BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	
SOUTHEAST ALASKA	)	OAH No. 15-0634-DEC
CONSERVATION COUNCIL	)	Agency No.

NOTICE of COMMISSIONER'S DECISION

Commissioner Hartig has amended the proposed decision and adopted the decision as amended. We are sending you the Commissioner's final decision in this matter.

DATED December 18, 2015

Office of Administrative Hearings
PO Box 110231
Juneau, AK 99811
(907) 465-1886; (907) 465-2280 fax

Certificate of Service: I certify that on December ~~18~~ 23, 2015, a true and correct copy of this notice was distributed as follows: Chris Peloso (by email); Buck Lindekugel (by email); Cameron Leonard & Eric Fjelstad. Perkins Coie (by email); Gary Mendivil (by email).

By:

Law Office Assistant

Non-Adoption Options

A. Under AS 44.64.060(e)(2), I decline to adopt this Decision, and instead order that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2015.

By: _____
Larry Hartig
Commissioner
Dep't of Environmental Conservation

B. In accordance with AS 44.64.060(e)(3), I revise the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopt the proposed decision as revised:

- Removal of the requirement that the Division post NOIs on the Department's website as soon as a NOI is received, inserting direction to have the Division look into the possibility of doing so to better serve the public under the cruise ship program; and

- Other clarifications.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of December, 2015.

By: _____
Larry Hartig
Commissioner
Dep't of Environmental Conservation

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISIONER OF ENVIRONMENTAL CONSERVATION

SOUTHEAST ALASKA CONSERVATION COUNCIL & COOK INLETKEEPER, requestors	)	
v.	)	
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF WATER	)	
and	)	OAH No. 15-0634-DEC
CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, intervener.	)	

DECISION

I. Introduction

The Department of Environmental Conservation issued a five-year general permit that allows eligible cruise ships to discharge treated wastewater into Alaska marine waters. The Southeast Alaska Conservation Council and the Cook Inletkeeper requested a hearing, raising several allegations of error in the permit. Commissioner Larry Hartig determined that issues not raised during public comment could not be raised at the hearing. The Commissioner referred only two issues for hearing: (i) whether the organizations had good cause for not raising all issues during public comment; and, (ii) whether the General Permit violates the antidegradation policy because it does not require a public comment period on the nature and location of each discharge.

On the first issue, the organizations did not have good cause for failing to raise issues during public comment. Raising issues at informal review does not cure the failure to raise the issues during public comment.

As to the second issue, the organizations have not demonstrated any violation of the antidegradation policy. The policy does not require that the Division issue individual permits or open up public comment each time a cruise ship files a notice of intent to discharge under a general permit.

II. Facts

On August 29, 2014, the Alaska Department of Environmental Conservation issued a five-year General Permit for large cruise ships to discharge wastewater while in Alaska's marine waters.[1] The General Permit set out general standards for discharges from a cruise ship operating under the permit. The permit

- authorizes the discharge of treated sewage and graywater, consistent with the terms of the permit, from a vessel with an advanced wastewater treatment system or equivalent into Alaska's marine waters;[2]
- prohibits discharge of foam, oily wastes, plastics, hazardous wastes, biosolids, and sewage sludges;[3]
- sets effluent limitations for the pertinent discharge content parameters;[4]
- establishes the size of permissible mixing zones, depending on whether the ship was traveling at a speed less than six knots (which includes being stationary), traveling at a speed of six knots or greater, or docked in Skagway;[5]
- sets requirements for monitoring, sampling, and reporting.[6]

Distributed with the permit was a "fact sheet."[7] The fact sheet included:

- maps of cruise ship ports and routes, and tables and discussions of cruise ship characteristics;[8]
- an analysis and explanation of the reasonable potential that a discharge could exceed water quality standards;[9]
- an explanation of mixing zones and the modeling used for mixing zone analysis (the Division used the "Cornell Mixing Zone Expert System program, which it abbreviated as "CORMIX");[10]

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1 Admin. Rec. at 1955-83. The General Permit is identified as Permit Number 2013DB0004. Eligible vessels are those with overnight accommodations for hire for 250 or more passengers.

2 *Id.* at 1960.

3 *Id.* at 1963-64.

4 *Id.* at 1964-67. The parameters included fecal coliform bacteria, total flow, total residual chlorine, pH, biochemical oxygen demand, total suspended solids, ammonia, and dissolved copper.

5 *Id.* at 1964. A mixing zone is the size of the area where the receiving water and the effluent mix so that the effluent is diluted. *See id.* at 1817. A ship must obtain authorization for a mixing zone if its wastewater exceeds water quality standards at the point of discharge. 18 AAC 70.240.

6 *Id.* at 1967-87.

7 *Id.* at 1498. The revised fact sheet is at 1800. All cites are to the revised fact sheet.

8 *Id.* at 1808, 1837-39; 1852; 1855.

9 *Id.* at 1815; 1846-52.

10 *Id.* at 1817-23; 1854-63.

- a discussion of water-quality-based effluent limitations, and the applicable effluent limits;[11]
- a discussion of the basis for the monitoring and reporting requirements;[12]
- a discussion of advanced wastewater treatment system information;[13]
- an antidegradation analysis.[14]

Before a cruise ship may discharge treated wastewater in Alaskan waters under the General Permit, it must file a "notice of intent." The notice of intent lets the Division know whether a vessel's plans for discharge will be in compliance with the General Permit. It identifies the vessel's wastewater treatment equipment and regimen. If the vessel will be discharging wastewater while in a port, it must seek authorization for what is called an "under-six-knots mixing zone," and provide information that will allow the Department to determine whether it meets the requirements for the mixing zone.

After receiving a timely notice of intent, the Department may authorize the mixing zone if it is consistent with the General Permit. The authorization may include additional terms and conditions. Alternatively, the Department could require that the vessel make changes to its notice of intent. Or the Department could deny coverage under the General Permit, and require the applicant to apply for an individual permit.[15]

To initiate the public comment process before issuing the General Permit, the Division first issued the permit in draft form on April 8. It opened a 45-day period of public comment that ended on May 23, 2014.[16] In addition to describing the industry and the technical conditions of the 2014 General Permit, a draft fact sheet included information on public comment, public hearing, and appeal procedures. It also included a description of changes from the 2010 General Permit.[17]

Southeast Alaska Conservation Council and Cook Inletkeeper are two organizations that participated in the public comment process. In making public comment, however, neither organization raised concerns about the modeling process that had been used by the Department's

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11 *Id.* at 1824-28.
12 *Id.* at 1829-32.
13 *Id.* at 1840-45
14 *Id.* at 1870-76.
15 *Id.* at 1962.
16 *See, e.g., id.* at 1800.
17 *Id.* at 2357.

Division of Water in preparing the draft General Permit. The two organizations—the requestors in this hearing—are referred to in this decision as the Conservation Council or the Council.

