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OFFICE OF THE LIEUTENANT GOVERNOR
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MEMORANDUM

TO: Gary Mendivil
Department of Environmental Conservation

FROM: Scott Meriwether, Office of the Lieutenant Governor
465.4081

DATE: March 9, 2018

RE: Filed Permanent Regulations: Department of Environmental Conservation

Department of Environmental Conservation regulations re: water quality standards and antidegradration implementation methods (18 AAC 70.015; 18 AAC 70.016; 18 AAC 70.990)

Attorney General File:	JU2015200094
Regulation Filed:	3/7/2018
Effective Date:	4/6/2018
Print:	226, July 2018

cc with enclosures: Linda Miller, Department of Law
Judy Herndon, LexisNexis

ORDER ADOPTING CHANGES TO
REGULATIONS OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

The attached 19 pages of regulations, dealing with water quality standards and antidegradation implementation methods are hereby adopted and certified to be a correct copy of the regulation changes that the Department of Environmental Conservation adopts under the authority of AS 46.03 and AS 46.14 and after compliance with the Administrative Procedures Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This action is not expected to require an increased appropriation.

In considering public comments, the Department of Environmental Conservation paid special consideration to the cost to private persons of the regulatory action being taken. The Department of Environmental Conservation also gave special attention to alternate practical methods in this regulatory action, as required by AS 46.03.024.

The regulation changes adopted under this order take effect on the 30th day after they have been filed by the lieutenant governor as provided in AS 44.62.180.

DATE: February 28, 2018
Anchorage, Alaska

Larry Hartig, Commissioner
Department of Environmental Conservation

FILING CERTIFICATION

I, Byron Mallott, Lieutenant Governor for the State of Alaska, certify that on March 7, 2018, at 4:55 p.m., I filed the attached regulations according to the provisions of AS 44.62.040 – 44.62.120.

Byron Mallott, Lieutenant Governor

Effective: April 6, 2018.

Register: 226, July 2018

18 AAC 70.015(a)(2) is amended to read:

(2) if the quality of a water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality must be maintained and protected unless the department, in its discretion, upon application, and after compliance with (b) of this section, allows the reduction of water quality for a short-term variance under 18 AAC 70.200, a zone of deposit under 18 AAC 70.210, a mixing zone under 18 AAC 70.240, or another purpose as authorized in a department permit, certification, or approval; the department will authorize a reduction in water quality only after the applicant submits evidence in support of the application and the department finds that

(A) allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located;

(B) except as allowed under this subsection, reducing water quality will not violate the applicable criteria of 18 AAC 70.020 or 18 AAC 70.025 or the whole effluent toxicity limit in 18 AAC 70.030;

(C) the resulting water quality will be adequate to fully protect existing uses of the water; **and**

(D) [THE METHODS OF POLLUTION PREVENTION, CONTROL, AND TREATMENT FOUND BY THE DEPARTMENT TO BE THE MOST EFFECTIVE AND REASONABLE WILL BE APPLIED TO ALL WASTES AND OTHER SUBSTANCES TO BE DISCHARGED; AND

(E)] all wastes and other substances discharged will be treated and controlled to achieve

(i) for new and existing point sources, the highest statutory and regulatory requirements; and

(ii) for nonpoint sources, all cost-effective and reasonable best management practices;

18 AAC 70.015 is amended by adding a new subsection to read:

(d) For purposes of (a) of this section, the highest statutory and regulatory requirements are

(1) any federal technology-based effluent limitation identified in 40 C.F.R. 122.29 and 125.3, revised as of July 1, 2017 and adopted by reference;

(2) any minimum treatment standards identified in 18 AAC 72.050;

(3) any treatment requirement imposed under another state law that is more stringent than a requirement of this chapter; and

(4) any water quality-based effluent limitations established in accordance with 33 U.S.C. 1311(b)(1)(C) (Clean Water Act, sec. 301(b)(1)(C)). (Eff. 11/1/97, Register 143; am 4/8/2012, Register 202; am 4/6/2018, Register 226)

Authority:	AS 46.03.010	AS 46.03.070	AS 46.03.110
	AS 46.03.020	AS 46.03.080	AS 46.03.710
	AS 46.03.050	AS 46.03.100	[AS 46.03.720]

18 AAC 70 is amended by adding a new section to read:

18 AAC 70.016. Antidegradation implementation methods for discharges authorized

under the federal Clean Water Act. (a) **General requirements for antidegradation analyses.** The department's antidegradation policy under 18 AAC 70.015 applies to all waters of this state. The provisions of 18 AAC 70.015(a)(1) - (3) identify three tiers of water quality and water quality protection, Tiers 1, 2, and 3 respectively. In implementing the antidegradation policy for a water of the United States within this state, the following provisions apply:

