

ALASKA POLLUTANT DISCHARGE ELIMINATION SYSTEM (APDES)

APDES Guidance for Local and Tribal Governments



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2.0 Introduction

The mission of the Alaska Department of Environmental Conservation (DEC) is to protect the environment and human health. Protecting the quality of Alaska's waters is a key part of that mission. At the core of DEC's efforts to protect water quality are the State water quality standard regulations (18 AAC 70). Those regulations establish standards of quality based on protecting the State's waters for designated beneficial uses, such as supporting aquatic life. Any permit authorizing a discharge to Alaska waters must result in compliance with the State water quality standards. The duty to seek and comply with an Alaska Pollutant Discharge Elimination System (APDES) permit is outlined in 18 AAC 83.

An intended and expected result of the State of Alaska assuming authority for the National Pollutant Discharge Elimination System (NPDES) permitting program is the development of sound permitting decisions based on a complete understanding of local conditions. DEC will seek input from the local residents, Tribes, governments, regional citizens' advisory councils (RCACs), and other organizations to inform its permit decisions. It is a goal inherent in DEC's efforts that the APDES Program enhances public access to permit information and process in order to produce better permits and better compliance with permit terms and conditions.

A process for local and tribal government participation in APDES permitting (either individual or general permits) is introduced in the DEC *Public Participation in the APDES Permitting Process* (Public Participation guide) document, finalized on October 27, 2008. The public participation guide describes the basic and supplementary public participation process, and references specific State coordination efforts and consultation opportunities for local and tribal governments.

The public participation guide states DEC will coordinate with local and federally-recognized tribal governments to conduct early notification of APDES actions. It recognizes the need to provide notice to local and tribal governments as early as reasonably practicable by the method deemed most effective and efficient. The public participation guide states that DEC will make reasonable efforts to inform and involve local and federally-recognized tribal governments potentially affected by a proposed activity under the APDES Program, and seek to learn the extent to which local and tribal governments are interested in being apprised of the permit process and preferences for how to best work with them.

In this subsequent document, *APDES Guidance for Local and Tribal Governments*, DEC details procedures utilized to identify, inform, and involve local and tribal governments that may be affected by a potential APDES permitting action. This guidance also details the permitting process, opportunities for involvement, and supplementation communication tools available to local and tribal governments potentially affected by an ADPES permitting action.

3.0 Permit Issuance Plan

DEC will prepare a Permit Issuance Plan (PIP) that identifies the wastewater permits the DEC proposes to issue during the upcoming two to three years. The PIP will be updated at least annually. The PIP will be posted on the DEC's web page. This process will allow local and tribal government, RCACs, and the public advance notice of a permit that is proposed to be issued or reissued in an area of their concern and the opportunity to contact DEC to discuss the project or schedule a meeting.

DEC will post a map depicting current PIP permits by major geographic regions of Alaska on the web page to assist local and tribal governments in identifying planned wastewater permitting actions in their area. In addition, DEC will annually mail a PIP to all local and federally-recognized tribal governments. The PIP will describe the potential permit receiving waters and identify a DEC point of contact(s). DEC will conduct an annual meeting, presentation, or teleconference to discuss proposed permitting activities listed in the PIP, potential discharge characteristics, geographic location or scope for proposed permits, the APDES process, and opportunities for involvement. Local and tribal governments are encouraged to review the PIP and contact DEC for more information about specific permits, as well as to identify themselves as affected by a proposed ADPES permitting activity.

4.0 Basic Local and Tribal Government Participation Process

The basic process for local and tribal government participation applies to all APDES permitting activities and begins once a permit writer determines that a permit application is technically complete. At that point, the permit writer requests the involvement of the APDES Local and Tribal Government Coordinator. Each step in the basic local and tribal government participation process is described below.

4.1 Affected Local and Tribal Government Determination

DEC undergoes reasonable and adequate efforts to identify local and tribal governments that have the potential to be affected by an APDES permitting decision and provides an opportunity to meaningfully participate if governments believe the discharge from the permitted facility or activity will affect them. The term "affected local and tribal government" is not defined in federal regulations, 18 AAC 83, or the APDES Program Description. In guidelines or protocols for other federal or state tribal relationships, a tribe [or local government] is "affected" if:

- there is a real possibility that cultural and natural resources of importance to the tribe [or local government] may be affected by an action;
- actions are proposed that will significantly or uniquely affect the local or tribal government's access to or use of fish, wildlife, or habitat; or
- any action is proposed that will have a substantial, direct effect on tribes [or local government].

In general, if a proposed facility or activity to be permitted under the APDES Program may have a direct effect on a local or tribal government or on a resource or area used by a local or tribal government, the local or tribal government should be considered affected for the purposes of

18 AAC 83. DEC conducts an internal determination of potentially affected local and tribal governments for the purposes of providing opportunities to participate in the APDES permitting process.

