to the approach of regulations prior to or without the nomination/designation process and recommended only the Alaska Legislature make Tier 3 determinations.

Response:

The public notice of the proposed regulation clearly identified the subject “Antidegradation Implementation Methods” textually, both in the title and in first two sentences of the Brief Description. Antidegradation policy at 18 AAC 70.015 and the associated implementation methods regulations include all three water protection levels; Tier 1, Tier 2 and Tier 3.

Additionally, the public notice on the proposed regulations stated “(2) Add a new section at 18 AAC 70.016 to describe levels of protection for waters of the United States within the State of Alaska, consistent with the federal Clean Water Act.” Section 18 AAC 70.016(d) describes the level of protection for a Tier 3 water in the same manner as the previous sections describe the levels of protection for Tier 1 and Tier 2 waters.

AS 44.62.200(b) “A regulation that is adopted, amended, or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for ***them to determine whether their interests could be affected by agency action on that subject.***” (emphasis added)

All statutory and regulatory public notice requirements have been satisfied.

Furthermore, lead-in language at 18 AAC 70.016(d) clearly states “Tier 3 analysis for the *protection of water* quality in Outstanding National Resource Water. Tier 3 applies to a *designated water or segment thereof and upon designation* affords the protection under 18 AAC 70.015(a)(3).” (emphasis added) The Tier 3 analysis as described in the proposed regulations is separate and distinct from the nomination and designation process and the protection level only applies upon final designation.

Finally, the department determined the inclusion of all three tier protections levels in the proposed regulations was necessary for a complete, efficient regulatory package and to be consistent with existing regulatory policy at 18 AAC 70.015.

The incorporation of a nomination and designation process in the proposed regulations (or future regulations) is not required to be in compliance with the Clean Water Act. Federal regulations do not require such methods in regulation, nor to actually designate Tier 3 waters, only to develop methods.

40 CFR 131.12 “(b) The State shall *develop methods* for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section.” (emphasis added)

Implementation methods are under state authority to determine and may be in various forms, including, but not limited to, statutory, regulatory or guidance. While the department has determined it appropriate to “hold” and not to act upon Tier 3 nominations that have been or will be submitted until such time as a final nomination and designation process is determined, Tier 3 designation methods are still present and available. As stated in the *Interim Antidegradation Implementation Methods* (July 2010), “waters could also be designated as tier 3 through two other existing legal mechanisms,” “A person could propose a tier 3 designation as part of the division's existing triennial review process,” and “people seeking tier 3 designations during this interim period may also pursue that goal before the state legislature in the first instance, by advocating

for a bill recognizing an ONRW water.” Additionally, the *Interim Antidegradation Implementation Methods* were determined consistent by EPA in July 2010, “EPA has reviewed ADEC's interim antidegradation implementation methods and believes that they are consistent with EPA's antidegradation regulation at 40 CFR 131.12, as well as Alaska's antidegradation policy at 18 AAC 70.015.”

Therefore, DEC remains in compliance with the Clean Water Act and federal regulatory antidegradation requirements. DEC will continue to work with all stakeholders on a final nomination and designation process, including the final designating authority that is transparent, works for all waters of the state, now and in the future. No changes were made to the regulations based on these comments.

52. Comment Summary

DEC received several comments opposed to the inclusion of tributaries as part of the Tier 3 analysis at 18 AAC 70.016(d)(1). Commenters expressed concerns that the interpretation was overly restrictive, not required by the CWA and EPA regulations, has significant potential ramifications, and that EPA's policy and guidance is not binding on the state.

Response:

DEC disagrees that a Tier 3 analysis should not be required for discharges to a tributary to a Tier 3 water. The proposed regulations are consistent with both federal antidegradation regulations and EPA Guidance. As stated in 40 CFR 131.12(a)(3),

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, ***that water quality shall be maintained and protected.*** (emphasis added)

and from the EPA's 2012 Water Quality Standards Handbook 4.7:

“EPA interprets this provision to mean no new or increased discharges to ONRWs and ***no new or increased discharge to tributaries to ONRWs*** that would result in lower water quality in the ONRWs.” (emphasis added)

Tributaries to Tier 3 waters have the potential to adversely affect Tier 3 water quality. A Tier 3 analysis is required to determine if adverse effects on Tier 3 water quality are likely to occur or not. No changes were made to the regulations based on these comments.

