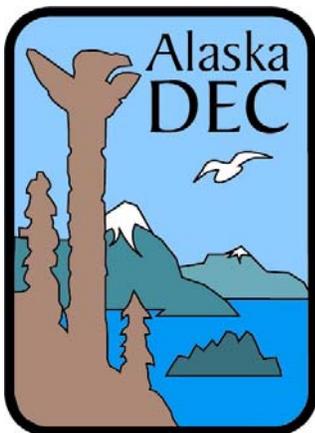


# **ALASKA POLLUTANT DISCHARGE ELIMINATION SYSTEM**

## **Public Participation in the APDES Permitting Process**



Final  
October 27, 2008

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## 1.0 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. They also include provisions for applying the standards. Any permit authorizing a discharge to Alaska waters must result in compliance with the State water quality standards regardless of whether the U.S. Environmental Protection Agency (EPA) or DEC is issuing the permit.

While the water quality standards establish the limits of allowable water quality change, permit actions require decisions about how the standards are applied. For example, the implementing provisions of the water quality standard regulations require decisions about the extent to which water quality can be degraded from high quality natural conditions under the State antidegradation policy, whether to provide for mixing of an effluent with receiving waters, and whether standards should be modified to reflect conditions specific to a site. An intended and expected result of the State of Alaska assuming primacy for the National Pollutant Discharge Elimination System (NPDES) permitting program is sound permitting decisions based on a complete understanding of local conditions.

***Enhance access.*** As the State's environmental permitting authority, DEC intends to rely on 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 Alaska Pollutant Discharge Elimination System (APDES) Program enhance public access to permit information and process in order to produce better permits and better compliance with permit terms and conditions.

***Equal protection.*** An equally important objective of the State APDES permit development and administration process is to provide equal access and protections across the State despite geographic, cultural, and socioeconomic characteristics of affected individuals or populations. The APDES Program will strive to provide an equal voice despite differences in the ability of persons to engage agency staff and decision makers, and difficulties associated with communications over distances and across cultures. Translators and facilitators with expertise in cross-cultural communications may be used where needed to overcome communication challenges.

***Efficiency.*** At the same time, the APDES permit issuance process must be efficient in how it informs the public, and in how it collects, considers and responds to input. An efficient permit issuance system is one that is capable of clear and open communication with interested public members and organizations about a project and its permit(s) while maintaining a schedule for timely permit development and issuance. The process also should engage the interested public in a thoughtful and effective manner so as to be accessible and informative, but not a burden. An anticipated byproduct of these efforts is a high degree of public confidence in DEC and the permits it issues and enforces.

When the State implements the APDES program, Tribes retain the government-to-government relationship they have with EPA. As one aspect of its role in overseeing the State's implementation of the program, EPA retains authority to approve or disapprove of State actions, including authority to object to any permits proposed for issuance by DEC that do not meet the requirements of the CWA. DEC may not issue a permit in the face of an EPA objection until the objection has been addressed and resolved. Through their government-to-government relationship with EPA, Alaska's Tribes can ask EPA for assistance to address their concerns.

At the same time, the State APDES public participation process extends State coordination efforts and consultation opportunities to Tribal governments. The State APDES Program provides opportunities for Tribes to share traditional knowledge, information about subsistence use, and Tribal concerns about potential permits with DEC.

***Overarching programs.*** Many larger projects, especially those that involve new development and that invoke federal permitting or funding decisions, trigger broader environmental reviews that consider the range of potential project impacts on the environment, human health, and certain species and their habitats. In these cases, impacts on water quality, and the NPDES or APDES permits intended to address those impacts, often comprise a subset of considerations under the broader review. Rules that expand and integrate environmental reviews include federal laws, such as the National Environmental Policy Act (NEPA), the Endangered Species Act, and the Magnuson-Stevens Fishery Conservation and Management Act, along with State rules under the Alaska Coastal Management Program (ACMP) and the Alaska Department of Natural Resource's programs for coordinating large mine development projects under AS 27.05.010(b) and other types of large projects under State of Alaska Executive Order 106. These broader environmental reviews often include early public education and outreach and create opportunities to engage with the public on water quality matters. DEC will strive to integrate its APDES public communication efforts into the public participation processes undertaken as part of NEPA, ACMP and other overarching reviews, and to take full advantage of the early public communication and engagement opportunities they offer to consider water quality and wastewater discharge permitting issues.

