STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
WASTEWATER DISCHARGE AUTHORIZATION PROGRAMS

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Brian Litmans
Senior Staff Attorney
Trustees for Alaska
1026 W. 4th Ave., Suite 201
Anchorage, AK 99501

ADEC File No.: 103.48.001

RE: Comments regarding Draft § 401 Certification of NPDES Permit AK0022942 Healy Power Plant

Dear Mr. Litmans,
The Alaska Department of Environmental Conservation (ADEC or department) received your comments on January 18, 2011 regarding the tentative determination to issue a certificate of reasonable assurance that the National Pollutant Discharge Elimination System (NPDES) Permit for the Healy Power Plant would comply with the applicable provisions of § 401 of the Clean Water Act. The purpose of this letter is to respond to your comments A and B regarding the draft certification.

The draft certification was public noticed from December 16, 2010 to January 18, 2011.

Comment A Summary:
The State lacks properly adopted and codified antidegradation implementation procedures. The *July 14, 2010 Interim Antidegradation Implementation Methods* are illegal regulations and cannot be used to conduct a legally defensible antidegradation analysis while final implementation methods undergo the rulemaking process.

Response Summary:
First, case law supports the proposition that state agencies may use guidance to interpret and implement regulations without going through another rule-making procedure as long as guidance does not add any substantive requirement to the regulations. Second, *Interim Methods* were conceived, developed, and implemented through legal means. While there is now a legal challenge to the guidance, the Court has not stayed their effect while that recent case is pending. In the absence of a stay, until *Interim Methods* are determined to be illegal, ADEC will continue to use them. Finally, the antidegradation policy in regulation governs the implementing guidance. The guidance is simply a tool to help guarantee responsible and consistent application of the policy by ADEC staff.

Comment B Summary:
ADEC should reevaluate the mixing zone with all available data. Due to the delay of public review of the May 2009 Draft 401 Certification, ADEC should reevaluate the mixing zone authorization using currently available data.

Response Summary:
The mixing zone authorization of the 2010 Draft 401 Certification is for the existing discharge from the Healy Power Plant and for the expected discharge from the Healy Clean Coal Project (HCCP). The department reviewed the available data prior to the public notice of the 2010 Draft 401 Certification and found that the available data reasonably demonstrated that the applicable requirements of 18 AAC 70 would be met, that the mixing zone size is as small as practicable, and that the effluent is treated to remove, reduce, and disperse pollutants using methods found by the department to be the most effective and technologically and economically feasible.

If you have any questions please contact Shawn Stokes at (907) 269-7504 or at shawn.stokes@alaska.gov.

Sincerely,

Sharon Morgan
Program Manager

cc: Cindi Godsey, EPA/Anchorage
Kristen DuBois, GVEA/Fairbanks
Shawn Stokes, ADEC