53. Comment Summary

DEC received one comment stating the term "quality of the existing and proposed expanded discharge" in section 18 AAC 70.016(d)(2)(C) is vague and should either be defined or rewritten.

Response:

The requested information is necessary to evaluate the proposed discharge in terms of water quality criteria, as well as impacts of the discharge to the Tier 3 water at (d)(2)(D). The information will be utilized as part of the department findings to determine if the proposed discharge may be authorized as temporary and limited in nature. No changes were made to the regulations based on this comment.

54. Comment Summary

DEC received numerous comments on the proposed regulatory approach to perform antidegradation analysis at the time a general permit is issued (18 AAC 70.016(e)). Commenters (1) questioned how the antidegradation regulations would apply to general permits and notice of intent process, (2) questioned the defensibility of the approach for statewide permit application and interpreted antidegradation analysis as being waterbody specific, (3) stated that allowing the antidegradation analysis for general permits to happen at the time that the general permit is issued, not at the time that a discharger seeks coverage under the general permit is fundamentally inconsistent with antidegradation, which is necessarily site specific (Hearing Officer's Final Decision in Adjudication of EPA General Permits AK-G70-1000 and AK-G70-0000 issued May 10, 2002 and concerning log transfer facilities in Alaska; *Ohio Valley v. Horinko*, 279 F. Supp. 2d 732 decided in 2003 and concerning West Virginia's antidegradation regulations), (4) were concerned about the potential range of waterbodies and activities that may be allowed in a general permit, were concerned about cumulative and site specific impacts, and recommended revisions to limit and clearly define general permits, (5) requested clarification and revision of 18 AAC 70.016(e)(3) for DEC to retain the authority to conduct an individual antidegradation analysis for a discharger seeking coverage under a general permit when cumulative degradation or individual circumstances warrant it, and (6) based on case law, stated that DEC must provide public notice and apply the antidegradation policy and implementation methods at the site-specific level before making individual authorizations under the general permit.

Response:

The department disagrees that the *Horinko* case concluded that a prospective antidegradation analysis was inappropriate at the time of general permit issuance. Instead, in the *Horinko* case the judge found that EPA was inconsistent in its position on what was required for a Tier 2 analysis for a general permit and consequently acted arbitrarily and capriciously in approving West Virginia's regulations. Moreover, the *Horinko* opinion reiterated numerous times that the court is mindful of the deference owed to an agency's reasonable interpretation of regulations. Note that since the *Horinko* decision EPA has approved the State of Washington antidegradation regulations that conduct the antidegradation analysis at the time of general permit issuance. In addition, the hearing officer's decision related to log transfer general permits is binding only to the specified permits (AK-G70-1000 and AK-G70-0000).

DEC's methodology for completing a Tier 2 analysis for general permits is to describe the conditions in the general permit for discharges to waterbodies, or a waterbody, by tier. For example, most DEC APDES permits are for discharges to Tier 2 waterbodies. As a result, the department imposes permit conditions (e.g., effluent limits, best management practices, etc.) under the principle that the level of water quality (and the waterbody uses) for Tier 2 waterbodies will be maintained and protected when permit conditions are adhered to, thus, providing assurance that all Tier 2 waterbodies receiving discharges under the general permit will remain high quality Tier 2 waterbodies. Accordingly, site-specific antidegradation analyses are not warranted under the principle that general permits are crafted to be protective of the selected waterbody tier. However, as a commenter noted, DEC does reserve the authority to conduct an individual antidegradation analysis for a discharge that seeks coverage under a general permit. In these cases, when DEC determines that an applicant seeking coverage under a general permit was not fully contemplated in the general permit's antidegradation analysis, then an additional analysis will be completed either as part of the general permit authorization or through the issuance of an individual permit. In the case of an additional antidegradation analysis being conducted as part of the general permit authorization process, the analysis specifying the

area of coverage and the waterbody tier would be subject to a public notice and comment period. Thus, whether DEC completes an antidegradation analysis during general permit development or during subsequent general permit authorization, the requirement for public participation is satisfied.

The concerns raised about the scope of the activities and potential impacts under an antidegradation analysis for a general permit are routinely addressed by the department when it determines the scope of the general permit itself. If a proposed activity does not fit under the general permit, it will not be covered by the general permit and an individual permit will be required. In many cases, an applicant will modify the activity or discharge so that it can meet the conditions of and hence be covered by the general permit. No changes were made to the regulations based on these comments.