***Feedback, assessment and continuing improvement process.*** A key aspect of DEC's public engagement efforts will be a continuing improvement process based on soliciting feedback from the public on the agency's efforts, using that feedback to assess the efficacy of measures used to inform and engage the public, and adapting agency approaches based on the public's view of what works best. The objective is a public engagement process that evolves in response to public need. DEC will develop and employ a formal process for soliciting and capturing feedback during and after key permitting efforts. Feedback will be compiled, analyzed and made available in report form. Reports will include lessons learned and recommendations for improving future efforts.

***Recordkeeping.*** DEC will document public and agency communications and record, particularly, key public concerns and how those concerns were considered. Documentation of public interest will be included as part of the official permit record, along with agency responses, actions, decisions, and supporting information. DEC will maintain an official record of each permitting action and make those records readily available to the public via internet posting.

***Training.*** Training for DEC staff, other agency staff, and the public in effective permit-centered communications will be another key element of the APDES public communications program. DEC

will employ both in-house and external communications experts to train agency staff and interested others in effective communication techniques. A basic level of communications training will be mandatory for all DEC permitting staff. Supplemental training opportunities will be offered as well. In addition to training agency staff, DEC will sponsor training for other State and federal agencies and the public that participate or are interested in APDES permit communications. DEC also envisions creating training tools, such as recordings of training sessions, which can be used as a reference outside of live training sessions.

***Applicability of this plan.*** In general, the Supplemental Communication Tools described in the document will apply to the permitting process for individual and general permits, but not to the approval of a notice of intent (NOI) for an individual facility to operate under a general permit. These tools may also be applied in instances where an NOI for an individual facility to operate under a general permit already invokes a public notice and comment process.

***Early notification of APDES actions.*** It is often the case that 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 will allow DEC to address them during permit drafting. In designing communication processes, DEC will be mindful of the advantages of communicating with the public and interested organizations early in the permit process. For every permit decision, DEC will coordinate with local and federally-recognized Tribal governments, and RCACs that may be affected.

DEC seeks to be proactive in the APDES permitting process. A Permit Issuance Plan (PIP) will be posted on the DEC website and updated biannually. The PIP is a list of all permits proposed to be issued or reissued during a calendar year. The PIP will be mailed to the local and Tribal government contacts and to any interested party upon request.

The Alaska statutes and the APDES regulations provide minimum standards for public participation opportunities. DEC has broad authorities, however, to supplement its communication efforts beyond the legal minimums. This guidance document summarizes the legal minimums for public notification and comment opportunity. It then goes on to describe additional tools available to the agency for supplementing the legal minimums in order to optimize opportunities for effective participation in the permit decision making process.

## **2.0 Basic Public Process**

The basic process providing for public participation on an APDES permit (either individual or general permit) is primarily contained in 18 AAC 83.120 and begins once a draft permit has been prepared. Each step in the required process is described below.

***Preliminary draft permit.*** Prior to formal public notice of a draft APDES permit, DEC regulations require that DEC post a preliminary draft permit on its website in conjunction with the permit

applicant's 10 day review of such 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 permittee to review and discuss the preliminary draft permit with DEC, it also gives the public an early opportunity for review of the developing draft permit.

***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, and 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 comment 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(l).

***Proposed final permit.*** After the close of the minimum 30-day public comment period, DEC considers information provided by the public, prepares a 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 where it is available to the public.

***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.

***Accommodations for persons with disabilities.*** 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.

### **3.0 Supplemental Public Processes**

DEC has broad authority to communicate with others in the course of conducting agency business.<sup>1</sup> 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. 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, the agency 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.

### **4.0 Supplemental Communication Tools**

This guidance describes additional outreach the agency may wish to undertake with interested persons, including Tribes, municipalities, and RCACs with respect to proposed APDES applications and permits that may raise significant local concerns or are complex or controversial.

DEC has at its disposal several tools that the agency may use individually or in combination to supplement required permit communications. 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 comment period. In other cases, DEC may combine a number of

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<sup>1</sup> 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).

supplemental efforts and regulatory requirements into a project *Permit Communication Plan*. Supplemental communication tools available to the agency are described below.

***Project Liaisons.*** DEC may appoint “project liaisons” or “navigators” to help in achieving agency goals of early communication with local residents and organizations, to provide for continuity in communications with the agency, and ultimately, to gather meaningful information. These positions are assigned personal professional responsibility for anticipating public communication needs, and designing and implementing effective participatory processes. Responsibilities of these positions include efforts such as maintaining lists of persons and organizations interested in being apprised of developments; maintaining contact with interested persons and organizations through face-to-face meetings; informing persons and organizations of status and progress; fostering the flow of information to and from agency permitting staff and the applicant; serving as an accessible agency point of contact; and arranging for meetings, conference calls, and other forums to enhance communications.

