

Department of Environmental Conservation
Antidegradation Public Workshop
Discussion Summary
Updated June 2015

Outline

1. Agenda
2. Notes submitted
3. Summary of Notes by Topic

1. Agenda for Antidegradation Public Workshop, May 13-14, 2015:

AGENDA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION/ DIVISION OF WATER
MEETING OF PUBLIC WORKSHOP FOR ANTIDEGRADATION REGULATIONS

May 13, 2015 – 1:00 – 5:00 PM

May 14, 2015 – 8:00 – 5:00 PM

Wednesday, May 13, 2015

- 1:00-1:15 Introductions
- 1:15-1:45 Overview of Antidegradation (Antideg 101)
- 1:45-2:15 Status of Tier 3 Waters provisions
- 2:15-3:15 Discussion of No Action Proposed Issues
- 3:15-3:30 Break
- 3:30-4:30 Discussion of Quick Fix Issues
- 4:30-4:45 Identify and Discuss Follow-Up Activities
- 4:45-5:00 Review Agenda for May 14, 2015
- 5:00 Adjourn

Thursday, May 14, 2015

- 8:00-8:15 Introductions
- 8:15-9:15 Key Issue for Discussion: 401/404 Permit Approval and Certification Process
- 9:15-10:00 Key Issue for Discussion: Alternative Analysis
- 10:00-10:15 Break
- 10:15-10:45 Key Issue for Discussion: Alternative Analysis (cont.)
- 10:45-11:45 Key Issue for Discussion: De Minimis Provision
- 11:45 Adjourn for Lunch Break

11:45-1:15 Lunch Break

- 1:15-2:15 Key Issue for Discussion: Antidegradation Analysis for General Permits
- 2:15-3:30 Key Issue for Discussion: Complexity of Antidegradation Regulations
- 3:30-3:45 Break
- 3:45-4:45 Conclusions from Antidegradation Public Workshop and Next Steps

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2. Overview of workshop format

ADEC hosted the 2015 Antidegradation Public Workshop (Workshop) to create a forum where ideas from known stakeholders in the antidegradation regulations implementation effort and the interested general public could be brought forward prior to publically noticing a second round of regulations. ADEC selected the venue of the Anchorage Performing Arts Center (PAC) in order to accommodate a sizeable group of participants. A number of round tables located within Voth Hall in the PAC allowed seating for more than sixty individuals. The Workshop was offered at no cost to participants, but they were asked to register. Hard copies of Workshop presentations and supporting materials were distributed to the participants. The speakers at the Workshop presented topics in PowerPoint formats, were organized into general topics presented for discussion on the first day by DOW Director Michelle Hale, DOW Technical Services Program Manager Earl Crapps, and DOW Water Quality Standards, Assessment and Restoration (WQSAR) Program Director Nancy Sonafrank. On the second day, the presentations by Alaska Pollutant Discharge Elimination System (APDES) Program Manager, Wade Strickland, shifted to more permit-oriented issues that had received significant comments during the initial public comment period on the draft antidegradation implementation regulations. All of the presentations were designed to provide basic information and facilitate open discussions. The total number of participants for the two-day Workshop was fifty registrants and six ADEC employees. The participants were drawn from industry, non-profit organizations, state and federal agencies, environmental consulting, and members of the general public.

3. Notes submitted: the following summary was created from notes submitted by:

- a. Michelle Hale, Director, Division of Water (DOW)
- b. Nancy Sonafrank, Program Manager, DOW Water Quality Standards, Assessment and Restoration
- c. Jeanne Swartz, DOW Technical Services Program
- d. Participants of Workshop's breakout groups

4. Summary of Notes by Topic

a. Wednesday, May 13, 2015

I. Status of Tier 3 Waters provisions

Questions/comments raised during this session:

- Is water use a constitutional right in Alaska and if so, how would antidegradation regulations impact that right, particularly the designation of Tier 3 waters?
- To what extent would Tier 3 waters designations consider public health needs and access rights?