55. Comment Summary

DEC received one comment requesting a definition of “best management practices” be added to section 18 AAC 70.990. The commenter also submitted a list of suggested definitions to incorporate that would help to standardize terms between ADF&G, ADNR and DEC to accommodate a more comprehensive communication between agencies and multijurisdictional areas.

Response:

Best management practices are sector, industry and/or permit specific. DEC determined that the inclusion of a regulatory definition for BMP would reduce the flexibility required to address the variety of facilities and associated discharges regulated under the APDES program. The addition of ADF&G and ADNR definitions to the proposed regulations is not necessary and potentially confusing. The definitions apply to the respective regulations cited within. No changes were made to the regulations based on this comment.

56. Comment Summary

DEC received one comment on the proposed regulatory definition of assimilative capacity (18 AAC 70.990(73)). The commenter (1) questioned if the definition applied to both acute and chronic criteria, (2) stated that the definition should not rely solely on concentration, but must also consider the pollutant’s loading capacity, and (3) recommended a revised definition to include cumulative loading based on EPA statements about bio-concentratable pollutants in the 1991 *Technical Support Document for Water Quality-based Toxics Control* (TSD). The suggested definition would set a limit for cumulative loading based on critical low-flow conditions.

Response:

DEC maintains the definition of assimilative capacity is accurate. The definition applies to both acute and chronic criteria, as specified by “applicable criteria” in the definition. The referenced section of EPA’s 1991 TSD pertains to permit limits, monitoring requirements, and, more specifically, mass-based effluent limits. Therefore, that section does not determine a regulatory definition of assimilative capacity.

From the EPA 2005 memorandum *Tier 2 Antidegradation Reviews and Significance Thresholds*, “The available assimilative capacity of a waterbody – the difference between the applicable water quality criterion for a pollutant parameter and the ambient water quality for that pollutant parameter where it is better than the criterion – is a valuable natural resource.” Assimilative

capacity is tied to the applicable water quality criteria which are most often expressed in concentration. When applicable criteria are expressed in terms of loading, the analysis of assimilative capacity will evaluate loading. The definition of assimilative capacity is broad enough to consider impacts, such as loading, that are not part of the applicable criteria when necessary to determine “the capacity of a specific water to accommodate the addition of a parameter without causing violations of applicable water quality criteria, impairing water quality, or negatively impacting uses.”

The commenter’s proposed language would restrict consideration of cumulative loading to be only based on critical low-flow considerations. Given that many cumulative impacts integrate exposures over long periods of time, it is overly restrictive to assume all exposures will occur at low-flow conditions or that only low-flow conditions will result in protective limitations. No changes were made to the regulations based on these comments.

57. Comment Summary

DEC received two comments requesting the definition of “new or expanded” be limited to “an increase in load or concentration.” The references to “other changes” or “adverse environmental impacts” will create uncertainty and grounds to argue that antidegradation review should have been undertaken.

Response:

DEC determined the proposed definition of “new or expanded” is adequate and provides the necessary broadness to apply under the APDES program. Limiting the definition strictly in terms of load or concentration would lead to confusion and not cover all parameters that are evaluated for permitting, e.g. flow, temperature, pH, or possible environmental impacts due to alteration of receiving water body characteristics. No changes were made to the regulations based on these comments.

58. Comment Summary

DEC received three comments on the proposed regulatory definition of parameter (18 AAC 70.990(76)). Commenters (1) stated the definition was too expansive and should be limited only to “pollutants that are actually regulated under a permit,” (2) requested that the definition be revised to include omitted CWA language found at 33 U.S.C. 1326(6) limiting sewage from vessels to that incidental to the normal operation of a vessel of the Armed Forces, and (3) questioned why the definition of pollutant is being included in the proposed regulations.

Response:

The proposed regulations address antidegradation implementation under the CWA; however, the CWA definition for pollutant, may be more restrictive for state water quality standards than what is applicable under the state regulatory (18 AAC 70.990(47)) and statutory (AS 46.03.900(20)) definition of pollution, which applies to both CWA and non-CWA discharges to state waters. Therefore, the definition of parameter is necessarily broad to encompass all areas of “pollution.” Notwithstanding this, because the proposed antidegradation implementation regulations must satisfy requirements of the CWA, the CWA definition of pollutant, that is also found at 18 AAC 83.990(49), is the relevant definition of pollutant under the proposed 18 AAC 70.016.

