

Department of Environmental Conservation

Division of Water



18 AAC 70 Water Quality Standards

Antidegradation Implementation Methods Regulations

Responsiveness Summary

November, 2017

Introduction

Clean Water Act and Antidegradation

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

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

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

Summary of Project

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

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

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

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

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

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

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

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

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

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

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

Opportunities for Public Participation

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

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

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

Individuals/Organizations Commenting

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

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

Comments:

I. General Comments

1. Comment Summary

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

Response:

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

2. Comment Summary

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

Response:

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

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

3. Comment Summary

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

Response:

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

The repealed regulation is a step in the implementing antidegradation policy, and as such, is more appropriately included as part of the proposed 18 AAC70.016 implementation regulations. Retaining the language in both sections of the regulations would be repetitive and unnecessary. The department does not agree that the revised language of “practicable” in place of the previously used term “reasonable” reduces the standard set forth, but rather provides more clarity as it is a defined term set forth in 18 AAC 70.990(48). Finally, Alaska’s antidegradation policy regulations at 18 AAC 70.015(a)(2)(E) remains consistent with the federal regulation at 40 CFR 131.12(a)(2). No changes were made to the regulations based on these comments.

4. Comment Summary

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

Response:

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

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

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

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

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

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

5. Comment Summary

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

Response:

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

6. Comment Summary

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

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

Response:

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

7. Comment Summary

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

Response:

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

8. Comment Summary

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

Response:

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

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

9. Comment Summary

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

Response:

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

10. Comment Summary

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

Response:

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

11. Comment Summary

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

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

Response:

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

12. Comment Summary

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

Response:

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

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

13. Comment Summary

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

Response:

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

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

II. Regulation Specific Comments

14. Comment Summary

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

Response:

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

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

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

15. Comment Summary

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

Response:

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

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

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

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

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

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

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

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

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

16. Comment Summary

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

Response:

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

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

17. Comment Summary

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

Response:

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

18. Comment Summary

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

Response:

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

19. Comment Summary

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

Response:

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

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

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

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

20. Comment Summary

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

Response:

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

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

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

21. Comment Summary

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

Response:

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

22. Comment Summary

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

Response:

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

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

23. Comment Summary

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

Response:

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

24. Comment Summary

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

Response:

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

25. Comment Summary

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

Response:

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

26. Comment Summary

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

Response:

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

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

27. Comment Summary

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

Response:

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

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

28. Comment Summary

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

Response:

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

29. Comment Summary

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

Response:

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

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

30. Comment Summary

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

Response:

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

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

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

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

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

31. Comment Summary

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

Response:

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

32. Comment Summary

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

Response:

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

33. Comment Summary

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

Response:

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

34. Comment Summary

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

Response:

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

35. Comment Summary

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

Response:

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

36. Comment Summary

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

Response:

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

37. Comment Summary

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

Response:

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

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

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

38. Comment Summary

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

Response:

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

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

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

39. Comment Summary

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

Response:

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

40. Comment Summary

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

Response:

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

41. Comment Summary

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

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

Response:

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

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

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

42. Comment Summary

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

Response:

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

43. Comment Summary

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

Response:

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

44. Comment Summary

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

Response:

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

45. Comment Summary

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

Response:

DEC has made modifications to clarify the section as follows:

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

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

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

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

46. Comment Summary

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

Response:

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

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

47. Comment Summary

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

Response:

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

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

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

48. Comment Summary

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

Response:

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

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

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

49. Comment Summary

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

Response:

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

50. Comment Summary

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

Response:

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

51. Comment Summary

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

Response:

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

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

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

All statutory and regulatory public notice requirements have been satisfied.

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

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

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

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

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

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

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

52. Comment Summary

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

Response:

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

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

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

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

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

53. Comment Summary

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

Response:

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

54. Comment Summary

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

Response:

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

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

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

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

55. Comment Summary

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

Response:

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

56. Comment Summary

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

Response:

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

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

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

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

57. Comment Summary

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

Response:

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

58. Comment Summary

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

Response:

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

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

59. Comment Summary

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

Response:

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

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

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