

## **Substantive Comments regarding Draft Antidegradation Workgroup Report, dated October 10, 2012**

Note that comment number references (e.g., CM1) pertain to the comment "bubbles" the EDITED version.

Line and page references the CLEAN Version.

## **Substantive Comments requiring attention from the Workgroup**

### **Executive Summary**

- Definition of temporary and minor discharges ((CM5) pg. xi, line 9)
- Please mention where wetlands fit in the term "Waters of the U.S. as surface water, but presumably not groundwater ((CM7) pg xi, line 24-27)

## **Issue #1: What Triggers an Antidegradation Review?**

### A2. Workgroup Member Recommendations- Issue #1

- 404 Permitting Process
  - Process ((CM8) pg. 8, recommendation #3

The 404b1 analysis includes the fill area AND to analysis of impacts beyond the fill area. I think we need to have a robust discussion again on 404 and get workgroup views on what DEC should be doing.

DEC should have the option of doing NOTHING and simply relying on the 404b1 analysis, in its discretion. This is, of course, different than using the 404b1 work as a "major reference."

- Public Notifications of 404 process ((mb13) pg. 10, Recommendation #5

How do we satisfy antideg public notice requirements without making this become overly cumbersome?

- Individual certifications ((b12) pg. 10, Recommendation #5

404 certifications do not issue a public notice and to include individual water quality certifications as part of this sentence would be very cumbersome to the Dept.

## **B. Issue #2: What Information is Needed to Determine Baseline Water Quality**

### B1. Description of Issue 2

- Identification of the available assimilative capacity –difference between BWQ and criteria helps inform alternatives analysis ((b15) pg. 16, lines 467-470)

Did WG say this? It helps to inform the discussion of protection of existing uses. It doesn't actually do a lot to inform the alternatives analysis.

### B3. Options Considered for Issue #2, with their Pros and Cons

- Existing DEC approach to determine baseline water quality
  - Natural Condition ((CM 20) pg. 16, lines 498-501)

The workgroup could benefit from an update of DEC's natural conditions guidance and where that stands with EPA and whether it can be used in APDES/NPDES permitting.

### B4. Further Discussion and Outcomes

- Factors to consider when establishing BWQ (Inc. Appendix B) (CM23) pg.18, 538-541.

Is this a consensus item? If so, it belongs in committee consensus, not "further discussion."

## **C. Issue #3: How are Outstanding National Resource Waters (ONRWs) Designated?**

### Description of Issue #3

- Spatial concerns ((CM25; B26) pg. 18, lines 554-555)

I'm not sure we talked about regulating discharges in "adjacent" areas. Slippery slope. I think we should limit this to the ONRWs themselves.

Has there been a final decision as to how far upstream?

### C3 Options considered for for Issue #3 with the pros and cons: Responsibility for reviewing nominations

- ONRW nomination process-information submitted (Reference- Appendix C) ((CM29) pg.20, lines 597-598)

Again, if this is a part of the group's consensus, the material below belongs in that section.

#### C4. Further Discussion and Outcomes

- Unsuitable Mining analogy ((b34) pg.24, Lines 691-693)

Since this came from public comment and not the workgroup, it might need to be removed unless approved of by the workgroup.

### **E. Issue #5: Tier 2 Analysis: What Level of Alternatives Analysis is Necessary?**

#### E2. Workgroup Member recommendations-Issue #5

- Use of the term “Practicable” ((CM38) pg. 28, Recommendation 1.

A high level comment is the overall purpose for the requirement in 18 AAC 70.015(a)(2)(D). Note that this requirement is not part of the federal antideg reg. It was discussed to some degree in past meetings but there are still open questions. For example, if a source is applying the highest statutory and regulatory requirements, does subsection (D) require a further (higher) look at treatment? This should be an item for further discussion, including addressing the threshold question whether subsection (D) should continue to be a part of the antideg process (since it goes above and beyond what is required by EPA and introduces uncertainty into the evaluation process).

#### E2. Workgroup Member recommendations-Issue #5

- Step 1: Consider a Reasonable Range of Practicable Alternatives
  - Compensatory Mitigation ((CM40) pg. 29- would have been vi ): NOTE THAT THE TEXT THIS COMMENT REFERS TO WAS DELETED IN THE CLEAN VERSION

This sounds like ADEC may require compensatory mitigation (I.E. as under section 404). There has been no discussion as to how this would be applied to an antideg analysis. Sealaska cannot support this concept, for reasons set out in our cover email.

Doesn't sound like mitigation to me. Pollutant trading has been used for NPDES in many other states and could be a useful approach since it is watershed-based and not only site-specific

#### E3. Options Considered for Issue #5 with their Pros and Cons

- Alternatives Analysis ((CM41) pg. 30, lines 794-797)

General comment: the alternatives analysis that ADEC would undertake would, in the case of large projects, overlap the analyses conducted under NEPA or 404. There should be language somewhere that ADEC may/could/should/would rely on this information as appropriate.

**F. Issue #6. How are Waters Ranked as Tier 1 and Tier 2?**

F3. Options Considered for Issue #6 with their Pros and Cons

- Parameter by Parameter approach ((b42) pg. 32, line 852)

No discussion of the parameter by parameter approach and pros and cons