“Parameter” and its corresponding definition would apply to all other areas/constituents not strictly consistent with the term “pollutant” (e.g., dissolved oxygen) whose presence in the discharge could reasonably cause or contribute to an exceedance of water quality standards. Therefore, the definition of parameter provides more complete coverage for all types of discharges and overall water quality protection. No changes were made to the regulations based on these comments.

59. Comment Summary

DEC received two comments on the proposed regulatory addition of the definition of temporary and limited (18 AAC 70.990(79)). Commenters (1) stated the definition was inappropriately vague, (2) requested the term “generally” be deleted and the definition be revised to include a maximum time period (1 month) and percentage change allowable, (3) requested the term “eliminating” be added to the definition, “all practical means of minimizing or eliminating such degradation are implemented,” and (4) stated the definition should be modified to make explicit reference to protecting designated and existing use and prohibiting exceedances of water quality criteria in order to explain how DEC intends to interpret the factors listed in the definition.

Response:

The regulatory test is whether the discharge is temporary and limited. There can be different combinations of discharge duration and degradation that would meet the overall requirement of being temporary and limited. There is no federal regulation applicable to implementing the state antidegradation policy under the CWA that prescriptively defines temporary and limited. DEC believes the flexibility provided by the definition in the revised implementation regulations is necessary for allowable discharges in the state, rather than prescriptive not-to-exceed limits such as one month or a set numerical percentage for the change in ambient conditions. Additionally, given the state’s abbreviated construction season, projects often take multiple seasons to complete and therefore, limited degradation in two successive construction seasons may be determined to be “temporary and limited.” The use of the term “generally” does not set a prescriptive limit and does not require the duration of the discharge to be continuous.

DEC has not added the term “eliminating” to the definition. Minimizing the degradation can include eliminating the degradation, if practicable.

DEC has identified the factors to be considered in determining temporary and limited degradation. The lead-in sentence provides clarification on what temporary means and an addition has been made to specify that impacts must be limited. Since water quality criteria can be exceeded while still being protective of designated and existing uses (for example, mixing zone authorizations for a continuous discharge) it would be overly restrictive to adopt the suggested language that water quality shall not be exceeded during a temporary activity. No changes were made to the regulations based on these comments.

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Outstanding National Resource Water (Tier 3 water)

Fact Sheet

What is an Outstanding National Resource Water (ONRW), or Tier 3 water?

ONRWs or Tier 3 waters are provided the highest level of protection under the antidegradation policy of the State of Alaska. The purpose of a Tier 3 designation is to offer special protection for waters of "exceptional recreational or ecological significance." Tier 3 waters are often regarded as the highest quality waters of a State. In some instances, however, these waters may not be of particularly high quality for traditional parameters such as dissolved oxygen, temperature, or pH as compared to state water quality criteria, because of the waterbody's unique characteristics (e.g., wetlands, hot springs). The key criteria for Tier 3 designation is that the water must be exceptional, important, unique, or sensitive ecologically or offer unique or important recreational uses.

What do the existing regulations say about Outstanding National Resource Waters (ONRWs), or "Tier 3" waters?

The meaning of an ONRW is clearly established in Federal [40 CFR 131.12(a)(3)] and state [18 AAC 70.015(a)(3)] regulations. The associated protection level requires Tier 3 water quality to be maintained and protected. As such, if a water were to be designated by the state as a Tier 3 water, new or increased discharges that would lower or degrade the existing water quality would not be allowable unless they were temporary or limited.

What are the effects of a Tier 3 designation?

No new or increased discharges to a designated Tier 3 water or its tributaries are permitted, if the discharges would result in lowering of water quality in the water (i.e., cause degradation). However, there is an exception to allow activities that result only in a temporary, short-term, and limited change in the water quality of a Tier 3 water; for example, for construction activities.

What is currently under discussion in regards to Tier 3 Waters?

What is being discussed currently by the Department is the implementation process (including criteria, submittal information and vetting process) and final designating authority for determining whether a water should be designated as a Tier 3 water.

Does Tier 3 water designation set higher water quality standards than those currently in regulation for the protection of aquatic life and human health?

Once designated, the water quality of a Tier 3 water must be maintained and protected. The protection level is based on the ambient water quality at the time of designation, which may be better or worse than the regulatory water quality standards for the protection of aquatic life and human health. Water quality standards are not changed in a Tier 3 designated water, it is just that any further degradation of existing

**STATE
OF
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water quality is not allowed. Even if the degradation did not exceed water quality criteria, it would not be allowed unless it were temporary or limited.