(1) the department will make an antidegradation analysis and findings for discharges subject to authorization by the department under

(A) 18 AAC 83 (Alaska Pollutant Discharge Elimination System (APDES) Program); and

(B) 33 U.S.C. 1341 (Clean Water Act, sec. 401) water quality certifications; for 33 U.S.C. 1341 (Clean Water Act, sec. 401) water quality certifications of 33 U.S.C. 1344 (Clean Water Act, sec. 404) permits, the department may determine upon review whether an evaluation and findings of no significant degradation under 33 U.S.C. 1344 and under 40 C.F.R. Part 230, revised as of July 1, 2017 and adopted by reference, 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; in the antidegradation findings the department will consider where the fill would be placed and impacts to the receiving water from the fill activity; only temporary and limited degradation may be authorized in Tier 3 water, in accordance with (d)(4)(A) of this section;

(2) the department will not make an antidegradation analysis and findings for

(A) activities proposed for the express purpose of watershed protection or

restoration if the applicant supplies information and the department finds that the antidegradation analysis is not required because the lowering of water quality would be temporary and limited and is necessary to secure long-term water quality improvement, including projects for the protection or attainment of existing and designated uses in water where the department determines that those uses have been impaired or threatened due to the loss or diminishment of the water's natural characteristics; projects under this subparagraph shall implement all department-required practicable best management practices;

(B) emergency response actions under the direction of a federal or state on-scene coordinator, designated under 33 U.S.C. 1321, AS 46.04.020, or AS 46.09.020, if any lowering of water quality is temporary and limited and existing uses are maintained and protected; the responsible party whose actions or lack of action necessitated an emergency response action shall address any lowering of water quality that is not temporary and limited; existing law may be used to address restoration, rehabilitation, replacement, or acquisition of the equivalent for the affected natural resources, including long-term water quality impacts;

(C) 33 U.S.C. 1341 (Clean Water Act, sec. 401) certifications where the department has waived certification under 33 U.S.C. 1341(a); this subparagraph does not alter federal agencies' existing obligations under 40 C.F.R. 230.10(b)(1) to issue permits in compliance with state water quality standards, including antidegradation provisions; or

(D) amendments to this chapter, including amendments to the water use classes and subclasses, amendments to water quality criteria, adoption of site-specific

criteria, and the reclassification of waters;

(3) 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; analysis and department findings for Tier 3 water are on a basis of a designated water;

(4) an antidegradation analysis for a discharge under 18 AAC 83 (Alaska Pollutant Discharge Elimination System (APDES) Program) specified in (1)(A) of this subsection is subject to the public participation and intergovernmental review procedures under 18 AAC 83.120; an antidegradation analysis for a 33 U.S.C. 1341 (Clean Water Act, sec. 401) certification of a discharge under (1)(B) of this subsection is subject to the public participation and intergovernmental review procedures under 18 AAC 70.015(c);

(5) the applicant shall submit sufficient information to complete an antidegradation analysis under (b), (c), and (d) of this section on department-approved forms; the department will review and determine whether the information is sufficient; information required for department review must include

(A) identification of the receiving water, including the geographic extent potentially affected by the proposed discharge;

(B) a description of the project purpose;

(C) the type of facility, activity, and discharge;

(D) the discharge rate;

(E) parameters of concern in the discharge and the respective concentrations, persistence, and potential impacts to the receiving water;

(F) data on parameters that may alter the effects of the discharge to the receiving water;

(G) which tier should apply for each parameter of concern, if applicable; and

(H) any additional information as requested by the department;

(6) if determined necessary by the department the following baseline water quality provisions apply:

(A) the applicant shall submit sufficient and credible baseline water quality information for the receiving water in order for the department to determine the applicable tier protection level and the assimilative capacity of the receiving water, including the capacity to accommodate future development activities or multiple discharges;

(B) the level of baseline water quality data necessary for department review must be relative to the size of the project, characteristics of the proposed discharge, and the characteristics of the receiving water including special management or habitat designations, as applicable; and

(C) 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

(i) the sensitivity of the receiving water to degradation of existing or designated uses;

(ii) the types of parameters of concern in the proposed discharge;

(iii) the available dilution or assimilative capacity of the receiving water for the proposed discharge, including the impacts of authorized discharges;

(iv) representativeness of any surrogate water information proposed for baseline water quality relative to the receiving water under review, including geographic, hydrologic, geologic, water use, and water quality characteristics;

(v) the validity of any baseline concentrations assumed to be below detection levels;

(vi) the quantity, date of analysis, analytical method, detection level, and spatial and temporal scope of any submitted data; and

(vii) whether the data considers applicable seasonal or natural variability.