The Division issued the General Permit on August 29, 2014. The Conservation Council requested an informal review of the permit. Informal review is discretionary under the Department's regulations.[18] The Director of the Division, Michelle Hale, granted informal review, stayed the permit, and remanded the permit back to the Division's Cruise Ship Program to address two questions:

(1) Whether allowing mixing zones in Gastineau Channel will limit the existing use of the [hatchery] net pens; and

(2) The use of different sets of ambient copper data for the reasonable potential analysis and the CORMIX modeling.[19]

On remand, staff addressed these issues by rerunning some of the modeling used to approve the draft permit. It compared location of the net pens with location of the shipping lanes used by the vessels subject to the permit.[20] It reran its models using a different data set for determining ambient copper and zinc in Gastineau Channel.[21] The updated models showed that the change in inputs did not affect the results. Assuming compliance with the permit, the net pens at the hatchery would not be affected by any discharge. Further, the ambient dissolved copper and zinc remained below the level that would trigger water quality criteria. Therefore, no changes were made to the draft permit after the informal review.[22] Staff did, however, amend the fact sheet to reflect the additional analysis. The stay was lifted, and the General Permit became effective.

On December 24, 2014, the Conservation Council requested a hearing on the record to contest six alleged errors in the General Permit. In response to a request from the Commissioner's office, it resubmitted its request on January 12, 2015, with some additional documents. The first five points raised by the Council related to alleged errors in the modeling and scientific assumptions or inferences the Division used in approving the permit. The sixth point alleged that the General Permit process was fundamentally inconsistent with clean water laws because a public process was required on an individual ship/site basis to permit discharge of wastewater.[23] The Division opposed the request for a hearing, pointing out that the

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18 18 AAC 15.185.
19 Admin. Rec. at 4348.
20 *Id.* at 67-68.
21 *Id.* at 69-71.
22 *Id.* at 68, 70.
23 Resubmitted Request for Hearing on Record of GP No. 2013DB0004.

Commissioner has the discretion to deny a hearing when the hearing request does not raise a disputed issue of fact or a significant issue of law.[24]

On March 16, 2015, Commissioner Larry Hartig asked the Conservation Council for additional information. With regard to four of the issues or subsets of issues raised by the Council, the Commissioner sought clarification regarding the legal error being alleged. For five of the six issues, the Commissioner asked the Council to indicate where the Council had raised the issue during the public comment period. If the Council had not raised the issue itself, the Commissioner asked where the comments provided by others had raised the issue. Finally, the Commissioner asked "[f]or each issue, if not specifically raised in public comment, please explain how it can fairly fit into a comment raised during the public comment period."[25]

In response to this request, on March 31, 2015, the Conservation Council provided the requested explanation of its legal theories and arguments. With regard to the issue of where the Council had raised the issues during public comment, the Council did not assert that it had raised these issues. It, did, however, provide cites to the record that, in its view, related to issues 1-5.[26]

On May 15, 2015, Commissioner Hartig granted a hearing on only one issue:

> Does allowing large cruise ships to degrade tier II waters without notifying the public about the nature and location of specific discharges violate Alaska's Antidegradation Policy?[27]

Commissioner Hartig found that the Council had raised this issue during the public comment period. With regard to the other five issues, however, the Commissioner found those issues had not been raised before the contested decision was issued. Therefore, under 18 AAC 15.245, those issues could not be included in the hearing.[28] The Commissioner rejected the argument that raising an issue during the informal review process cured the omission. The Commissioner did, however, note that the Council could assert that it had good cause for not raising the first five issues during public comment. If good cause were found, the Conservation Council could pursue the additional arguments under 18 AAC 15.245.

The Department published a public notice of the hearing, alerting potential intervenors to the appeal. On June 5, 2015, the Cruise Lines International Association Alaska moved to intervene in the hearing. The motion was granted.

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24 Division Opp. to Req. for Adj. Hrg. at 5 (Feb. 2, 2015) (citing 18 AAC 15.220(b)(4)(A)).
25 Commissioner's Request for Additional Information (March 16, 2015).
26 SEACC Response to Req. for Add'l Inf. (March 31, 2015).
27 Commisssioner's Decision (May 15, 2015).
28 *Id.*

Because no facts were in dispute, no evidentiary hearing was held. The Conservation Council moved for a finding of good cause to include the excluded issues in the appeal, and it moved for summary adjudication on its argument that the General Permit process violated the antidegradation policy. The Division and the Cruise Lines Association opposed both motions. Oral argument was held on August 24, 2015.

III. Discussion

A. Does the Conservation Council have good cause to include additional issues in its appeal?

Under 18 AAC 15.245, "a party may not raise an issue of fact or question of law that was not raised timely to the department before the department's issuance of the contested decision unless the party shows good cause for the failure to raise each matter." With regard to what constitutes "good cause," the regulation states that

> grounds upon which a party may show good cause include the following:
>
> (1) the party could not reasonably have ascertained the issue or made the information available within the time required by this chapter; or
>
> (2) the party could not have reasonably anticipated the relevance or materiality of matter sought to be raised or the information sought to be introduced.[29]

The Conservation Council does not argue that it raised the excluded issues during the public hearing. Nor does it assert that it qualifies for one of the two grounds for good cause described in the regulation, or for any grounds that would be a matter outside of its control. Instead, the Council asserts four arguments for why its failure to raise an issue at the public comment stage should not preclude raising the issue at hearing. First, the Council contends that as a matter of law, issues raised at informal review are appealable. Second, as a matter of policy, the Council believes that raising issues at the informal review stage should constitute good cause because it gives the Department notice of the issue. Third, the Council argues that it has good cause to raise the issue now because the Department did not advise it that failure to raise the issue during public comment would prevent it from pursuing an issue during hearing. Fourth, in an implied argument, the Council asserts that another commenter made a comment regarding modeling during the public comment stage.

1. Does 18 AAC 15.185 allow the Conservation Council to cure its failure to raise an issue at the public comment stage by raising it at the informal review stage?

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[29] 18 AAC 15.245.

The Conservation Council argues that the regulation that permits informal review opens the door for an appeal and hearing on matters raised during the informal review. It notes that the regulation on informal review, 18 AAC 15.185, requires that the informal review decision "shall also advise the requestor and all other parties of the right to seek an adjudicatory hearing [under] 18 AAC 15.200 or AS 44.62, if either of those options is available to the requestor or other parties."[30] In the Council's view, this statement means that it has a right to hearing under 18 AAC 15.200.

In opposition to this argument, the Division and the Cruise Lines Association argue that a disagreement on how to interpret the law is not good cause. In their view, the Commissioner decided that 18 AAC 15.185 does not permit a hearing after an informal review on issues not previously raised in comments on the draft permit. The Division asserts that in this hearing process before an administrative law judge, the ALJ does not have authority to second-guess the Commissioner's interpretation of the law.