When does Tier 3 water protection take effect?

The maintenance and protection of Tier 3 water quality is only effective upon actual designation. Until such time, the water is evaluated and managed as a Tier 1 or Tier 2 water, as applicable. Under the current Department procedure, antidegradation reviews are initiated when a potential discharger submits a permit application for a new point-source discharge or to expand a current point-source discharge. The permitting procedure, including antidegradation analysis, would consider the Tier 3 water only when there is a final designation in place.

Does a Tier 3 designation apply upstream and/or to all tributaries of the water?

No, the designation and protection level applies only to the designated Tier 3 water itself. However, any proposed discharge upstream or to a tributary to a designated Tier 3 water that would degrade the water quality of the Tier 3 would not be allowed. Proposed discharges upstream of or to a tributary to a designated Tier 3 water would be evaluated during the Department's permit development and antidegradation review procedures to determine if Tier 3 water quality was protected.

Can a Tier 3 designation be removed or un-designated?

Currently, there is no precedent for removing an ONRW once in place; neither is there federal regulation or policy prohibiting such an action. There is also no method for un-designating a water in federal law. However, in practice once a water has been determined to be of exceptional significance warranting Tier 3 protection, it would be presumed to be extremely difficult to show at some time in the future that it is no longer exceptional and justify removal of the Tier 3 designation and protection level.

Are discharges permitted to Tier 3 water?

The federal and state antidegradation policies require water quality to be maintained and protected in a Tier 3 water. The interpretation of this provision typically is that new or increased discharges to a Tier 3 water or its tributaries are not permitted if the discharges would result in a lowering of water quality (i.e., cause degradation). The only exception to this prohibition is to allow activities that result only in a temporary, short-term and limited change in the water quality of a Tier 3 water; for example, construction activities that only impact water quality during construction. Such activities must not permanently degrade water quality.

It is difficult to give an exact definition of "temporary" or "short-term" because of the variety of activities that might be considered. In broad terms, the definition of temporary is often considered to be weeks and months rather than years, although in Alaska "temporary" might span more than one year due to the short construction season. If a construction activity is involved, for example, temporary is defined as the length of time necessary to construct the facility and make it operational. During any period of time when the State would allow temporary degradation of a Tier 3 water, all practical means of minimizing such degradation should be implemented. Any proposed permit would have opportunity for public participation prior to ADEC issuing the final permit.

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What about existing discharges to a designated Tier 3 water or tributary?

Discharges currently permitted by the Department, either under individual permits or authorizations under a general permit, would be allowed to continue; i.e., they would not be prohibited or required to cease the discharge activity. Existing permitted discharges would not be restricted in the future by a Tier 3 designation in the receiving water unless the discharger wanted to expand/increase the pollutant load in their discharge. An increase in pollutants would not be allowed.

Tier 3 protection would be based on baseline water quality at the time of designation, not on the timing of any theoretical permit renewal request. As such, if an authorized/permitted discharge existed at the time of the final Tier 3 designation, that discharge would be allowed to continue, including permit renewals. Any proposed increase of pollutant discharge to the Tier 3 water would not be allowable.

What types of discharges would not be allowed in a designated Tier 3 water?

New or expanded discharges that would not be permitted into a designated Tier 3 water include municipal storm water runoff, domestic wastewater (i.e., treated sewage) discharges, and any wastewater discharges from industrial operations such as mining projects.

What about other activities on or near a designated Tier 3 water, e.g. boating, snowmobiling, terrestrial sewage treatment (septic system), road run-off, road salting/sanding, fish camps, fish oil processing, smokehouses, etc.?

In general, activities that do not require an Alaska point source discharge permits (APDES permits) are not affected by a Tier 3 designation. A Tier 3 designation would not impact normal activities not currently regulated by the state, such as incidental boat travel that does not cause significant degradation to the water. Individual septic systems discharging to a leach field are considered a land application that does not require an APDES permit.

Outboard motors, road run-off and road plowing/salting/sanding are considered nonpoint source discharges. Road plowing, salting, and sanding are regulated as part of a Municipal Separate Storm Sewer System (MS4) permits for larger communities such as Anchorage and Fairbanks. Outside of a MS4 permit, DEC currently does not regulate the road plowing, salting, and sanding activities.