When a permit writer begins work on a permit, they request a potentially ‘affected local and tribal government determination’ and an ‘early local and tribal government notification’ from the APDES Local and Tribal Government Coordinator.

The APDES Local and Tribal Government Coordinator uses information provided by the permit writer, application, past permits, reports, plans, studies, and/or other resources to conduct a determination of local and tribal governments potentially affected by an APDES permitting action. When identifying potentially affected local and tribal governments, DEC:

- Identifies the known and potential effects of the proposed discharge
- Locates the local and tribal governments near the proposed discharge or with the potential to be affected by or interested in the discharge
- Considers specific issues and resources such as subsistence foods and culturally important sites that may be located at a distance from the local or tribal government
- Develops a list of potentially affected tribes and their respective contact information
- Documents the resources consulted and issues considered
- Completes an Affected Local and Tribal Government Determination Worksheet

A potentially affected local or tribal government can confirm that they are affected and request that DEC coordinate with the environmental officer, planner, or other authority designated by the local or tribal government. The local and tribal government should provide the contact information for the main contact for the permitting action. A local and tribal government can also self-identify as affected by contacting DEC and would then be considered affected for a specific APDES permitting action.

4.2 Early Local and Tribal Government Notification

DEC seeks to be proactive in the APDES permitting process and recognizes that, in most cases, the most effective time for public outreach is early in the permitting process -- before or during the process of drafting a permit. Engaging others early on improves the odds for identifying and addressing issues and formulating solutions that may or may not need to be accounted for in a permit and the agency’s decision on the permit. In particular, early collection of traditional knowledge, subsistence information, and other information important to residents and local or tribal governments may allow DEC to address them during permit drafting.

DEC will make reasonable efforts to inform and seek participation from local and federally-recognized tribal governments that may be affected by a proposed activity under the APDES Program. This will be accomplished by providing notice of a forthcoming permit proceeding early in the permit process. Early notice is typically provided by mail and can also be provided by e-mail, telephone, or a combination thereof depending upon what is requested and/or deemed most effective and efficient.

The APDES Local and Tribal Government Coordinator writes early notification letters, with assistance of the specific permit writer, in a manner conducive to clear communication, with minimal use of jargon and acronyms. Maps and technical data are included where appropriate and available. DEC recognizes, in particular, the value of local or tribal governments using satellite imagery and/or topographical maps to determine if a wastewater discharge has the potential to affect them, and therefore includes such enclosures where practicable.

The notifications describe specific information provided by the permit writer and application such as permit name and number, description of the discharge potentially to be permitted, discharge characteristics, geographic location of the facility and/or operator, opportunities for participation, and a designated staff contact(s). As part of the notification step, DEC will seek to learn the extent to which local and tribal government officials are interested in being apprised of the permit process and preferences for how best to work with them, including whether additional contact is desired. If necessary and requested by the local or tribal government, DEC will use a translator or facilitator to assist with this effort.

Telephone calls and teleconferences may also be used to notify tribes of activities that may affect them and to gather local input or concerns. Telephone calls will be documented in a telephone log and included in the administrative record. Time sensitive notifications will be made by the most efficient and effective means possible including email, fax, and mail. DEC will consider geographic distances and other unique circumstances, like subsistence activities and cultural/community activities when scheduling public involvement opportunities.

4.3 Consideration of Local and Traditional Knowledge or Concerns

Permits issued under the APDES program require that DEC solicit and consider local and traditional knowledge. Local and traditional knowledge is solicited during the early local and tribal government notification process; information can be provided for consideration by whatever means most efficient for the local or tribal government. DEC facilitates opportunities, as needed, to understand how an APDES permit may affect a local or tribal government. DEC may schedule a communication or coordination effort if the local or tribal government requests more information to understand concerns or information submitted by local or tribal governments or to discuss potential resolutions or alternatives to a permitting action. DEC will consider the information provided and may coordinate with local and tribal governments to identify concerns and potential alternatives, address potential issues early in the permitting process, and incorporate local and traditional knowledge or concerns into permit a when possible and appropriate.

Information provided will be documented and will become part of the administrative record. DEC will respond in writing to local and tribal governments that submit local and traditional knowledge or concerns for consideration during permit development. The response will be facilitated by the APDES Local and Tribal Government Coordinator, with the assistance of the specific permit writer, and may be provided in a template response to early comments, direct letter, or incorporated in the response to comments document within the final permit documents. If necessary and requested by the local or tribal government, DEC will use a translator or facilitator to assist with this effort.

4.4 Preliminary Draft Permit

Prior to formal public notice of a draft APDES permit, regulations require that DEC post a preliminary draft permit on its website in conjunction with the permit applicant's 10-day review of the permit, unless the review period is waived in part or in whole by the applicant.