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- What are examples of Tier 3 waters in other states and the outcomes/ consequences of designation of those waters?
 - *DEC response:* Lake Tahoe, California is an example of a Tier 3 water. Wastewater is required to be trucked out of Lake Tahoe, as a consequence of Tier 3 designation
- What is the permit process for Tier 3 waters?
- Can a state “undo” a Tier 3 water?
- Suggest including that a proposal for a Tier 3 water does not mean that the water will be treated as a Tier 3 water until the designation is made.

II. Discussion of No Action Proposed Issues

Questions/comments raised during this session:

- What is the jurisdiction of antidegradation regulations? Does the definition of surface water include shallow groundwater?
 - *DEC Response:* Antidegradation policy applies to all state waters including groundwater. Proposed implementation regulations would apply only to Waters of the U.S. as determined by the Clean Water Act (CWA) regulations
- What do antidegradation regulations require in the cases of discharge of water from oil spill cleanup, as response vessels apply dispersants?
 - *DEC Response:* Emergency response is exempted from Tier 2 analysis in the proposed regulations
- Social or economic importance – NEPA analysis provides both socioeconomic benefits and costs of development. Can antidegradation analysis consider socioeconomic costs or just benefits?
 - *DEC Response:* DEC would not ignore, but not require information on negative impacts of development (e.g. from NEPA analyses). DEC is not required to consider socioeconomic costs
- Social or economic importance – disturbed as a No Action proposal: EPA has guidance on balancing the importance question. Concerned that this proposal may not be following Alaskan law
- Are non-point sources subject to antidegradation?
 - *DEC/EPA Response:* Non-point sources authorized by the state are required to be included as part of the antidegradation analyses per state and federal antidegradation policy. Non-point sources themselves are not subject to an antidegradation analysis, however, state authorized non-point source pollution contributing pollutants to a waterbody for which a discharge is being permitted are subject to evaluation as part of the antidegradation permitting process to determine that all cost-effective

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and reasonable BMPs established under state authority are implemented as part of the permitting action. Examples would include storm water best management practices that are required in many permits.

III. Discussion of Quick Fix Issues

Questions/comments raised during this session:

- If assimilative capacity is an importance criteria, would this trigger baseline water data?
 - *DEC response:* DEC intends to remove assimilative capacity from the list of importance criteria, so importance analysis does not require baseline data
- Suggest keeping the language about facility wide/upstream evaluation, but explain it better

5. Summary of Notes by Topic

b. Thursday, May 14, 2015

IV. Key Issue for Discussion: 401/404 Permit Approval and Certification Process

Questions/comments raised during this session:

- How would 401 cert of a 404 permit affect the process for a US Army Corps of Engineers (Corps) project in Shaktoolik?
 - *DEC Response:* DEC will inquire about the status of this permit with the Corps
- How would Alaska antidegradation regulations affect Corps nationwide-permitted projects that take place in Alaska?
 - Clarity is needed on antidegradation regulatory process. Wetlands that are filled as part of 404 permitting are not the same as Waters of the U.S. (WOTUS). How can antidegradation regulations be applied to wetlands?
 - *EPA Response:* Antidegradation can be applied to wetlands, where the discharge of fill is proposed, and ADEC may use “significant degradation,” consistent with the 404(b)(1) guidelines, when evaluating proposed fills in accordance with antidegradation Tier 1 and Tier 2 analyses. ADEC might usually, but not in all cases, agree with the Corps determination of what is and is not “significant degradation.” The 404 process may not provide ADEC with information needed to make a Tier 2 determination that a lowering of high quality water is necessary to

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provide for important economic or social development in the area where the water is located

- *DEC Response:* DEC will work to provide more clarity
- Has ADEC looked at other states to see how 401/404 process works?
- Why not opt out as a rule and reserve the right to opt in to antidegradation analysis in 401 certs of 404 permits, rather than opt in and reserving the right to opt out?
 - If we opt out, what are the criteria for opting in? This could put the State in a difficult position
 - Part of the evaluation of opting in or out could be – impaired waters, Drinking Water intakes
 - Regulatory certainty is important
 - This regulatory process is DEC’s opportunity to make this clear

