

Alaska Antidegradation Workgroup, June 20-21, 2012
Summary of Meeting #4 (approved at August 1 meeting)

The following notes include comments to the Alaska Department of Environmental Conservation (ADEC) from the Alaska Antidegradation Workgroup. These comments were developed during the June 20-21, 2012 workgroup meeting and may be refined in future meeting summaries. ADEC is reviewing the comments and has made no decisions on the issues the comments address. Each issue discussed is listed below, along with the key questions and relevant discussion. Draft workgroup recommendations are listed in the draft workgroup report.

DAY ONE, June 20, 2012

Meeting #3 Summary Revisions

See final Meeting #3 Summary on DEC's website

http://dec.alaska.gov/water/wqsar/Antidegradation/Workgroup_notebook.html

Case Law Update

Workgroup Member Questions/Comments:

1. Only activities regulated by DEC under CWA Sections 401, 402, and 404 should be subject to antidegradation requirements and reviews. The workgroup agreed not to revisit this decision again.
2. The Wildlands case indicates that nonpoint sources discharges don't trigger antidegradation review on their own, even though nonpoint BMPs need to be considered in point source permit review.

Socioeconomic Analysis and 404 Permits

Workgroup member questions/comments:

1. Generally, the 401(b)(1) analysis for a 404 permit does not include a socioeconomic analysis. However, 404 permits trigger a National Environmental Policy Act (NEPA) analysis.
2. DEC should consider any socioeconomic analyses done for other regulatory requirements, including those that are performed in relevant Environmental Impact Statements or other associated NEPA analyses.

CWA Section 401 Certifications of 404 permits

Workgroup member questions/comments:

DEC should add some standard conditions to its CWA Section 401 water quality certifications of 404 permits that support antidegradation concepts.

Public Comments on Day One Morning Discussion: NONE

Baseline Water Quality (BWQ) Proposal

Workgroup member questions/comments:

1. If a water is not impaired for all uses and it is not Tier 3, then Tier 2 should apply as a rebuttable presumption.
2. The burden should be on the applicant to provide information that a particular parameter exceeds WQS sufficient to classify that parameter as Tier 1. DEC should also rank water as Tier 1

when it has sufficient available information to make that decision (e.g. CWA 303(d) listing for an impaired water).

3. The flexibility of what DEC is already doing should be recognized in regulation.
4. How do you know existing uses without any BWQ data? How much BWQ data is needed?
5. With present staff and resources, DEC cannot do adequate cost-benefit analyses to justify requesting additional data. The workgroup deleted this requirement from the BWQ proposal.
6. DEC should have the authority to determine if data is good quality.
7. DEC should be able to require any additional information of the applicant.

ACTION ITEM: DEC will prepare a revised draft Baseline Water Quality Proposal for workgroup consideration.

Draft Workgroup Report

Workgroup member questions/comments:

1. Change Figure 2 to say Current or Existing Water Quality, rather than Baseline Water Quality.
2. Consider changing Figure 2 to another type of graph since the X-axis is meaningless.
3. Clearly differentiate recommendations from workgroup discussion.
4. Change the font or text color for workgroup recommendations to make them stand out.
5. Summarize all workgroup recommendations in the Executive Summary.
6. On page 15 #2, add "only" to beginning of first sentence.
7. Make it clear when talking about a Tier 2 antidegradation analysis versus general antidegradation reviews that might involve Tier 1 or Tier 3.

ACTION ITEM: DEC will reformat the draft workgroup report dated 06-13-2012.

ACTION ITEM: Workgroup members will use Track Changes to edit the sections on Issues 1-3 in the draft workgroup report. The draft ready for editing will be sent via email by DEC.

Issue #5: Requirements for Alternatives Analysis – 2nd discussion

Workgroup discussed Straw person for Issue #5.

http://dec.alaska.gov/water/wqsar/Antidegradation/docs/Workgroup_notebook/ref5.6.pdf

Workgroup member questions/comments:

1. Application information should include a narrative statement that DEC will consider cost-effectiveness (cost vs. performance) as a key review parameter.
2. DEC should not use a numeric threshold cap for cost.
3. DEC should treat new and existing facilities differently.
4. DEC should require applicants to address a range of alternatives.
5. Applicants should use narrative descriptions to discuss their alternatives in terms of cost, performance, reliability, and ancillary environmental effects. Preferred alternative will be identified by applicant, but other alternatives do not have to be ranked.
6. DEC should not require that a Professional Engineer complete the alternatives analysis.