18 AAC 83.115(f). While this review is primarily intended for the applicant to review and discuss the preliminary draft permit with DEC, it also gives local and tribal governments an early opportunity to review the developing draft permit.

The preliminary draft permit will also be sent via an electronic list serve and will be sent to local and tribal governments via electronic mail or fax upon request. Due to the short review period and time sensitive nature, the preliminary draft permit is not typically sent via mail.

4.5 Draft Permit

Notice that a draft permit is available for public review and comment is provided by a combination of mailings to agencies, local governments mail lists, newspaper advertisements, online public notice web posting, and other manners constituting legal notice. The public notice initiates a minimum 30-day public review and comment period. 18 AAC 83.120(b).

The public notice and draft permit must be mailed to, among others, certain listed State and federal agencies and RCACs as well as to any affected Indian Tribe. 18 AAC 83.120(c)(1)(C) and 18 AAC 83.120(g). Individuals who specifically request to be kept on a list of persons to receive information on the permit must also be mailed a copy of the notice. 18 AAC 83.120(c)(1)(F). Any unit of local government having jurisdiction over the area within which the facility or proposed facility is to be located must also be mailed a copy of the public notice. 18 AAC 83.120(c)(1)(G). The permit application and a fact sheet describing the terms of the permit are also made available during the public notice period. DEC may schedule one or more public hearings on the draft permit if there is significant public interest, to describe the permitting decision, or for other good reason. 18 AAC 83.120(1).

DEC will use the local or regional paper nearest to the potentially affected local or tribal government to provide notice of a draft permit to the extent practicable.

A potentially affected local or tribal government may decline to receive the public notice if they notify DEC that they are not affected and do not wish to receive any further correspondence about a specific permit during the local and tribal government review period.

Under State Administrative Order 129, the State complies with the Americans with Disability Act (42 U.S.C. 12101 – 12213). All public notices associated with permits include a notice that a person with a disability can request and receive special accommodation to participate in the permit process.

4.6 Proposed Final Permit

After the close of the minimum 30-day public comment period, DEC considers information provided by the local and tribal governments, prepares a response to comments document summarizing the public comments received on the draft permit, and may make changes to the draft permit. The resulting proposed final permit is made available to the applicant for a five-day

review, unless the review period is waived in part or in whole by the applicant. 18 AAC 83.120(m). At the same time, DEC posts the proposed final permit and supporting documentation on the DEC web page. Additionally, the proposed final permit will also be sent via an electronic list serve.

DEC will provide the proposed final permit and supporting documentation to local and tribal governments via electronic mail or fax upon request. Due to the short review period and time sensitive nature, the proposed final permit is not typically sent via mail.

4.7 Final Permit

Following the close of the five-day review of the proposed final permit, DEC will prepare a final permit for issuance. The final permit, response to comments, revised fact sheet, and associated permit documents will be posted on the DEC web page.

The final permit documents, including response to comments, will be sent to any commenting local and tribal governments, or to other individuals or organizations upon request.

5.0 Supplemental Processes

DEC has broad authority to communicate with others in the course of conducting agency business.¹ As part of its APDES efforts, the agency is committed to exercising this authority to accomplish its objectives of better permits and parity in water quality protection across the State. This section describes the situations where the agency will supplement its public participation efforts and the tools available for that purpose.

Additional public outreach is typically most appropriate for proposed projects that raise significant local concerns or which are complex or controversial. Some circumstances that may warrant additional public outreach on permitting matters include:

- large, complex projects with multiple permitted discharges;
- projects that are locally or regionally important or controversial;
- projects that raise recreational or subsistence resource and use concerns;
- projects that are proximal to sensitive or protected resources or areas; and
- projects that may involve the use of new or complex technologies.

In deciding whether to supplement permit communications, the primary consideration will be the degree of interest expressed by the public, Tribal organizations, non-governmental organizations, local and regional governments, and RCACs.

¹ For example, Alaska Statute 46.03.020 provides that DEC may, in its discretion, “(3) consult with and cooperate with (A) officials and representatives of any nonprofit corporation or organization in the state; (B) persons, organizations, and groups, public and private, using, served by, interested in, or concerned with the environment of the state . . .” Further, DEC may “undertake studies, inquiries, surveys, or analyses it may consider essential to the accomplishment of the purposes of the department; these activities may be carried out by the personnel of the department or in cooperation with public or private agencies, including educational, civic, and research organizations, colleges, universities, institutes, and foundations.” AS 46.03.020(5)

Local and tribal governments may request the use of supplemental permit communications by whichever means is the most convenient e.g., email, telephone, letter, and DEC will consider the degree of interest and respond to the request.