Whether this decision should address the Commissioner's interpretation of the regulations does not turn on the issue of "ALJ authority." The final decision will be made by the Commissioner, not the ALJ. As the Commissioner explained in an earlier decision:

> The decision at the end of the appeal will be a more rigorously tested version of the first decision. If it differs from the first, the difference may not stem from any "errors" in the initial round. Instead, it is simply a new decision made with a different and more complete body of evidence. The task is to make the best decision possible at the executive branch level."[31]

The Division and the Cruise Lines do, however, have a valid concern over whether the Commissioner referred the issue of the interpretation of regulations governing availability of a hearing as a subject of this hearing when he referred the issue of good cause. Although the answer is not clear, because the Commissioner's referral allows consideration of arguments regarding good cause, this decision will address the Council's interpretation of the regulations.

Turning to the merits of the Conservation Council's argument on whether an appeal of an informal review is allowed, if the Division had amended the permit during informal review, the process might allow for a subsequent hearing on some aspect of the new issue, if one of the parties was aggrieved by the amendment. The regulation on requesting a hearing, 18 AAC 15.200, allows a party whose interests are affected by a decision to contest that decision. If the

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30 18 AAC 15.185(c). Under subsection (b), the same language is attached when informal review is denied.

31 *In re Rockstad*, OAH No. 08-0282-DEC at 5 (Dep't of Env. Cons. 2008).

"contested decision"—in this case, the General Permit—had been changed during informal review, that might open the door for additional process.[32]

Here, however, the contested decision did not change. That means that the contested decision remains the original General Permit. Under the regulation that establishes the requirement to submit evidence and raise issues, 18 AAC 15.245, a party may not raise an issue at hearing that "was not raised timely to the department *before* the department's issuance of the contested decision."[33] Because the informal review occurs *after* issuance of the contested decision, raising an issue for the first time at the informal review stage could not give rise to a right to a hearing when the contested decision is the same.

Nothing in the informal review regulation—18 AAC 15.185—changes this outcome. The regulation advises that a party may pursue a hearing if available.[34] This language does not create a right to hearing where that right did not already exist. Therefore, the Commissioner did not err in his interpretation of the regulation.

2. Does the Conservation Council have good cause to raise arguments about the issues it raised at informal review because it has given the Department sufficient notice of the issues?

The Conservation Council's second argument asks that good cause be found because the informal review put the Division on notice of the Council's issues. The Council notes that not only did the Division have notice, the Director of the Division asked staff to consider the Council's issues. In its view, because the Division was able to consider the issues, the Division was not prejudiced by the Conservation Council's failure to raise the issues at public comment. It concludes that all of the policy objectives of having an orderly administrative decisionmaking process, often described as a process of exhausting administrative remedies, are met. In the Council's view, the "good cause" barrier exists only to protect the process and make sure that the Division is not bypassed. Given no prejudice to the process, the Council concludes that it meets the good cause standard, and should be allowed to pursue its issues at hearing.

The Division and Cruise Lines Association assert that this argument makes 18 AAC 15.245 a nullity. If a requestor of a hearing is allowed to bypass the public comment stage and perfect its hearing rights by asking for informal review, interested parties would have no

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32 The process available to the Division, a requestor, or an intervenor when a contested decision is amended during informal review is beyond the scope of this decision. This decision is merely noting that the Conservation Council's argument could be applicable in that fact scenario, but not to the facts at issue here.

33 18 AAC 15.245 (emphasis added).

34 18 AAC 15.185(c).

incentive to participate in the public hearing. The Division also asserts that finding good cause here would give two bites at the apple, and that a requestor should only have one bite.

The Conservation Council is correct that sometimes legal requirements for preserving a case or issue are analyzed in terms of prejudice—if no one is harmed by allowing a process to go forward, in some cases, a deadline or threshold requirement can be waived.[35] In other cases, however, the law demands a greater fealty to legal prerequisites, and a failure to raise an issue at an early stage in the process can mean that the party cannot raise it at a later stage.[36] Sometimes the issue of whether failure to comply with an administrative requirement is fatal to bringing a later claim is analyzed in terms of whether the requirement was "mandatory" or "directory."[37]

Here, the interpretation of "good cause" will turn on the language of the regulation, and the Department's policy rationale for limiting the scope of permit appeals. First, turning to the language of the regulation, the term "good cause" does not suggest that prejudice to the opposing party is the standard for allowing new issues to be raised at the hearing stage. On its face, the term "good cause" implies that the person who did not meet the requirement had a reason or an explanation for the failure. It does not imply that the controlling factor is whether the other party was harmed. Further, the two examples of good cause included in the regulation indicate that good cause in this context is generally limited to situations where the party acted reasonably in not bringing the matter forward during public comment—without regard to prejudice to the other party.[38] In statutory interpretation, when a general term like "good cause" is followed by a list of examples that all share a common characteristic, the common characteristic will usually serve as a restriction on the other occurrences that meet the term.[39] Although good cause is not limited to only the two examples in the regulation, good cause in this context is limited to situations similar to those examples. Lack of prejudice to the Division or the process is not good cause.[40]

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35 *Cf., e.g., Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 204 P.3d 1023, 1029 (Alaska 2009) (holding that in determining good cause for missing deadline to file appeal, "[w]e therefore consider the prejudice to the state and to the court, and the policy of hearing cases on their merits.").

36 *Cf., e.g., State, Dep't of Rev. v. Gazaway*, 793 P.2d 1025, 1027 (Alaska 1990) (holding that failure to raise issue at administrative hearing or on appeal waives the issue).

37 *Cf., e.g., S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adj.*, 172 P.3d 768, 771-72 (Alaska 2007) (explaining that "[w]hether a party must strictly comply with a procedural rule, regulation, or statute turns on whether the language of the law is mandatory or directory").

38 18 AAC 15.245.

39 *See, e.g., City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 459 (Alaska 2006) ("Pursuant to the doctrine of *ejusdem generis*, a general term, when followed by specific terms, will be interpreted in light of the characteristics of the specific terms, absent clear indication to the contrary." (Quoting *West v. Umialik Ins. Co.*, 8 P.3d 1135, 1141 (Alaska 2000))).

40 Prejudice in the context of a permit process will always be difficult to assess because there may be many interested parties other than the Division, for some of whom, time may be of the essence and for others of whom,

Requiring issues to be raised at the public comment stage, and allowing an exception only for unforeseeable reasons or reasons beyond a requestor's control, is consistent with the Department's interests. The Department has a strong interest in having all issues vetted during its public process. This is not merely an issue of notice or exhaustion or following an orderly process that starts at the division level—this is also an issue of ensuring that the process is open and public. The Department is frequently involved in controversial matters that affect the public interest. Many parties, from many different points of view and interest, may appear and participate during public comment. The Department has a strong interest in being objective and fair to all parties, and in hearing from all points of view. To this end, comments are made available to all members of the public, as are the Department's responses to the public comment.