Issue #4: Economic and Social Importance – 2nd discussion

Workgroup discussed Straw person for Issue #4

http://dec.alaska.gov/water/wqsar/Antidegradation/docs/Workgroup_notebook/ref4.4.pdf

Public Comments on Day One Afternoon Discussion: NONE

DAY TWO, June 21, 2012

Issue #4: Economic and Social Importance – 2nd discussion continued

Workgroup member questions/comments:

1. Nonpoint sources should be considered when evaluating assimilative capacity.
2. DEC's implementation procedures should read "DEC will consider reasonable, foreseeable, future uses of the waterbody..." when evaluating assimilative capacity.
3. DEC needs a mechanism to deal with fully used assimilative capacity.
4. It should be made clear in the permit fact sheet when all assimilative capacity for a parameter will be used, making it clear to the public.
5. What procedure is in place to deal with competitive dischargers and assimilative capacity?

Issue #6: Application of Tiers – 1st discussion

Workgroup member questions/comments:

1. DEC should develop criteria and use designations for the wide variability of wetlands in Alaska. DEC may want to evaluate wetlands on a waterbody-by-waterbody basis.
2. DEC should use the parameter-by-parameter approach for applying Tier 1 and Tier 2 protection for most waters.
3. Handle Tier 3 on a waterbody-by-waterbody approach.
4. Assume all waters are protected at Tier 2 unless they are impaired for all uses or Tier 3.
5. Tier 2 analysis on parameter basis. If one parameter exceeds water quality criteria, then do a Tier 1 review for that parameter.
6. Conduct the antidegradation analysis using the parameter-by-parameter approach for parameters in the discharge and in the receiving water.
7. DEC may require an applicant to provide data on parameters that are not in the discharge but are affected by the discharge, e.g. hardness concentration in the receiving water will affect the toxicity of metals in the discharge and calculation of water quality criteria.

Public Comments on Day Two Morning Discussion:

Water quality standards vary in time and space and every waterbody exceeds WQS at some time. WQS exceedances are an integral part of the ecosystem. Give yourself the flexibility to maintain the waterbody-by-waterbody approach by looking at biometrics.

Review of Issues 1-3 Comparison Document

1. Should the antidegradation analysis consider the permitted or discharged amount? For example, some wastewater plants are permitted at total capacity but operate at less than that.
Workgroup recommendation: Permitted amount
2. Is a review needed for reissued permits that have not had an antidegradation review and have not changed in flow, etc.?
Workgroup recommendation: No, these permits should be grandfathered because they are now part of baseline water quality. However, DEC should be able to require an alternatives analysis and require process, treatment, or other upgrades when it recognizes that there can be better performance at a reasonable cost.

3. Is a review needed if the discharge was not previously permitted because a) the discharge did not require a permit previously but the law has changed, b) the applicant tried to get a permit and never got one, or c) the applicant is illegally discharging?
Workgroup recommendation: An antidegradation review is needed for all three scenarios. The level of review will vary depending on the scenario.
4. Should DEC reserve the right to require an antidegradation review at any time for a General Permit (GP) regardless of what's in the permit?
Workgroup recommendation: Yes, in the GP, DEC should specify the conditions under which it may do an antidegradation review at the NOI stage.
5. Page 3, 2a and 2b: All CWA 401 water quality certification activities require an antidegradation review.
6. Should Alaska adopt an intermediate level of protection, i.e. Outstanding State Resource Waters (OSRW) or Tier 2.5?
Workgroup: No
7. Should existing permits be grandfathered?
Workgroup: Yes, but not if there is a new or increased discharge.
8. Should antidegradation reviews be conducted for non CWA activities?
Workgroup: Only activities regulated by DEC under CWA Sections 401, 402, and 404 should be subject to antidegradation requirements and reviews.

ACTION ITEM: Eddie Packee, Eric Fjelstad, Amy MacKenzie, and Cam Leonard will research whether the 404(b)(1) analyses consider impacts outside the fill area.

Issue #7: Significant and/or de minimis degradation – 1st discussion

Workgroup member questions/comments:

Is *de minimis* needed since we've already recommended that any increase in permit limit would require an antidegradation review?

ACTION ITEM: Tetra Tech will explore how other states are applying *de minimis*. Is determining *de minimis* more work than just doing a Tier 2 analysis? What challenges have states faced? How many applications do they get in that claim *de minimis*?

Review of Workgroup Process

Workgroup member questions/comments:

The workgroup would like to see the draft regulations before starting the rulemaking process.

Public Comments on Day Two Afternoon Discussion:

- Waste load allocations may include parameters that are volatile, that precipitate, or that degrade over time. DEC may want to re-evaluate baseline when considering whether load has been fully allocated.