(b) **Tier 1 analysis of existing use protection.** Tier 1 applies to all water of the United States within this state and receives the protection under 18 AAC 70.015(a)(1). The following apply for a Tier 1 antidegradation analysis:

(1) the department will conduct a Tier 1 antidegradation analysis for all discharges specified in (a)(1) of this section;

(2) for (a)(1)(B) of this section, the finding of no significant degradation under 33 U.S.C. 1344 (Clean Water Act, sec. 404) and under 40 C.F.R. Part 230, revised as of July 1, 2017 and adopted by reference, fulfills Tier 1 antidegradation finding requirements for dredge or fill material;

(3) the applicant shall submit sufficient information required under (a)(5) of this

section and if requested under (a)(6) of this section in support of the application;

(4) Tier 1 is the only antidegradation protection level for a parameter if the receiving water is not also designated a Tier 3 water and if the applicable water quality criteria are exceeded for that parameter as demonstrated by one or more of the following:

(A) the receiving water is listed under 33 U.S.C. 1313(d) (Clean Water Act, sec. 303(d)) for that parameter;

(B) the department determines a Tier 1 protection level for that parameter based on information in the most recent state report issued under 33 U.S.C. 1315(b) (Clean Water Act, sec. 305(b));

(C) the department has previously issued a Tier 1 finding for that parameter in the water and is re-evaluating that finding; the water remains Tier 1 for the applicable parameter unless sufficient and credible information is provided for the department to review and determine that the protection level for the parameter should be revised;

(5) the department will not authorize a discharge to a Tier 1 water unless the department finds that

(A) existing uses and the water quality necessary for protection of existing uses have been identified based on available evidence, including water quality and use related data, information submitted by the applicant, and water quality and use related data and information received during public comment;

(B) existing uses will be maintained and protected; and

(C) the discharge will not cause water quality to be lowered further where

the department finds that the parameter already exceeds applicable criteria in 18 AAC 70.020(b), 18 AAC 70.030, or 18 AAC 70.236(b).

(c) **Tier 2 analysis for the lowering or potential lowering of water quality not exceeding applicable criteria.** Tier 2 applies when the water quality for a parameter in a water of the United States within this state does not exceed the applicable criteria under 18 AAC 70.020(b), 18 AAC 70.030, or 18 AAC 70.236(b) and receives the protection under 18 AAC 70.015(a)(2). The following apply for a Tier 2 antidegradation analysis:

(1) Tier 2 is presumed for all water as the default protection level for all parameters unless

(A) the water is listed under 33 U.S.C. 1313(d) (Clean Water Act, sec. 303(d)) for the applicable parameter;

(B) the department determines a Tier 1 protection level for the applicable parameter based on information in the most recent state report issued under 33 U.S.C. 1315(b) (Clean Water Act, sec. 305(b));

(C) available evidence is provided for department review to determine if a parameter is only subject to Tier 1 analysis and the department finds that

(i) the applicable parameter level persistently exceeds water quality criteria in 18 AAC 70.020(b), 18 AAC 70.030, or 18 AAC 70.236(b); and

(ii) the failure to have water quality that does not exceed applicable criteria is not the result of a permit violation for discharge to the receiving water, unlawful discharge from a nonpoint source, or a spill; or

(D) the water is designated Tier 3;

(2) when evaluating development of a license or general or individual permit for a discharge specified in (a)(1) of this section, and if that discharge will lower or have the potential to lower water quality of Tier 2 water, the department will conduct a Tier 2 antidegradation analysis and make findings for

(A) a proposed new or expanded discharge; for a proposed expanded discharge under a reissued license or general or individual permit, a Tier 2 antidegradation analysis will only be conducted for the portion of the discharge that represents an increase from the existing, authorized discharge;

(B) an existing discharge that did not previously require authorization, if the applicant is proposing an expanded discharge;

(C) an existing discharge where a license or permit was previously required but had not been issued;

(D) a previously expired license or permit that had not been administratively extended; or

(E) a previously terminated discharge, if the applicant is seeking reauthorization;

(3) the department will not conduct a Tier 2 antidegradation analysis for

(A) reissuance of a license or general or individual permit for a discharge that the applicant is not proposing to expand;

(B) issuance of a license or general or individual permit for an existing discharge that did not previously require authorization and that the applicant is not proposing to expand; or

(C) reissuance of an administratively extended license or permit, if the applicant is not proposing an expanded discharge;