The Department also has a strong interest in making sure that its final decision is correct. To help ensure that a division has not made an error, the Department allows a party to request an informal review under 18 AAC 15.185. The only parties to the informal review are the requestor and the Division. The informal review offers a quick, easy way for a division to correct errors, without having to go through the hearing process.

In allowing for this nonpublic process, the Department did not intend for it to substitute for the public process. The public process remains the primary vehicle for initial Departmental decisionmaking. Therefore, the governing regulations should be interpreted in a manner that ensures the public process is favored over the informal review. This means that merely raising the issue at informal review will not preserve the issue for hearing because that would encourage requestors to bypass the public process in favor of informal review. This is true without regard to whether a division had notice of the issue through the informal review process.

In sum, the Department's regulation requires that all issues be raised during the public process unless a person requesting a hearing has good cause for not raising the issue. The text of the regulation indicates that good cause will generally be limited to situations where the requestor was reasonably unable to raise the issue at the public comment stage. That reading is consistent with the policy of having all issues raised in the public process. The Conservation Council's argument that it has good cause because the Division had notice of its issues through informal review is rejected.

3. Did someone other than the Conservation Council raise the issues the Council wishes to appeal at public comment?

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delay may be of the essence. This helps explain why the department's regulations did not adopt lack of prejudice as the controlling standard for good cause.

The Conservation Council acknowledges that its "public comments did not raise concerns with DEC's discharge modeling."[41] It notes, however, that, "other commenters raised general modeling concerns."[42] By noting this point, the Council implies (but does not actually argue) that having someone else raise the issue at public comment may be sufficient to preserve the right of another to raise the issue at a hearing.

It is not necessary to decide in this case whether another party's raising an issue at public comment could allow a requestor to raise the same issue at hearing. First, the Conservation Council does not actually argue that the law permits it to piggyback on the comments of another—it merely implies the argument in its statement of facts, without analysis in its argument section. Second, the support given by the Council for its assertion that others raised similar issues is not persuasive. The Council notes that "[o]ne reviewer expressed the desire for more explicit descriptions of the modeling."[43] Asking for more information about modeling, however, is not the same as arguing that the modeling was faulty.[44] Public comment to this effect by the Council itself would not have preserved allegations that the modeling was inaccurate and deficient. Therefore, the general comment regarding modeling does not preserve the issue for the Council.

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41 Requestors' Motion for Good Cause at 5.

42 *Id.*

43 *Id.*

44 Indeed, as the Cruise Lines Association points out, it was the reviewer that asked that additional detail be included. Cruise Lines Association Response to Motion for Good Cause at 10 (asserting that it wanted additional information "so that it could evaluate for itself the conformity of this process to established permitting procedures and analyses).

4. **Does the Conservation Council have good cause for not raising its issues during public comment because the Department did not advise it that failure to raise the issue during public comment would prevent it from pursuing an issue during hearing?**

Before approving an application for a general permit for discharging waste, the Department must post the application on the Internet and solicit public comment regarding the proposed discharges.[45] The public notice must include

> (1) information on the nature and the location of the proposed activity;
>
> (2) information on how the public can receive more information, including a statement that an interested person will be sent a copy of the application upon request; and
>
> (3) a statement that a person may submit comments on the application by filing written comments with the department before the published comment deadline.[46]

Under the Department's regulations, each person who provided public comment or testified at a hearing regarding an application for a general permit will be sent a copy of the Department's decision on the permit.[47] The decision must include "a statement that a person aggrieved by the Department's decision may request an adjudicatory hearing under 18 AAC 15.200."[48]

The Conservation Council argues that it had good cause for not raising the issue because "the public comment notice failed to inform the public that the scope of comments submitted on the draft permit would circumscribe later participation in the administrative review process."[49] The Council does not explain why this omission is good cause for not raising issues at the public comment stage.

The Cruise Lines Association and the Division argue that the public notice does not have to include a statement that issues must be raised at the public comment stage because that requirement is clear in the law. They assert that being unaware of a procedural requirement in the law is not good cause for failing to adhere to the requirement. They argue that the need to follow the administrative process is well-known, citing cases requiring exhaustion of administrative remedies.

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45 AS 46.03.110(b); 18 AAC 15.050.
46 18 AAC 15.050(b).
47 18 AAC 15.080(b).
48 *Id.* at (a).
49 Requestors' Motion for Good Cause at 11.

In certain circumstances, courts have found fault with an agency's process that failed to alert a person to the next step necessary to preserve appeal rights. In *Manning v. Alaska Railroad Corp.*, for example, the Alaska Supreme Court found that an agency's notice of a final decision must alert the other party that the notice was a final order, and that it started the clock on the thirty-day deadline for the party to appeal to court.[50] *Manning* recognized that when dealing with a government agency, the public would often have a difficult time distinguishing a final order (which is appealable to court) from a non-final notice or order (which is not appealable to a court). To avoid surprise and injustice, *Manning* established a bright-line rule that a final order from an agency must include a notice that the order was appealable to a court, and that an appeal had to be filed within thirty days.[51] Without that magic language, the notice was not final.

This case, however, concerns a different issue from that discussed in *Manning*. Here, the issue is when a party has the right to pursue a hearing regarding an agency's decision on a permit application. The requirements that apply to appeals of permit decisions are described in regulation.[52] The regulations were adopted during a public process, are available to the public, and provide sufficient notice of how to raise an issue during the process so as to preserve it for later appeal.[53]

As noted above, the Department also has a regulation, 18 AAC 15.050(b), that instructs the Division on what must be included in a public notice of a permit application.[54] The regulation does not require that the notice of the opportunity to comment on the permit include notification that a person's appeal rights will be limited to the issues raised by the person at public comment. The Division complied with that regulation. The Council has not identified a rationale for requiring that the Division do more than comply with the regulation. Therefore, the Council's criticism of the contents of the Division's notice is not good cause to appeal issues not raised by the Council at public comment.

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50 853 P.2d 1120, 1123-24 (Alaska 1993).

51 *Id.* at 1124.

52 18 AAC 15.200; 18 AAC 15.245.

53 The Division's website on the 2014 General Permit for Large Commercial Passenger Vessel Wastewater Discharge has a link to "Cruise Ship Program related Alaska Laws and Regulations." http://dec.alaska.gov/water/cruise_ships/gp/2014gp.html. That link has a link to "Administrative Procedures," under which a person will find a copy of 18 AAC 15.200 and 18 AAC 15.245. http://dec.alaska.gov/water/cruise_ships/Law_and_Regs/18AAC15.pdf.

54 18 AAC 15.050(b). The Council could pursue the issue of what should be included in a public notice of a general permit application by petitioning under AS 04.62.220 for a public rulemaking procedure to amend 18 AAC 15.050.