***Pre-application public workshops.*** Pre-application public workshops may be held before a permit application is submitted. The workshops typically involve the voluntary participation of the permit applicant and serve three broad purposes: 1) to orient the public and interested organizations to the project, its potential impacts, and efforts to address or mitigate impacts; 2) to introduce the applicant and agency permitting staff to specific local resource uses, sensitivities, and concerns (including subsistence and recreational activities and resources); and 3) to provide information about the permitting process and timeline. Pre-application public workshops may include discussion of plans for, or results of, baseline monitoring efforts.

Pre-application public workshops may be held by DEC or may be held as part of broader, coordinated interagency efforts, such as those conducted as part of a National Environmental Policy Act (NEPA) process or an Alaska Department of Natural Resources (DNR) Large Project Team process. The number of workshops can range from a single workshop to a series of workshops in one or more locations depending on the situation.

The means the agency uses to notify the public of workshops is driven by a judgment as to what will be the most effective way to reach interested individuals and parties. Notification typically consists of some combination of: individual notification via mailings, e-mail or telephone calls, advertisements in local or regional publications, and public service announcements. In more rural settings, DEC staff should consider working with local government and residents to spread the word by whatever means is typical for the community, such as bulletin board postings or local government announcements.

***Post-application public workshops.*** DEC may also hold public workshops after a permit application has been received. Post-application public workshops serve the same purposes as the pre-application public workshops. They may be held before the official public comment period on a draft permit, or, more typically, during the official public comment period. When held during the comment period, workshops may be held in conjunction with public hearings where the workshops often immediately precede the hearings. While the primary purpose of a public hearing is to allow the public an opportunity to respond to a draft permit, workshops provide for a two-way flow of information from DEC to the public about the project and permit(s), as well as from the public to DEC.

Notice of post-application public workshops held in conjunction with public hearings is typically provided along with the official hearing notice. The means the agency uses to notify the public of workshops that are not held in conjunction with hearings will be the same as outlined for pre-application public workshops.

**Public hearings.** Permit development regulations provide DEC with discretion to hold public hearings during the public comment period on draft permits. Hearings can provide a more convenient means for the public to comment to the agency on a permit. They also afford an opportunity for members of the public to hear from other members and organizations.

In accordance with regulations governing public hearings on APDES permits, DEC will hold one or more public hearings whenever the Department finds, based on requests, a significant degree of public interest in a draft permit; a hearing might serve to clarify issues; or there is other good reason. As a general rule, formal public hearings alone may not be the most effective means of informing the public or providing for clear exchange of information. Hearings are often most effective when they follow other efforts to inform the public.

**Supplemental notice and information.** The APDES regulations include both prescribed and optional methods for notifying the public of the availability of draft APDES permits. Prescribed methods include a combination of mailings, publishing notices in newspapers, and methods constituting legal notice. Under the same regulations, however, DEC has authority to provide 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.” 18 AAC 83.120(c)(4).

As mentioned earlier, 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 more rural settings, DEC staff should consider working with local government and residents to spread the word by whatever means is typical for the community, such as bulletin board postings or local government 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 thought to be of interest may be forwarded directly to interested parties, or their availability may be announced to interested parties with instructions for obtaining the information, such as downloading them 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 DNR Large Project Team format, DEC will strive to integrate effective notification and information efforts into an overall coordinated effort.

***Local and Tribal government coordination.*** 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 early in the permit process notice of a forthcoming permit proceeding. That advance notice will be provided by mail, e-mail, telephone, or a combination thereof depending on what is deemed most effective and efficient as early as reasonably practicable following an applicant's notice to DEC. As part of the advance notice coordination step, DEC will seek to learn the extent to which municipal and Tribal government officials are interested in being apprised of the permit process and preferences for how best to work with them, including whether consultation is desired (see below). If necessary and requested by the Tribe, DEC will use a translator or facilitator to assist with this effort. In addition to procedural matters, initial coordination efforts will focus on early identification of local interests and general concerns.