Non-point source discharges should implement best management practices (BMPs) to prevent unnecessary pollutant discharge, however. Under current state regulations, a Tier 3 designation would only impact regulated non-point source discharges and/or if the designated Tier 3 water was listed as impaired with an established TMDL which included non-point source restrictions, in the same manner as non-designated water. A Tier 3 designation would directly impact other non-point source discharges only if they are regulated by the state in the future.

Can water quality degradation ever be allowed in a Tier 3 water?

Degradation of Tier 3 water quality is only allowable in cases where the lowering is determined to be temporary, short term, and limited.

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Would an ONRW designation affect highway improvements, bridge construction, or other similar activities?

A Tier 3 designation would not impact activities where the Department has determined the lowering of water quality to be temporary and limited. Projects that result in a long-term or permanent lowering of designated Tier 3 water quality, through a permitted discharge or other activity, would not be allowable.

How would industrial land activities such as logging or mining be impacted by an ONRW designation?

Land uses, such as logging or mining, would not be impacted as long as the ONRW water quality was maintained and protected. Discharges to an ONRW or tributary of an ONRW that would degrade existing ONRW water quality would not be allowed.

Who can nominate or propose a Tier 3 water?

Current, anyone may nominate a water for Tier 3 designation. However, this is one of the criteria currently under discussion by the Department.

Who is or would be responsible for the information necessary to nominate a Tier 3 water?

Will there be baseline (ambient) water quality studies?

Currently, the nominator would be responsible for all information and associated costs of gathering the information to nominate a water for a Tier 3 designation. The information recommended to be submitted in support of a nomination, including ambient water quality data, is also currently under discussion by the Department.

How are designated Tier 3 water boundaries established?

The Tier 3 water extent and/or boundaries should be clearly identified in the submitted nomination.

What Alaska waters are currently designated as Tier 3?

Currently, the State of Alaska has not designated any Tier 3 waters.

What waters in Alaska have been nominated for Tier 3 designations?

The Chandalar River, the Yakutat Forelands, the Chilkat River, the Koktuli River, and the Draanjik River have been nominated for Tier 3 designation.

Can a Tier 3 nomination be withdrawn from consideration?

Yes, currently there are no restrictions on the nominator withdrawing a submitted Tier 3 nomination.

What are the criteria that makes water eligible for Tier 3 designation?

Unlike other states, a vast majority of Alaska's more than 3 million waterbodies have had little or no impact from direct human development. In a state with so many high quality waters, it makes it difficult to establish criteria for Tier 3 designation that apply statewide. The Tier 3 criteria and designation process has not been established in Alaska and these topics are currently under discussion. Some examples from other states include waters that are part of national or state parks, wildlife refuge or wilderness areas, special

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trout waters, federal Wild and Scenic Rivers or other high quality waters that have not been significantly modified by human activities.

What are the processes used by other states to designate Tier 3 waters?

The process for Tier 3 water designation is left to the states to define. Methods used by other states range from legislative designation to designation by a board or commission, to designation by a state agency. Currently, nominations for Tier 3 water designation in the State of Alaska may be submitted directly to your legislator for consideration.

What are examples of Tier 3 water designations from other states?

Examples from other states include waters that are part of national or state parks, wildlife refuge or wilderness areas, special trout waters, federal Wild and Scenic Rivers or other unique waters. Some States including Washington, Oregon, Idaho, and Nevada have not designated any Tier 3 waters; California has designated two, Lake Tahoe and Mono Lake; Montana has designated all waters in national parks as Tier 3 waters, and Arizona has designated 22 waters as Tier 3.

What should be included as part of a Tier 3 nomination?

This is currently under discussion. However, the Department has proposed a nomination include all available information to support the Tier 3 criteria that the water has “exceptional recreational or ecological significance.” This may include, for example:

- A detailed description of the water
- Water quality data to the extent that it is available. Where applicable, this would include rationale to suggest water quality is equal to or better than the water quality standards
- A detailed description of the recreational and/or ecological values that make the water exceptional, including economic, subsistence, cultural factors, etc.
- Any land use designations in the watershed such as national and state park, wilderness area, state or national wildlife refuge, etc.
- A description of stakeholder and community outreach and support for the nomination
- Any other supporting information

Who is responsible for designating Tier 3 water?