B. Does the General Permit violate Alaska's anti-degradation policy?

We turn now to the one issue that the Conservation Council preserved: whether Alaska's antidegradation policy requires notifying the public about the nature and location of specific wastewater discharges before a permit may be issued. The Council's criticism of the General Permit can be divided into two different approaches. One approach is a "facial" challenge. Under this approach, the Council argues that a general permit for cruise ships can never meet the antidegradation policy because the policy requires individualized analysis and public hearing for each vessel. The second approach is an "as-applied" argument. Under this approach, the Council is arguing that even if a general permit could be used, this General Permit does not meet the requirements of the antidegradation policy.

1. What are the tools the Department uses to regulate discharge of pollution?

We begin the discussion of the Conservation Council's argument that the General Permit is deficient with a brief overview of the governing legal standards for permitting wastewater discharges. Modern regulation of water quality stems from the Clean Water Act, 33 U.S.C. §§ 1251 – 1387. General permits, individual permits, notices of intent, and the antidegradation policy are tools used by the government to help protect waters from pollution. Because Alaska has state law requirements that are compliant with federal law, for most state waters, these matters are now administered by the Department under the Alaska Pollution Discharge Elimination System, with oversight from the Environmental Protection Agency.[55]

State law requires that an owner or operator of a large commercial vessel must have a permit before discharging wastewater into marine waters of the state.[56] A general permit is a tool for regulating a number of similar dischargers.[57] A general permit for dischargers of wastewater "identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers."[58] A vessel will not have permission to discharge under the general permit, however, until a notice of intent is filed and approved. The fact sheet explains that a notice of intent "serves as the application under a general permit and includes the information and available evidence necessary to determine consistency with [the regulation governing mixing zones,] 18 AAC 70.240"[59]

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55 *See, e.g.*, http://dec.alaska.gov/water/wwdp/index.htm.

56 AS 46.03.462(a).

57 AS 46.03.100(b)(2); 18 AAC 72.900(a); *see also, e.g., Environmental Defense Center, Inc., v. United States Env. Prot. Ag.*, 344 F.3d 832, 853 (2003).

58 *Environmental Defense Center*, 344 F.3d at 853.

59 Admin. Rec. at 1817.

Federal law requires states to adopt an antidegradation policy that addresses how the state will protect water quality from being degraded by discharges of pollutants.[60] Federal law divides waters into three different levels, Tiers I, II, and III. Each tier requires different levels of protection from pollution. The same categories are adopted into the state antidegradation policy in the Department's regulations at 18 AAC 70.015.

Tier I waters are those that receive the least protection. For waters designated as Tier I, the water must be protected so that existing uses can continue.[61]

Tier II waters are higher quality. They have to be protected at existing quality, with discharges allowed only after a state makes certain findings, including that a discharge into the waters is necessary for economic or social development and will not harm existing uses.[62] A

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60 40 C.F.R. § 131.12.

61 40 C.F.R. § 131.12(a)(1); 18 AAC 70.015(a)(1).

62 40 C.F.R. § 131.12(a)(2); 18 AAC 70.015(a)(2). Because the requirements for Tier II waters are at issue in this dispute, the full text of 18 AAC 70.015(a)(2) is set out below:

> (2) if the quality of a water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality must be maintained and protected unless the department, in its discretion, upon application, and after compliance with (b) of this section, allows the reduction of water quality for a short-term variance under 18 AAC 70.200, a zone of deposit under 18 AAC 70.210, a mixing zone under 18 AAC 70.240, or another purpose as authorized in a department permit, certification, or approval; the department will authorize a reduction in water quality only after the applicant submits evidence in support of the application and the department finds that
>
> (A) allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located;
>
> (B) except as allowed under this subsection, reducing water quality will not violate the applicable criteria of 18 AAC 70.020 or 18 AAC 70.025 or the whole effluent toxicity limit in 18 AAC 70.030;
>
> (C) the resulting water quality will be adequate to fully protect existing uses of the water;
>
> (D) the methods of pollution prevention, control, and treatment found by the department to be the most effective and reasonable will be applied to all wastes and other substances to be discharged; and
>
> (E) all wastes and other substances discharged will be treated and controlled to achieve
>
> (i) for new and existing point sources, the highest statutory and regulatory requirements; and
>
> (ii) for nonpoint sources, all cost-effective and reasonable best management practices;

state's policy for Tier II waters must impose the highest treatment and control requirements for point sources of pollution. (A point source is an identifiable, nondispersed origin, such as a pipe.) The policy must also require "cost-effective and reasonable best management practices" for nonpoint sources. (A nonpoint source is a widespread source, such as rainwater runoff from a field.)

Tier III waters are pristine waters that "constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance," whose quality must be maintained and protected.[63] Alaska has not designated any waters as Tier III waters.

The parties agree that the antidegradation policy governs discharges of treated sewage and graywater by the cruise ships that operate in Alaska. In the Department's and the Cruise Line Association's views, the General Permit and the subsequent system of approving or disapproving notices of intent meet the antidegradation policy. In the Conservation Council's view, however, the General Permit does not comply, and cannot comply, with the antidegradation policy.

2. Does the antidegradation policy require that the Department hold a public hearing for each notice of intent or issue an individual permit for each large commercial vessel that discharges wastewater in Alaska's water?

The parties agree that applying the antidegradation policy to cruise ships in Alaska waters requires a public process. They disagree, however, about whether a site-specific review is required, and about whether the general permit and the notice of intent processes can be sufficient to meet the requirements of the policy. The Conservation Council argues that an individualized assessment under the policy requires a public hearing for each vessel, with notification to the public of where that vessel will discharge waste, before that vessel is permitted to degrade Alaska's waters.

The Conservation Council bases its argument on the requirement that, before allowing a discharge that lowers water quality, the Department must find that the discharge is "necessary to accommodate important economic or social development *in the area where the water is located.*"[64] It cites to a 2002 decision in which the Department held "DEC cannot fulfil its responsibilities [under the antidegradation policy] without conducting some level of site-specific

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[63] 40 C.F.R. § 131.12(a)(3); 18 AAC 70.015(a)(3).

[64] 18 AAC 70.015(a)(2)(A) (emphasis added).

review."[65] The Council also asserts the 2002 decision rejected the industry's argument that "no site-specific findings are necessary because the General Permit conditions themselves are sufficient to ensure that state water quality standards, and the antidegradation policy of 18 AAC 70.015, will not be violated."[66] The Council argues that the 2002 decision effectively required a public hearing at the notice of intent stage in order to cure the lack of site-specific analysis. In the Council's view, the same result should obtain here—either require a public hearing for the notices of intent or require that all cruise ships obtain individual permits, with public comment sessions for each individual permit.