V. Key Issue for Discussion: Alternative Analysis Provisions

Questions/comments raised during this session:

- Permittees will evaluate costs for all practicable alternatives, but would they have to choose the least degrading practicable alternative? Wouldn’t this remove choice?
- Cost/benefit analysis is different than cost effectiveness
- Does ADEC have the broad expertise to do the analysis, especially when evaluating the permittee’s economic situation?
- Breakout discussions:
 - Economic analysis – cost is considered under the definition of practicable, but relates to the project purposes. DEC needs clarity on cost effectiveness
 - Requiring the least degrading practicable alternative would conflict with Coeur’s least environmentally damaging practicable alternative (LEDPA) analysis for its 404 permit
 - 18 AAC 70.016(c)(5)(A) of the proposed antidegradation regulations is already required
 - 18 AAC 70.016(c)(5)(B)(i) and (ii) are descriptors
 - 18 AAC 70.016(c)(5)(B)(iii – v) should be deleted as this could be prescriptive. Move to factsheet or guidance if necessary
 - Other regulation have used “including, but not limited to” instead of “such as”
 - *DEC response:* The terms “such as” and “including” have different meanings
 - Everything to be included in regulations should be clear and necessary
 - The regulations need more detail on scope and how to scale antidegradation analysis

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- “Least degrading practicable alternatives” is not favored. Don’t tie permittee’s hands. See pp. 10 & 14 of proposed regulations
- “Least degrading practicable alternative” forces ADEC to deal with the internal workings of applicant’s economics
- “Practicable” does not address the need to analyze cost effectiveness
- Great Lakes antidegradation regulations, approved by EPA, and applied to several states, do not require permittee to use least degrading practicable alternative. The role of necessity will vary by project
- 18 AAC 70.016(c)(5)(D)(i) and (iii) look redundant but conflict with each other. This leaves ADEC open to challenge
- 18 AAC 70.016(c)(5)(D)(ii) would do nothing
- This section of the proposed regulations raises the possibility of potential litigation. It is not prudent to require only least degrading alternative. It would be better to just identify the different alternatives without forcing applicant to select the least degrading
- This section parallels the federal CWA section 404(b)(1) regulations. Since DEC is using the same definition of “practicable”, DEC should use same interpretations as USCOE
- DEC may need other agencies’ expertise to do parts of the antidegradation analysis
- “Most practicable” is not the same as “most effective”
- In 18 AAC 70.016(c)(8)(D)(i), stop at “necessary”. DEC only needs to document why the discharge is “necessary”, based on the alternatives
- Additional notes from Breakout Group
 - What the group doesn’t like about Alternatives Analysis provisions:
 - How will ADEC implement alternatives analysis?
 - What about modifications to alternatives analyses?
 - Does a range of alternatives need to include alternatives, identified during scoping and public processes?
 - If applicant provides list of alternatives, when does the public provide information?
 - Seems burdensome for small projects with discharges that don’t require NEPA documentation. Would the alternatives analysis mean just a short paragraph for a small project?
 - What is the timetable for turnaround?
 - A fact sheet would help guide permittees as to scale
 - What group would change in regulation:
 - If [DEC or applicant] is not going to choose least degrading alternative, then they should express why. Explain holistic environmental effects of least degrading alternative
- Additional notes from Breakout Group-
 - What group doesn’t like about Alternatives Analysis provision:

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- The group liked the LEDPA-like language in the proposed draft regulations and is concerned that a revision of this section might change the intent
- Part B – “range of practicable alternatives” – should require less information from very small projects versus mega-projects
- How will DEC scale information requests to the size of the potential impacts?
- Strongly disagree with DEC’s intent to only consider the benefits of the proposed project, rather than taking a balanced view – should be more like State of Washington in this regard
- What group would change in regulations:
 - Needs better description of how to scale request to size of potential impacts
 - Need more prescriptive approach regarding needs and expectations
- Additional notes from Breakout Group -
 - How little we know about process
 - How [would DEC] apply antidegradation to modified facilities? Antidegradation is applied to new and expanded discharges
- Additional notes from Breakout Group
 - Federal policy doesn’t require least degrading alternative
 - It is not prudent to use least degrading alternative. Instead DEC should use “preferred alternative”