DEC will also consider the views of the applicant and other state and federal agencies. In all its communications, DEC will strive to communicate factually and clearly. By planning ahead, DEC will also strive to schedule communication processes so that they do not adversely affect permit development schedules. At the same time, it will attempt to schedule proposed actions and opportunities for public involvement to reasonably accommodate seasonal patterns in Alaska's lifestyles and livelihoods.

5.1 Supplemental Communication Tools

DEC has at its disposal several tools that they may use individually or in combination to supplement required permit communications, at the request of local and tribal governments.

DEC staff will strive to identify and employ the most effective ways to notify interested individuals and parties of permit actions and other matters. Notification will typically consist of some combination of: individual notification via mailings, e-mail or telephone calls; advertisements in local or regional publications; and public service announcements. In rural settings, DEC works with local and tribal governments through an early notification process and encourages residents to spread the word by whatever means is typical for the community, such as bulletin board postings or local announcements.

For larger or more controversial projects, DEC will compile lists of interested individuals and parties. The agency's experience suggests that maintaining lists of e-mail addresses for interested parties and organizations and communicating via e-mail is an effective and efficient means of keeping the public informed. DEC will also use the internet to make information available to the public. Major permits under development may warrant their own web page with links from other DEC or agency web pages.

As part of notifying interested persons and organizations, DEC will seek to distribute or make available pertinent information about permits and projects. Documents, data, and developments that may be of interest may be forwarded directly to interested parties or availability may be announced to interested parties with instructions for obtaining the information, such as downloading from a DEC web page. Supplemental information distributed or made available to interested parties may include materials such as special analyses and reports on particular issues or topics; plans, data, analyses, and reports generated by baseline monitoring programs; and project and permitting schedules.

For large projects where permit development occurs under a Department of Natural Resources Large Project Team format, DEC will strive to integrate effective notification and information efforts into an overall coordinated effort.

The Public Participation guide describes additional outreach the agency may wish to undertake with interested persons, including local and tribal governments, with respect to proposed APDES

applications and permits that may raise significant local concerns or are complex or controversial.

In some cases, supplemental communications may rely on invoking a single supplemental activity, such as extending review periods or holding workshops during the draft permit public notice period. In other cases, DEC may combine a number of supplemental efforts and regulatory requirements.

DEC may appoint “project liaisons” or “navigators” to help in achieving agency goals of early communication with local residents and organizations; hold pre- or post-application public workshops before a permit application is submitted; hold public hearings during the public notice period on draft permits; extend public notice periods; develop and use a permit communications plan; or provide supplemental notice by any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or use of any other form or media to elicit public participation.

Supplemental communication tools are described in more detail in the Public Participation guide.

5.2 Training, Guidance, and Outreach

DEC will provide training, guidance, and outreach opportunities to inform local and tribal governments about the APDES permitting process and resources and opportunities for involvement. Training, guidance, and outreach can occur as a variety of efforts including: presenting at conferences or meetings; hosting teleconferences or developing publications materials, guidance documents, or electronic tutorial material.

A key aspect of DEC’s local and tribal government outreach efforts will be a continuing improvement process based on soliciting feedback on agency efforts, using that feedback to assess and efficacy of measures used, and adapting agency approaches based on local and tribal governments’ views of what works best. DEC will develop and employ a formal process for soliciting and capturing feedback during and after key permitting efforts. DEC will consider lessons learned and recommendations for improving future efforts.

Additionally, DEC will provide training on cultural awareness and effective communication to staff involved in APDES permitting actions.

5.3 Program Effectiveness and Continuity

DEC recognizes the importance of building relationships with local and tribal governments to enhance program effectiveness and continuity. DEC encourages local and tribal governments to contact DEC if changes are made to contact information and will work to maintain accurate mailing lists. DEC mitigates challenges associated with staff turnover, and encourages the consideration of developing procedures to share information when turnover does occur.

6.0 Other Permit Actions: Modify, Revoke, and Reissue, or Terminate

In addition to issuing APDES permits, DEC may take other permit actions to modify, revoke and reissue, or terminate permits. These actions may also include a public participation process. The Public Participation guide describes processes the agency may wish to undertake with interested persons, including local and tribal governments and RCACs with respect to other permit actions.

7.0 Appeals

Local and tribal governments also have access to permit appeals processes. Final agency permitting decisions can be appealed by the permittee or members of the public, including local and local and tribal governments, and RCACs. Members of the public may request informal review by the Director of the Division of Water as set out at 18 AAC 15.185 or file a request with the Commissioner for a formal adjudicatory hearing under 18 AAC 15.200. A person requesting either informal review or a formal hearing must show that he is “directly and adversely affected” by DEC’s decision in order to have standing to challenge the decision. Ultimately, a party who remains dissatisfied with the DEC’s decision after informal and/or formal agency review may seek judicial review of final agency permitting decisions through the court system.