In response, the Division asserts that site-specific analysis is not specifically required in 18 AAC 70.015 each time a NOI is processed.[67] The Cruise Line Association does not deny that some site-specific analysis may be required, but asserts that the site-specific analysis can be effectively done by use of conservative assumptions in the modeling of the size and dispersion rates of the mixing zones. In the Association's view, by using conservative assumptions for inputs to the model, all harbors are effectively modeled, even though the actual model for all harbors except Skagway was Juneau.[68] Both the Division and the Association distinguish the 2002 General Permit decision because that decision applied to a zone of deposit for a log transfer facility. That activity involved a static discharge of solids, whereas this General Permit concerns discharges of treated wastewater, from vessels that may be moving or temporarily in port.

Although the Council is correct that the public notice must be sufficient to allow for meaningful public comment, it does not follow that the public notice must advise exactly where the discharge will occur. When a vessel discharges wastewater while in motion, the wastewater is dispersed over a large area. For that activity, giving the public notice of the general routes along which the vessels will travel is sufficient. That notice will allow the public sufficient information to evaluate the conclusion that a moving discharge anywhere along the routes will be in compliance with the antidegradation policy. Individuals with concerns about a discharge occurring while underway anywhere along that route can raise those concerns.

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65 Requestors' Motion for Summary Adjudication at 10 (quoting *In re EPA General Permits AK-G70-1000 and AK-G70-0000* (Dep't of Env. Cons. 2002) at 41).

66 *Id.* at 12 (quoting *In re EPA General Permits* at 40).

67 Division's Opposition to Summary Judgment Motion at 9-10.

68 Cruise Line Association's Response to Requestors' Motion for Summary Adjudication at 11.

When a vessel discharges wastewater while stationary or moving at a slow rate, however, more specificity is required. The waste will disperse more slowly, leaving a greater concentration of pollutants in the water for a longer period time. Moreover, those discharges will likely take place in or near a port, where existing and different uses of the water are more likely. Therefore, the permit or fact sheet should identify the ports where a stationary or slow-moving discharge will occur. That will provide sufficient notice for meaningful public comment, as required under the antidegradation policy.

The Conservation Council's main complaint relating to the need for site-specific analysis is that a general permit should not make assumptions and generalizations about sites in lieu of doing scientific analysis for each site. It objects to the use of Juneau as a surrogate for all other ports except Skagway. In its view, the modeling and analysis must be performed for all ports.

With regard to the issue of whether surrogate analysis is allowed in wastewater permitting, the Alaska Supreme Court's decision in *Miners Advocacy Council, Inc., v. State, Dep't of Env. Cons.* is instructive.[69] Although that case did not involve a general permit, it did involve 539 different permits for discharge of effluent from mines. In approving these permits, the Department reasoned that its general analysis and conclusion applied to all permits "regardless of any site-specific differences."[70] The court approved this general approach to permitting—multiple sites may be approved based on one analysis, where the assumptions that form the basis for the generalization are stated and reasonable.[71] The court approved the permits for all mines that operated in a manner consistent with the reasoning applied in the Department's analysis.[72] For some of the permits, however, the court found that the Department's assumptions were invalid because those mines operated in a different fashion.[73] The court reversed the Department's approval for those permits where the Department's analysis was flawed.

The lesson from *Miner's Advocacy Council* is that generalizations based on assumptions and data are permissible in permitting of wastewater discharge. Repeating scientific observation and analysis for each individual site is not required if the sites are similar across all material parameters. The sites must be similar, however, and the assumptions and conclusions valid.

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69 778 P.2d 1126 (1989).

70 *Id.* at 1139.

71 *Id.* at 1140 (approving department's methodology for those mines that did not divert most or all of stream to use in mining operations).

72 *Id.*

73 *Id.* at 1139-40 (disapproving department's conclusion on whether mines that used most or all of stream for settling ponds would achieve sufficient dilution upon returning effluent to stream beds because for those mines no additional water from stream would dilute effluent).

Therefore, the general permit must state the assumptions and grounds for the generalizations made across multiple sites so the public or a reviewing body can understand, evaluate, and challenge the Division's conclusions. Thus, the Council's argument that a general permit can never be used for large commercial vessel wastewater discharges is not correct—generalizing across similar situations is allowable, as is relying on valid assumptions about scientific analyses and process.

We turn now to the Conservation Council's arguments based on the Department's 2002 General Permits decision. That decision noted that some site-specific analysis is required, and approved a general permit based in part on the Division's assurance that it would require public comment for any notice of intent to create a new zone of deposit under the general permit.[74] The Council argues that this means that the Department must adopt the same approach in this case, and require a public comment session each time a vessel files a notice of intent.

The 2002 General Permits decision based its conclusion regarding site-specific analysis on the use and definition of the term "the water" in 18 AAC 70.015(a)(2)(A). This subparagraph permits discharges into Tier II water only if "allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located."[75] Because in the 2002 case "the water" likely meant a localized waterbody around the zone of deposit, a site-specific analysis would be important for each notice of intent for a new zone in a different waterbody. Here, however, "the water," includes all marine waters of the state. More specifically, this General Permit generally alerts the public that the water in question includes the sea lanes generally traversed by the cruise ships (identified in maps) and the cruise ship ports-of-call.

The 2002 General Permits decision did not address the issue of making generalizations from one site to others, or using one site's analysis as a surrogate for all other sites. Therefore, its holding that a degree of site-specific analysis is required under the antidegradation policy does not undercut the finding here that the general permit and notice of intent processes can be used to permit cruise ship wastewater discharge in Alaska.

In sum, some degree of site-specific analysis is required for a general permit across multiple sites. A general permit may, however, be based on general knowledge or assumptions about the sites where discharges will occur, as long as the assumptions are clear. A general

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74 *In re EPA General Permits AK-G70-1000 and AK-G70-000* (Dep't of Env. Cons. 2002) at 40-44.

75 *Id.* at 41 (quoting 18 AAC 70.015(a)(2)(A)).

permit regarding discharge from a vessel can meet the public notice requirements by giving notice of stationary or slow-moving discharge sites and the general routes upon which other moving discharges will occur. Therefore, requiring public comment at the general permit stage, and not at the notice of intent stage, can be consistent with the antidegradation policy when applied to cruise ship wastewater discharges.

3. Does the 2014 General Permit comply with the requirements of the antidegradation policy?

a. Is the "worst-case scenario" approach justified in this case?

The Conservation Council's first "as-applied" argument is that the generalized approach taken by the Division—relying on Juneau as a worst-case scenario—was too flawed to meet the individualized, site-specific analysis required under the antidegradation policy. Care must be taken in analyzing this argument to the extent that it relies on the Council's conclusion that the Division's scientific analysis and modeling were based on bad science.