***Local and Tribal government consultation.*** Consultation with local State-chartered and federally-recognized Tribal governments, and RCACs is typically organized and led by a project liaison and can be organized as a single discussion with representatives of the local or Tribal government or a series of discussions prior to providing formal public notice of a draft permit. Consultation may be either face-to-face or by telephone depending on cost, staff availability, and other practical considerations. The consultation process is intended to provide for a meaningful and timely dialog with local and Tribal officials with open sharing of information, the full expression of local and state views, a commitment to consider local views in decision-making, and respect for local authority and knowledge. If necessary and requested by the Tribe, DEC will use a translator or facilitator to assist with this effort. Summaries of consultations will be entered into the permit record including DEC responses to substantive concerns.

***Extended public comment periods.*** While regulations require a minimum 30-day public comment period on draft permits, DEC has the discretion to provide for longer public comment periods, to extend comment periods before the comment deadline passes, and to provide for supplemental comment periods after an original comment deadline passes. In most instances when the public participation process includes one or more public hearings, DEC will specify a minimum 45-day comment period. The minimum 45 days provide for public notice to be issued 30 days before the public hearing as required by regulation, but also give the public some time after the hearing to formulate comments in light of testimony presented at the hearing.

DEC will also typically specify a minimum 45-day comment period when permits are for large, complex, and controversial facilities. The agency will extend comment deadlines or provide supplemental public comment opportunities when there is significant public sentiment that the initial time allotted was insufficient for reasons unknown to, or unforeseen by, DEC when it initially established the schedule. At the same time, DEC will weigh the benefits of longer public comment periods against impacts of project and permit schedules.

***Permit communication plans.*** As mentioned previously, DEC may develop Permit Communication Plans that integrate those communications required as a matter of law with any single supplemental

communication tool or combination of tools into a single overall plan for engaging the public on a permit matter. Permit Communication Plans are typically used for large, complex, and controversial projects, but may be developed for any permit project where it would help interested persons and organizations understand ahead of time the breadth and sequence of all opportunities to learn about, discuss, and comment on a permitting project.

## **5.0 Other Permit Actions: Modify, Revoke and Reissue, or Terminate**

In addition to issuing APDES permits, the Department may take other permit actions to modify, revoke and reissue, or terminate permits. These actions may also include a public participation process.

***Modify.*** The Department may modify an active permit for specific reasons. The Department will follow the same public involvement procedures used for new permits when it modifies an existing permit, with the exception of a minor modification defined at 18 AAC 83.145. The minor modification provision is tightly restricted to a very narrow range of truly minor changes and does not include a process for public notification or comment. When the Department modifies a permit under the provisions of 18 AAC 83.135, Tribes, RCACs, and other interested parties will have the opportunity to review the preliminary draft, draft, and proposed final permit modifications and request a meeting, workshop, or public hearing with the Department. 18 AAC 83.115 and 18 AAC 83.120. The proposed modifications will be available for a minimum 30-day public review and comment period. All other provisions of the existing permit remain in effect for the term of the permit and are not subject to the public review process. 18 AAC 83.130(f).

***Revoke and Reissue.*** Under certain circumstances, the Department may revoke and reissue a permit. When re-issuing a permit, the Department will follow the same public participation procedures as for a new permit, including invoking any of the supplemental communication tools described previously.

***Terminate.*** The Department may also terminate a permit before the end of its term at its own instance or at the request of a permittee. 18 AAC 83.140. If the permittee objects to permit termination, the Department will prepare a notice of intent to terminate that is subject to the same public review procedures as permit issuance. 18 AAC 83.130(i). Tribes, RCACs, and other interested parties will have the opportunity to review the preliminary draft, draft, and proposed final notice of intent to terminate and request a meeting, workshop, or public hearing with the Department. The notice of intent will be available for a minimum 30-day public review and comment period. 18 AAC 83.115 and 18 AAC 83.120.

## **6.0 Appeals**

The public also has access to permit appeals processes. Final agency permitting decisions can be appealed by the permittee or members of the public, including local and Tribal governments, and RCACs. Members of the public may request informal review by the Director as set out at 18 AAC 15.185 or file a request 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 the Department’s decision in order to have standing to challenge the decision. Ultimately, a party who remains dissatisfied with the Department’s decision after informal and/or formal agency review may seek judicial review of final agency permitting decisions through the court system.

## **7.0 Additional Ways to Stay Informed**

***Permit Issuance Plan.*** The Department will prepare a Permit Issuance Plan that identifies the permits the Department proposes to issue during the upcoming three years. The Permit Issuance Plan will be updated annually. The Permit Issuance Plan will be posted on the Department’s web page and notification sent via the electronic mailing list that the Plan is available for review. This process will allow Tribes, 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 the Department to discuss the project or schedule a meeting.