Federal regulations state that “The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy.” This includes the identification and designation of Tier 3 waters. The State’s antidegradation policy is in regulation at 18 AAC 70.015.

Currently, nominations for Tier 3 water designation in the State of Alaska may be submitted directly to your legislator for consideration. The State is in the process of developing more comprehensive nomination and designation implementation methods, and these methods once developed, will specify who will designate Tier 3 waters.

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What water quality standards apply to a Tier 3 water?

No degradation is allowed in Tier 3 waters and the applicable water quality standards are the baseline water quality levels at the time of Tier 3 designation. A temporary discharge can exceed those levels for a short period as long as the water quality returns to the original baseline levels once the discharge ceases.

How are land-use activities affected by a Tier 3 designation?

Land use projects that result in a long term lowering of Tier 3 water quality, through a discharge or other activity, would not be allowable.

Are there other potential land use restrictions in relation to designated Tier 3 waters?

Tier 3 restrictions only apply to water quality. The only land use restriction that would be affected by a Tier 3 designation would be if the activity included a discharge to the designated Tier 3 water or tributary that would degrade the water quality of the designated Tier 3 water. In this case, the land use activity would not be prohibited, however, alternatives to the discharge would need to be in place so that the designated Tier 3 water quality was maintained and protected.

What about accidental discharges, e.g. logging truck “splashing” into the river on a rainy day?

Who would enforce designated Tier 3 water protections?

As explained previously, a Tier 3 water designation would not impact normal activities. Spills of petroleum, hazardous substances, etc. are enforced by the SPAR division of DEC under 18 AAC 75 regulations. Enforcement of designated Tier 3 water quality restrictions would be a coordinated effort between multiple agencies, including DEC, DNR, and others.

For more information on Alaska’s antidegradation policy and Tier 3 water please refer to the Department webpages.

<http://dec.alaska.gov/water/water-quality/antidegradation/>

<http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>

From: [Achee, Laura A \(DEC\)](#)
To: [Achee, Laura A \(DEC\)](#)
Subject: FW: answer to the question - can you undesignate a water?
Date: Friday, April 5, 2019 12:04:33 PM

From: Beckwith, William [<mailto:Beckwith.William@epa.gov>]
Sent: Friday, January 29, 2016 2:07 PM
To: Crapps, Earl L (DEC) <earl.crapps@alaska.gov>
Subject: FW: answer to the question - can you undesignate a water?

FYI

From: Beckwith, William
Sent: Friday, January 29, 2016 2:16 PM
To: 'Hale, Michelle M (DEC)' <michelle.hale@alaska.gov>
Cc: Chung, Angela <Chung.Angela@epa.gov>; Opalski, Dan <Opalski.Dan@epa.gov>
Subject: RE: answer to the question - can you undesignate a water?

Hi Michelle – The following is the answer I gave to Earl last Friday by phone. My apology for not following-up with an email.

There is no federal requirement that a state assign ONRW protection to a water; and a state has discretion to remove ONRW protection from a water, if it chooses to do so consistent with state law, and the action is done consistent with the federal WQS rules for revising water quality standards (including public participation of course). Note that the federal WQS rules governing the revision of uses could apply if the ONRW designation was done in a way that carried with it designated uses in addition to the ONRW assignment.

Given the fundamental purpose of the federal ONRW provision, I suggest that any assignment of a water as an ONRW be done with a serious intent to follow through with ONRW protection, rather than with an expectation that a reversal would occur. I will have to check with HQ and the other Regions and follow-up on your question regarding whether any ONRWs have been reversed.

Please contact me if you have questions.

Thanks for sending the notice today that the Governor introduced Tier 3 legislation (SB 163). Will contact you if we have questions.

- Bill
206-553-2495

From: Hale, Michelle M (DEC) [<mailto:michelle.hale@alaska.gov>]
Sent: Friday, January 29, 2016 12:46 PM

To: Beckwith, William <Beckwith.William@epa.gov>

Cc: Chung, Angela <Chung.Angela@epa.gov>; Opalski, Dan <Opalski.Dan@epa.gov>

Subject: answer to the question - can you undesignate a water?

Good morning, Bill,

As you can imagine, we could really use an answer to our question, Can a Tier 3 water designation be reversed. Follow-up questions include: If so,how? And Have any been reversed throughout the country?

Thanks.

- Michelle

Michelle Hale

Director, Division of Water

Alaska Department of Environmental Conservation

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