For example, the Conservation Council argues that the Department "lacks evidence to support its assumption that all Alaska marine waters, other than those designated as 'impaired' are of high enough quality to absorb the levels of pollutants allowed under the General Permit."[76] But that is the point of the modeling exercise—to see how the effluent disperses and whether the water dilutes the waste products. To the extent that the Council's argument raises issues about the quality of the Division's science, the Council did not preserve the argument.

The issue that the Council *did* preserve for hearing is whether the Division sufficiently informed the public of the basis of its reasoning, so that the public's right to meaningfully participate in the process was protected. If yes, then the Division did have evidence (modeling based on conservative assumptions) to support its conclusion that all Alaska marine waters could absorb the expected discharges of treated wastewater. If no, the Council's request for additional public process would be granted.

Here, the Division has stated its reasons for basing its generalization on Juneau. The Division identified Juneau, Skagway, and Ketchikan as the three ports with the most cruise ship traffic. Each has multiple docks that are close together. This means that these three ports will have more discharge of effluent and overlapping mixing zones than all other ports, making them the most difficult waters for the effluent to dilute sufficiently to meet the standards required in regulation. Ketchikan, however, is an open-ended port and has higher current velocities than

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[76] Requestors' Motion for Summary Adjudication at 8.

Juneau and Skagway.[77] Therefore, Juneau is a reasonable surrogate for Ketchikan because Ketchikan waters will dilute more rapidly than Juneau waters. The same is true for other ports (except Skagway), which have lower traffic than Juneau. In Skagway, with its close-ended port and two docks close together, the effluent would be more concentrated and dilute more slowly. Skagway had to be modeled separately from Juneau. As a result of the Skagway-specific modeling, Skagway has a smaller mixing zone than is allowed for all other ports that are based on the Juneau model.[78]

In addition, the Division and the Cruise Line Association are correct that the Division's use of conservative assumptions in its modeling strengthens the Division's conclusion that it can rely on Juneau as a surrogate for all ports other than Skagway. By using inputs to the model that likely overestimate the ambient levels of contaminants in those ports, the Division has designed a mixing zone that will pass the test required for protection of Tier II waters in all ports.

The Conservation Council does not agree that designing the model for protection of Tier II waters is a conservative assumption. In its view, because Tier I waters have higher ambient levels of pollutants, they would be more at risk when additional contaminants are discharged into the waters.[79]

This argument, however, is another way of arguing that the modeling was scientifically inaccurate—an argument that the Council has not preserved. If the inputs to the model (which are based on conservative assumptions about actual ambient concentrations) are accurate (and on this record, they are), then the output of the model (the size of the mixing zone needed to disperse the contaminants in the discharge) will be adequate for both Tier I and Tier II water because the contaminants will be dispersed below regulatory levels. Therefore, the Council's critique of the Tier II assumption does not support its argument that public comment is required at the notice of intent stage.

In sum, the Division's approach analyzed specifics of Juneau and Skagway, and to some extent, of Ketchikan. The Division used conservative inputs to the model that configured the mixing zones. It explained its rationale for its conclusion that Juneau is a reasonable surrogate for all ports other than Skagway. Residents of other ports could challenge that conclusion if they wished do so. By identifying Skagway as a special case, and setting higher standards for Skagway, the Division has shown that it will consider a site on a site-specific basis when

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77 Admin. Rec. at 1856.

78 *Id.* at 1964.

79 Requestor's Combined Response at 7.

necessary. Therefore, the Division's analysis and reasoning meet the requirements of the antidegradation policy for meaningful public participation and site-specific analysis.

b. Is the analysis of economic and social benefit in the General Permit sufficiently site-specific to meet the requirements of the antidegradation policy?

The Conservation Council takes issue with the General Permit's approach to the economic analysis in 18 AAC 70.015(a)(2)(A), which requires a finding that "allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located." To meet this requirement, the Division first cites to a body of work done at the state level, including the proceedings of a science advisory panel in 2012, and the Department's 2013 Preliminary Report on Cruise Ship Wastewater.[80] These studies addressed the necessity of lowering water quality. To address the economic importance of the cruise ship industry, the Division cites to studies done by the Alaska Department of Labor and Workforce Development, and the Alaska Department of Commerce and Economic Development. These studies document the spending and jobs created in Alaska as a result of the cruise ship industry.[81]

The Conservation Council is correct that the economic and social analysis required by 18 AAC 70.015(a)(2)(A) is not an insignificant element of compliance with the policy. The antidegradation policy requires that the Division alert the public to the economic and social impacts regarding an industry that seeks to degrade the public's waters. The goal is to have an informed public, not just a scientific measurement of particles in the water.

The specific argument brought by the Conservation Council with regard to the economic analysis in this General Permit, however, is quite narrow. The Council asserts that "DEC did not explain how the economic benefits enjoyed by destinations like Juneau or Ketchikan are comparable to small communities, like Angoon or Saxman."[82] The Council does not identify any specific economic or social benefits or costs that were overlooked by the Division or that would change the outcome. Although the interests of all members of the public are important, the Division may use commonsense in meeting the requirements of 18 AAC 70.015(a)(2)(A). It may rely on the knowledge that discharges of treated wastewater made on the sea-ways while moving at cruise speed disperse quickly and, unless something unusual indicates otherwise, do not significantly affect water quality in bypassed villages or ports. It should consider all impacts, and report on those that are material, but it does not have to methodically report on every

80 *Id.* at 1871-72.
81 *Id.* at 1875.
82 Requestors' Motion for Summary Adjudication at 9.

instance in which it finds no impact. Loading up a report with statistics and analyses that show nothing and go nowhere would have the opposite effect from that desired here—the public would lose interest in the process.

The Conservation Council's argument in this case appears to accept that cruise ship traffic is an important economic and social development for the destination ports. That conclusion is supported by the economic and social analysis appended by the Division at Appendix H of its Fact Sheet.[83] This analysis is not extensive, but it is sufficient to meet the requirements of the antidegradation policy.

c. Is the notice of intent sufficiently integral to the regulatory process that it requires an additional public hearing?

The Conservation Council notes that not all facts are known at the General Permit stage. Some facts will not become known until a cruise ship files its notice of intent. Some facts we are still learning as scientific knowledge expands. In this situation, the Council concludes that the five-year General Permit for wastewater discharge violates the public's right to participate in the process of protecting the public's water. The only cure, in its view, is to have public comment at the notice of intent stage of the process, or to void the General Permit and require individual permits. It cites to a federal court of appeals decision, which held that public comment at the notice of intent stage becomes more crucial if the notices of intent play a substantive role in the permit process.[84] In the Council's view, because the notices of intent could play a substantive role under this General Permit, each notice of intent should receive a public hearing. It also cites to the 2002 General Permits decision issued by the Department, in which the Division's decision to allow public comment at the notice of intent stage cured the concern that the Division might abuse its discretion when evaluating those notices of intent, and allowed the Department to approve the general permit.[85] Finally, the Council cites to the Department's *Interim Antidegradation Implementation Methods*, which recognize that the antidegradation analysis could be difficult at the general permit stage because some specific information might not be known until the filing of the notice of intent.[86]

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83 Admin. Rec. at 1871-75.