(4) for a discharge specified in (a)(1) of this section, the applicant shall submit sufficient information in support of the application; the amount of information and level of detail necessary must be relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of and potential risk to the receiving water; information required for department review includes

(A) information required under (a)(5) of this section;

(B) any information requested under (a)(6) of this section;

(C) 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;

(D) identification of receiving water quality and accompanying environmental impacts on the receiving water for each of the practicable alternatives in (C) of this paragraph;

(E) evaluation of the cost for each of the practicable alternatives in (C) of this paragraph, relative to the degree of water quality degradation;

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

(G) an analysis that supports the accommodation of important social or

economic development in the area where the receiving water is located, for the proposed discharge that will lower or has the potential to lower water quality;

(5) to demonstrate under (4)(G) of this subsection the accommodation of important social or economic development, the applicant shall complete either

(A) a social importance analysis identifying each affected community in the area where the receiving water for the proposed discharge is located and demonstrating that a lowering of water quality accommodates important social development under 18 AAC 70.015(a)(2)(A), including in one or more of the following areas:

(i) community services provided;

(ii) public health or safety improvements;

(iii) infrastructure improvements;

(iv) education and training;

(v) cultural amenities;

(vi) recreational opportunities; or

(B) an economic importance analysis identifying each affected community in the area where the receiving water for the proposed discharge is located and demonstrating that a lowering of water quality accommodates important economic development under 18 AAC 70.015(a)(2)(A), including in one or more of the following areas:

(i) employment, job availability, and salary impacts;

(ii) tax base impacts;

(iii) expanded leases and royalties;

(iv) commercial activities;

(v) access to resources;

(vi) access to a transportation network;

(6) the department may require the analysis of specific alternatives or request additional information that the department determines necessary to assess the submitted alternatives analysis, social importance analysis, or economic importance analysis;

(7) if, after review of available evidence, the department finds that the proposed discharge will lower water quality in the receiving water, the department will not authorize a discharge unless the department finds that

(A) the reduction of water quality meets the applicable criteria of 18 AAC 70.020(b), 18 AAC 70.030, and 18 AAC 70.236(b), unless allowed under 18 AAC 70.200, 18 AAC 70.210, or 18 AAC 70.240;

(B) each requirement under (b)(5) of this section for a discharge to a Tier 1 water is met;

(C) point source and state-regulated nonpoint source discharges to the receiving water will meet requirements under 18 AAC 70.015(a)(2)(D); to make this finding the department will

(i) identify point sources and state-regulated nonpoint sources that discharge to, or otherwise impact, the receiving water;

(ii) consider whether there are outstanding noncompliance issues with point source permits or required state-regulated nonpoint source best

management practices, consider whether receiving water quality has improved or degraded over time, and, if necessary and appropriate, take actions that will achieve the requirements of 18 AAC 70.015(a)(2)(D); and

(iii) coordinate with other state or federal agencies as necessary to comply with (i) and (ii) of this subparagraph;

(D) the alternatives analysis provided under (4)(C) - (F) of this subsection demonstrates that

(i) a lowering of water quality under 18 AAC 70.015(a)(2)(A) is necessary; when one or more practicable alternatives that would prevent or lessen the degradation associated with the proposed discharge are identified, the department will select one of the alternatives for implementation; and

(ii) the 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;

(E) except if not required under (4)(F) of this subsection, the social or economic importance analysis provided under (4)(G) and (5) of this subsection demonstrates that a lowering of water quality accommodates important social or economic development under 18 AAC 70.015(a)(2)(A); and

(F) 18 AAC 70.015 and this section have been applied consistent with 33 U.S.C. 1326 (Clean Water Act, sec. 316) with regard to potential thermal discharge impairments.

(d) **Tier 3 analysis for the protection of water quality in outstanding national**

resource water. Tier 3 applies to a designated water, and upon designation receives the protection under 18 AAC 70.015(a)(3). The following apply for a Tier 3 antidegradation analysis:

(1) for all discharges specified in (a)(1) of this section to a Tier 3 or tributary to a Tier 3 water that will degrade or have the potential to degrade the existing water quality of a Tier 3 water, the department will conduct a Tier 3 antidegradation analysis and make findings when reviewing

(A) a proposed new or expanded discharge;

(B) an existing discharge that did not previously require authorization, if the applicant is proposing an expanded discharge;

(C) an existing discharge where a license or permit was previously required but had not been issued;

(D) a discharge with a previously expired license or permit that had not been administratively extended; or

(E) a previously terminated discharge, if the applicant is seeking reauthorization;

(2) the applicant shall submit sufficient and credible information in support of the application; information required for department review must include

(A) information required under (a)(5) of this section;