VI. Key Issue for Discussion: *De Minimis*

Questions/comments raised during this session:

- It is difficult to understand how *de minimis* could be quantified in the receiving water
- This provision could get complicated fast and lead to delays
- *De minimis* is often the source of legal challenges [in other states]
 - *DEC response:* DEC would not invoke the *de minimis* provision. An applicant would have to request it
- Clarification requested: Would *de minimis* be <5% from the [baseline] conditions as of the initial [regulation] adoption date? If so, the regulations could say instead “as of the initial [data] collection”. Does it need to be “as of the date of adoption”?
 - *DEC response:* DEC took this concept of *de minimis* from the Idaho antidegradation regulations, and will review Idaho’s implementation procedures again to make sure Alaska’s regulations are clear
- Is “cumulative” redundant with “from all sources”?

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- One person said the *de minimis* provision was drafted well, but the challenge would be establishing the baseline water quality. Only direct measurement, not modeling, should be used to make this determination
- ANILCA Title II, Alternatives Analysis; this would apply to LEDPA-like in-holder access
- *De minimis* provision should be explicit in that it only applies to renewal of permit (if too complicated, applicant can always use simple Tier 2 analysis)
- How would *de minimis* work with gravel permits?
- Would antidegradation be required for tributaries to Tier 3 designated waters?
- Additional notes from Breakout Group
 - “The proposed discharge shall not adversely affect the assimilative capacity of the receiving water by more than a nominal amount as of the initial date of this section, and shall not result in adverse long term cumulative impacts”

VII. Key Issue for Discussion – Antidegradation Analysis for General Permits

Questions/comments raised during this session were-

- What would be the effects of cumulative impacts from sources permitted under general permits?
 - *DEC response:* DEC has Water Quality Based Effluent Limits (WQBELS) that assure Water Quality Standards are met
- Do we anticipate an expansion of discharges permitted under a general permit?
 - *DEC response:* Depends on economy, price of gold, for example
- How does DEC assure that assimilative capacity is not exceeded in a waterbody?
- How can DEC do a spatial analysis to assure no cumulative impacts?
- Can DEC do a re-opener in a general permit if antidegradation is found to not being addressed satisfactorily?
 - *DEC response:* DEC has authority to reissue permits at any time. DEC can revisit if assumptions on antidegradation analysis are no longer valid.
- *De minimis* should be excluded from general permits
- 18 AAC 70.016(e) is unclear. It seems as if DEC is asking for information at the NOI stage; how can DEC obtain this evidence? Make it clear that DEC is looking for information at the GP stage
 - *DEC response:* DEC evaluates this information to determine eligibility for a general permit. 18 AAC 70.016(e)(3) is the same information as required to seek an individual permit
- If general permits are issued statewide, there could be a loss of exceptional characteristics in some waters
- Supportive of antidegradation analysis at time of GP issuance
- When developing a new GP, reach out to regulated community and make sure the antidegradation analysis is rigorous: Show your work - How would general

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permits work if a Tier 3 designation was made in an area covered by a general permit?

- DEC should break down the coverage of general permits into geographic areas or link to watersheds DEC should use hydrologic unit codes (HUC) at 8 level for general permit coverage
 - *Additional comment:* 8-digit HUC does not work well in Alaska
- If geographical general permit is used, the coverage area should be based on HUCs
- DEC should do more oversight for cumulative effects
- DEC should use data on NOIs to track where covered facilities are located
- How are general permits publically noticed, in terms of antidegradation analysis?

- *DEC comment, for clarity:* 401 certification of 404 permits are publically noticed under federal permit procedures, which differ than procedures for Alaska Pollutant Elimination Discharge Elimination System (APDES) permits