84 Requestors' Motion for Summary Adjudication at 12 (citing *Environmental Def. Center v. United States Env. Prot. Ag.*, 344 F.3d 832, 853 (9th Cir. 2003)).

85 *Id.* at 10, 12 (citing *In re EPA General Permits* at 40-41, 43, 48).

86 *Id.* at 12 citing *Interim Antidegradation Implementation Methods* (2010) *available at* http://dec.alaska.gov/Water/wqsar/Antidegradation/docs/P&P-Interim_Antidegradation_Implemenation_Methods.pdf.

In response, the Division asserts that notice and comment at the notice of intent stage (at least relating to the General Permit at issue here) would be pointless. The same science and conservative assumptions that justified the General Permit would be used again to authorize the discharge under the notice of intent—the public would learn nothing new by this additional process. The Division dismisses the cases cited by the Conservation Council because the additional notice and comment required in those cases was applicable only to the facts at issue, and were exercises of discretion, not requirements of law.[87]

A review of the cases cited by the Conservation Council indicates that the issue behind the extra process concern in those cases was changing or unknown conditions. In the Department's 2002 decision, *In re EPA General Permits AK-G70-1000 and AK-G70-0000,* the Department was concerned about "NOI's requesting the authorization of operations at new, previously unpermitted sites."[88] The Department approved the general permits because the Division adopted a policy that provided for public comment whenever a notice of intent was received for a new log transfer facility site. In the federal district case cited by the Council, the court was concerned that public participation would be impossible before the notice of intent stage when the permit issuing authority had no information about the discharges into Tier II waters.[89]

Here, in contrast, the cruise ship industry in Alaska is a mature industry about which the Division had considerable information at the time the General Permit was being prepared. The Division's modeling includes inputs that reflect knowledge of the cruise ship's wastewater discharges, and the conditions under which they occur. The modeling used conservative inputs for the most difficult ports. Therefore, the Division's approach to the General Permit meets the individualized analysis requirements of the antidegradation policy.

Indeed, even after a notice of intent is received, the precise location, time, and content of a vessel's discharge of wastewater will not be known. At some point, the "lack of knowledge" argument confuses the permitting stage of regulation with the monitoring and enforcement stages.

The Division's argument that it does not make sense to order the opportunity for public comment for each notice of intent for coverage under the General Permit is persuasive, so long as the public's right to meaningfully participate in the process is not undercut by new

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87 Division's Opposition to Summary Judgment Motion at 12-13.

88 *In re EPA General Permits AK-G70-1000 and AK-G70-000* (Dep't of Env. Cons. 2002) at 43.

89 *Ohio Valley Env. Coalition v. Horinko,* 279 F. Supp.2d 732, 762 (S.D. W.Va. 2003).

developments. In most (if not all) cases, the notice of intent will merely be "business as usual," confirming what is already known—a vessel intends to operate in Alaska in accordance with the General Permit. When the notice of intent is routine, and contains information that is within the broad range of what was reasonably anticipated at the time of the General Permit, a new round of public process is not necessary.[90]

Moreover, a blanket order requiring public comment for all notices of intent will not help keep the public informed and involved—it will have the opposite effect. The public will tune out the frequent and meaningless public comment on cruise ship discharge. The process will become jaded and perfunctory, while creating unnecessary costs and burdens for industry, environmental watchdog organizations, the Department, and the public.

IV. Conclusion

1. The Southeast Alaska Conservation Council and the Cook Inletkeeper did not have good cause for failing to raise during public comment five of their six issues on appeal regarding General Permit 2013DB0004. Requesting an informal review does not substitute for the requirement that an issue be raised during public comment.

2. The antidegradation policy requires that some degree of site-specific analysis be performed before a discharge of wastewater is authorized.

3. General Permit 2013DB0004 meets the site-specific analysis requirement of the antidegradation policy because it uses reasoned analysis, sufficiently explains its assumptions and generalizations in applying that analysis across multiple sites, and separately analyzes the one individual site that does not meet the assumptions.

4. The antidegradation policy requires that the public be provided with a meaningful opportunity to participate in decisions permitting wastewater discharges by large cruise ships.

5. The public process provided in issuing General Permit 2013DB0004 meets the public process requirement of the antidegradation policy. The Division is not required by the antidegradation policy to provide additional public comment process whenever a notice of intent is filed under this General Permit. This is true even if new and specific information is contained in the notice of intent, if the information would not trigger a new or supplemental

[90] This decision rejects the Council's argument that public participation is required because the Division "lacks sufficient information to determine whether a particular ship complies with permit limits" until the notice of intent is filed. Requestors' Motion for Summary Adjudication at 11. That is the purpose of the notice of intent—to indicate compliance with a general permit, and if that is all that a notice of intent does, it would not give rise to any need for additional public process.

antidegradation analysis in order to meet the requirement in 18 AAC 70.015.If the Division does a new or supplemental antidegradation analysis in response to an NOI, then it would need to meet the public notice requirement of 18 AAC 70.015. [91]

DATED this ___ of _____, 2015.

By: _____
Stephen C. Slotnick
Administrative Law Judge

[91] It is outside the scope of this administrative review to attempt to identify what particular new facts in an NOI that might be submitted to the Division for coverage under the General Permit could trigger a new or supplemental antidegradation review under 18 AAC 70.015. No question has been raised regarding any authorization to discharge that has been approved by the Division since the General Permit became final, so there is no actual situation to consider or guide one. It isn't clear from the briefing that it is even that likely that an NOI will be submitted in the future that would result in the need for a new or supplemental antidegradation analysis before coverage would be proposed under the General Permit. Still, this begs the question whether, if there was such an NOI submitted to the Division in the future, would the public notice requirements under 18 AAC 70.015 be met? Authorizations are currently posted on the department's website (http://dec.alaska.gov/water/cruise_ships/gp/Auth_14html) and the public has a right to ask for the documents giving rise to the authorization (See Section 11.3 of the General Permit). This would appear to be a reasonable means of keeping the public informed if the information is posted quickly and the process for obtaining documents is not too cumbersome or slow. However, there could be additional measures that could reasonably be taken to better inform the public of potentially new and significant information in an NOI. Such additional measures might, as has been suggested by the Council, include the posting of the NOIs on the Division's webpage. Looking at that webpage, there were only 18 authorizations under the General Permit in the 2015 season, which indicates it might not be burdensome on the Division to post the NOIs it receives for coverage under the General Permit. The Commissioner directs the Division to take a hard look at whether the public might be better served through posting of the NOIs or other information relating to vessels seeking coverage under the General Permit. This direction to the Division is limited to future authorizations for coverage under general permits issued under the cruise ship program.