(B) applicable baseline water quality information requested under (a)(6) of this section for the Tier 3 water where the proposed discharge is to a Tier 3 water, and for the Tier 3 water and the receiving water where the proposed discharge is to a water

tributary to the Tier 3 water and will degrade or potentially degrade the existing quality of a Tier 3 water;

(C) information on the quality of the existing or proposed expanded discharge to the Tier 3 water; and

(D) information on the effect of the proposed new or expanded discharge to the water quality of the Tier 3 water;

(3) the department will not authorize a new zone of deposit under 18 AAC 70.210 or new mixing zone under 18 AAC 70.240 in a designated Tier 3 water;

(4) the department will not authorize a discharge to a Tier 3 water or tributary to a Tier 3 water unless the department finds that

(A) the lowering of water quality is temporary and limited, including any lowering of water quality due to dredging or fill placement authorized under a 33 U.S.C 1344 (Clean Water Act, sec. 404) permit;

(B) no lowering of the Tier 3 water quality will occur and existing uses and Tier 3 water quality will be maintained and protected;

(C) a discharge to a tributary to a Tier 3 water meets all applicable requirements under (b) and (c) of this section;

(D) existing state-regulated nonpoint sources to the Tier 3 water are using all state-required practicable best management practices; the department will consider available information that documents whether state-regulated nonpoint sources to the Tier 3 water are using best management practices to ensure that no lowering of water quality will occur and existing uses will be maintained and protected; and

(E) there is no proposal for a new zone of deposit under 18 AAC 70.210 or new mixing zone under 18 AAC 70.240 in a Tier 3 water.

(e) **General permit antidegradation analysis.** The department will apply the antidegradation policy under 18 AAC 70.015 and implementation methods set out in this section for each new or reissued general permit under 18 AAC 83 (Alaska Pollutant Discharge Elimination System (APDES) Program) at the time a general permit is issued. At the time a general permit is issued, the department

(1) will obtain available evidence, as necessary, to support tier-specific requirements and findings under this section;

(2) will make findings on how the antidegradation policy under 18 AAC 70.015 and the antidegradation implementation requirements under this section are met; and

(3) may request information from potential applicants who may discharge under the general permit in order to conduct the antidegradation analysis.

(f) **Temporary and limited degradation of water quality.** A temporary and limited degradation of water quality is limited to the shortest possible time, generally weeks or months, and is limited in impact. An activity with a temporary and limited effect may not degrade water quality permanently. The department will allow the activity only after all practicable means are implemented to minimize the degradation. In determining if proposed degradation of water quality would be temporary and limited, the department will consider the following factors:

(1) the length of time during which water quality will be lowered; activities under this paragraph may include temporary activities that require more than one construction season to complete;

(2) the percent change in ambient conditions;

(3) parameters and characteristics, including the potential for cumulative effects;

(4) the likelihood for long-term water quality benefits to the water body after the short-term degradation;

(5) the degree to which achieving the applicable water quality standards or criteria during the proposed activity will be at risk; and

(6) the potential for any residual long term effects on existing uses. (Eff. 4/6/2018, Register 226)

Authority: AS 46.03.010 AS 46.03.070 AS 46.03.110
AS 46.03.020 AS 46.03.080 AS 46.03.710
AS 46.03.050 AS 46.03.100

18 AAC 70.990 is amended by adding new paragraphs to read:

(74) "assimilative capacity" means

(A) the increment of water quality that is better than the applicable criteria; or

(B) 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;

(75) "new or expanded," with respect to discharges, means discharges that are regulated for the first time or discharges that are expanded such that they could result in an increase in permitted parameter load or concentration or other changes in discharge

characteristics that could lower water quality or have other adverse environmental impacts;

(76) "parameter" means any chemical, physical, or biological characteristic of water, including a pollutant as defined under 18 AAC 83.990;

(77) "receiving water" means the water, or segment of the water, to which a discharge occurs or is proposed to occur;

(78) "sufficient and credible" means scientifically valid chemical, physical, or biological data that

(A) is of adequate quantity and quality; and

(B) is collected under a sampling and analysis plan, including quality assurance and quality control procedures, and addressing spatial and temporal coverage, as applicable. (Eff. 11/1/97, Register 143; am 4/29/99, Register 150; am 6/22/2003, Register 166; am 3/23/2006, Register 177; am 6/13/2006, Register 178; am 2/5/2017, Register 221; am 4/6/2018, Register 226)

Authority:	AS 46.03.010	AS 46.03.070	AS 46.03.110
	AS 46.03.020	AS 46.03.080	AS 46.03.710
	AS 46.03.050	AS 46.03.100	AS 46.03.720